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THE DEFINITION OF RELIGION IN CHARITY LAW IN THE AGE OF FUNDAMENTAL HUMAN RIGHTS¹

Kathryn Bromley²

Introduction

In 1813, Elizabeth Mary Bates settled an *inter vivos* trust in England, one half of whose profits went to the Moravian Church for the purpose of "maintaining, supporting and advancing the missionary establishments among heathen nations". Every year the Moravian Church applied for a return of the income tax paid on this income, and every year until 1886 the Church received it. In 1886, John Pemsel, the treasurer of the Moravian Church, was refused the tax rebate of 73 pounds, and so he sued the Income Tax Commissioners on the Church's behalf. The Court of Appeal awarded the tax rebate to John Pemsel, on the basis that the religious purposes specified in Elizabeth Bates' trust were charitable. The Commissioners appealed to the House of Lords. In 1891, Lord MacNaghten confirmed the analysis of the Court of Appeal in a decision which remains the leading case on the definition of charity.³

The issue which this paper will address is whether the Supreme Court of Canada would reach the same decision on the same set of facts today. Would John Pemsel be successful if he were to apply to the Charities Division of the Canadian Customs and Revenue Agency ["CCRA"] to have the trust of Elizabeth Bates designated as a registered charity? This paper will assume that the CCRA refuses to grant Pemsel the tax benefits because of its determination that the Moravian Church does not constitute a 'religion' within the meaning of the second head of charity. Faced once again with an unfavourable bureaucratic interpretation of a long-standing legal concept, this time the term 'religion' within the definition of 'charity', Pemsel litigates to convince the court that (a) the Moravian Church is a religious institution,

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² Kathryn Bromley, is a student at the University of Toronto Law School.

³ *Commissioners for Special Purposes of the Income Tax Act v Pemsel* [1891] AC 531 (HL) [hereinafter "*Pemsel*"].

and (b) activities aiming to 'convert the heathen' to the Moravian Church qualify for tax privileges as being for the 'advancement of religion'.

In this challenge to the CCRA's decision, Pemsel argues that the refusal to register the Moravian Church as a charity infringes his freedom of religion and conscience, guaranteed by s.2(a) of the Canadian Charter of Rights and Freedoms.[the Charter]. Alternatively, he argues that the Ministry's conferral of tax benefits on certain, but not all, religious institutions, constitutes discrimination within the meaning of the equality guarantee in s.15. An ethical society intervenes, arguing that the state support of religions, but not ethical or moral institutions, similarly violates their s.2(a) and s.15 rights. Religious organizations across Canada become deeply concerned about the litigation, for they realize that the supremacy of the Constitution means that any finding that state support of the advancement of religion is an unjustifiable infringement of a Charter right will have profound effects on the four billion dollar charitable sector.

John Pemsel is unlikely to rise from the dead to dispute a decision that the Moravian Church is not a religion. However, it is entirely plausible that these or related issues will be raised all the way to the Supreme Court in the foreseeable future. The substantial economic benefits resulting from charitable status will make this issue worth litigating for organizations with a significant donor base. The spectre of state 'establishment' of the church, raised by any law which appears to link religious matters to the State, and the controversial nature of distributing state benefits based on profoundly personal beliefs is likely to engage the public interest and make this a national issue. The huge amounts of money involved in the charitable sector, the lack of legal authority in the area, and the importance of the issues at stake all seem to demand judicial direction. And in the modern world, these issues will revolve around the principles and provisions of the Charter.

Admittedly, the relationship of a private gift to a document aimed at protecting individual rights from government interference is not immediately obvious. Before addressing questions relating to substantive rights, therefore, it is necessary to examine whether the Charter applies to charity law and the various functions of the charitable sector.

Application of the Charter

Section 32(1): This Charter applies:

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament...

- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The extent to which the law of charity is rooted in centuries-old traditions and values of equity and the common law may appear to insulate it from the modern challenges of constitutional and human rights. The law of charity remains governed by a list of charitable purposes articulated by the House of Lords in 1891.⁴ The unique “public-private” nature of charitable trusts⁵ means that as a matter of trust law, the application of the Charter is equivocal at best. The Supreme Court revealed its own hesitation to complicate the law of charity with Charter considerations in the recent *Vancouver Society* case.⁶ Neither the common law definition nor the private law character of trust law dispose of the issue, however, the relationship between the Charter and the charitable sector can only be ascertained by examining the contexts in which a challenge to the present law of charity could arise.

The central focus of any application inquiry is not the *type* of law at issue, but whether a sufficient element of government action attaches to the law to bring it within the scope of s. 32(1). In the seminal case of *Dolphin Delivery*⁷, McIntyre J emphasized the inclusive nature of the Charter, confirmed by the section 52(1) pronouncement that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”. “There can be no doubt”,⁸ he declared, that the Charter applies to the common law as well as legislation. McIntyre J went on to delineate the bounds of Charter application based on the view that it was intended to govern relations between the state and the individual.⁹ While section 32(1) brings the legislative, executive and administrative branches of government within the reach of the Charter, purely private litigation lies

⁴ *Ibid* at 583 per Lord MacNaghten: “Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.”

⁵ Mayo Moran, “Rethinking Public Benefit: The Definition of Charity in the Age of the Charter” in Jim Phillips, Bruce Chapman and David Stevens, eds. *Between State and Market: Essays on Charity Law and Policy in Canada* (forthcoming).

⁶ See *Vancouver Society of Immigrant & Visible Minority Women v MNR* (1999) 169 DLR (4th) 34 (SCC) [hereinafter “*Vancouver Society*”] at 94, 129.

⁷ *Retail, Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Ltd.* (1986) 33 DLR (4th) 1 (SCC) [hereinafter “*Dolphin Delivery*”].

⁸ *Ibid* at 190.

⁹ *Ibid* at 191.

outside its scope. As a result, it was not the particular law at issue, but the absence of "any exercise of or reliance upon governmental action" which insulated the dispute between the private company and the worker's union from Charter review.¹⁰

This judicial framework for application issues suggests that the Charter's relevance to the charitable sector depends less on the nature or source of the substantive law than on the degree of 'government' involvement in its implementation. It is therefore necessary to understand the current regulatory structure for charities in Canada in order to assess whether the Charter applies to the charitable purpose of the advancement of religion.

The Regulatory Structure for Charities in Canada

The regulation of charities is a matter of provincial jurisdiction, falling under s. 92(7) of the *Constitution Act 1867*. However, the most consequential features of charitable status are the fiscal benefits accorded to charitable organizations under the Income Tax Act. As a constitutional matter, these benefits enable the federal government to rely on their s.91(3) federal taxation power as the jurisdictional basis for the regulation of charities. The Income Tax Act also dictates the process by which organizations seek charitable status in Canada.¹¹ There are two basic requirements for registration under section 248(1): the purposes and activities of the organization must be charitable, and all of the organization's resources must be devoted to those activities.¹²

¹⁰ *Ibid* at 199.

¹¹ Income Tax Act, RSC 1985 (5th Supp.), c.1, [hereinafter "ITA"], s. 248(1):

In this Act, "registered charity at any time means:

- (1) a charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1), that is resident in Canada and was either created or established in Canada,
- (2) that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation;"

¹² See *Vancouver Society* (1999) 169 DLR (4th) 34 (SCC) at 109, per Iacobucci J: "In conclusion, the requirements for registration under s.248(1) come down to two:

- (1) the purposes of the organization must be charitable, and must define the scope of the activities engaged in by the organization; and
- (2) all of the organization's resources must be devoted to these activities unless the organization falls within the specific exemptions of s. 149.1(6.1) or (6.2).

The designation of charitable status for purposes of the Income Tax Act is the responsibility of the Charities Division of the CCRA. Decisions regarding registration are based primarily on the applicant's constituting documents, which set out their purposes as well as a statement of their activities. There are three possible responses to a registration request – acceptance, refusal, or an “Administrative Fairness” letter, which indicates that the Charities Division requires further information regarding the applicant's organization before arriving at a final decision. The Minister is deemed to have refused registration where the applicant receives no notification within 180 days of the filing of the application.¹³ Section 172(3) sets out a statutory right of appeal to the Federal Court of Appeal from the Minister's decision to refuse or revoke registration of a charitable organization.¹⁴

Two major benefits accrue to those organizations which succeed in obtaining charitable status. First, registered charities are among the legal entities which are exempted from income tax under Division H of Part I of the Income Tax Act.¹⁵ However, what sets charitable organizations apart from the other entities entitled to the Division H exemption is the ability to issue donation receipts to both corporate and individual donors.¹⁶ In *Vancouver Society*, Iacobucci J recognized that this additional benefit, “designed to encourage the funding of activities which are generally regarded as being of special benefit to society”, was potentially “a major determinant” of the success of a charitable organization.¹⁷

The scheme of charities regulation flowing from these taxation privileges repudiates any claim that charity law is purely private law in Canada. The question is whether the law of charity implicates a sufficient degree of government action to sustain a Charter challenge. While *Dolphin Delivery* left open the degree and character of state involvement necessary to bring an action under s.32(1), the subsequent decade of jurisprudence has established that ‘government action’ will be defined broadly. Examined in light of the current level of government involvement in the administration and regulation of Canadian charities, the s.32(1) jurisprudence

¹³ ITA s.172(4).

¹⁴ *Ibid* s.72(3).

¹⁵ *Ibid* s.149(1)(f).

¹⁶ *Ibid* s.110.1(1)(a): Section 110.1 of the ITA allows a corporation to claim a tax deduction in respect of the total of all amounts given to a registered charity. Individuals receive tax credits for charitable donations under section 118.1.

¹⁷ See *Vancouver Society* (1999) 169 DLR (4th) 34 (SCC) at 95.

suggests that the Charter is highly relevant to the legal definition of charity in Canada.

Application of the Charter to the Charitable Sector

The application of the Charter to the Income Tax Act follows naturally from the *Dolphin Delivery* ruling that the Charter applies to the legislative branch of government. In *Symes v The Queen*,¹⁸ a female lawyer launched a s.15 challenge to Revenue Canada's disallowance of her deduction of child care wages as business expenses in her personal income tax return. The majority of the Court rejected the argument that bringing the Income Tax Act under s. 32(1) would risk "overshooting" the purposes of the Charter, as this danger "relates not to the *kinds* of legislation which are subject to the Charter, but to the proper interpretive approach which courts should adopt as they imbue Charter rights and freedoms with meaning"¹⁹ The Court denied that judicial deference to the legislature regarding difficult economic questions should be considered at any stage prior to the section 1 analysis of a Charter challenge.

The problem with using *Symes* to conclude that the legal meaning of charity is subject to the Charter is that the Income Tax Act contains no statutory definition of what purposes or activities are charitable. As a result, the fundamental basis for a decision to extend tax benefits to an applicant organization is the common law classification of charitable purposes articulated in *Pemsel*.²⁰ *Hill v Church of Scientology* is often cited as authority that the common law is not subject to Charter scrutiny.²¹ However, the Court indicated more precisely how the boundaries of Charter application were to be drawn:

When determining how the Charter applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved.²²

¹⁸ (1993) 110 DLR (4th) 470 (SCC).

¹⁹ *Ibid* at 550.

²⁰ This principle has been confirmed repeatedly by Canadian courts: see *Vancouver Society of Immigrant & Visible Minority Women v MNR* (1999) 169 DLR (4th) 34 (SCC) at 102.

²¹ (1995) 126 DLR (4th) 129 (SCC) at 152.

²² *Ibid* at 156.

The Court affirmed that the common law has been subjected to Charter scrutiny “in a number of situations where government action was based upon a common law rule”.²³

The determination of charitable status by the Charities Division of the CCRA may provide one such example of government action based upon a common law rule. The duty of the Minister of Revenue to administer and enforce the provisions of the Income Tax Act is set out in section 220(1).²⁴ Section 900(8) of the Income Tax Regulations²⁵ delegates the Minister’s authority to assess applications for charitable status to the Director of the Charities Division. The *Slaight Communications* holding that bodies exercising statutory powers are subject to the Charter suggests that decisions of the Charities Division constitute government action within the meaning of s. 32(1):

As the Constitution is the supreme law of Canada...it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied.... Legislation conferring an imprecise discretion must therefore be interpreted as not allowing Charter rights to be infringed.²⁶

The legislative discretion which the ITA confers on the Minister and delegates to the Charities Division to refuse or revoke charitable registration is broad and imprecise. It is likely that any action which named the Minister of Revenue as a defendant would fall squarely within the ambit of the Charter.

Although the legislature cannot authorize a body to infringe the Charter, it can give authority to a body that is not subject to the Charter.²⁷ This leaves open the argument that although the Charities Division is a statutory entity, it is excluded from the s.32(1) definition of government by virtue of its large degree of

²³ *Ibid* at 153.

²⁴ ITA s.220(1). See also s. 220(2.01), which provides that the Minister may “authorize an officer or a class of officers to exercise powers or perform duties of the Minister under this Act”.

²⁵ *Income Tax Regulations*, Can. Reg., c. 945, s.900(8).

²⁶ *Slaight Communications Inc. v Davidson* (1989) 59 DLR (4th) 416 (SCC).

²⁷ *Eldridge v BC (AG)* [1997] 3 SCR 624 at 654.

autonomy.²⁸ In the recent case of *Eldridge v BC (AG)*, the Supreme Court acknowledged that the legislature may create completely autonomous private corporations, as well as "public and quasi-public institutions that may be independent from government in some respects..."²⁹ However, the Court held that "...in so far as they act in furtherance of a specific governmental program or policy"³⁰, the Charter applies even to private entities. The registration of charitable organizations and foundations is clearly an act in furtherance of the federal government's taxation policy. Regardless of how the Charities Division is characterized, therefore, it seems that decisions pertaining to charitable registration will be captured by the s. 32(1) definition of government.

It is possible, of course, that the issue of religious purposes could arise in the context of purely private litigation. A party who stands to benefit from a failed trust (for example, the residuary beneficiary of a will) might challenge the validity of a trust's charitable purpose on the grounds that it does not advance "religion". At first glance, it appears that such a dispute would not implicate the Charter. As McIntyre J stated in *Dolphin Delivery*, "where...private party 'A' sues private party 'B' relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply".³¹ However, the subsequent case law suggests that this principle will not always immunize a common law rule from the application of the Charter.

As a general rule, the judiciary stands outside the broad s.32(1) definition of "government", thereby constituting the primary exception to the application rule.³² This implies that in an action between private parties, the Court would not be forced to bring a common-law definition of charitable purposes in line with the Charter. However, the issue is not so easily resolved. For one thing, *Dolphin Delivery* explicitly states that although a court order is not 'government action' for purposes

²⁸ The function of the Minister in considering applications for charitable registration has been held to be a "strictly administrative function" that is not subject to judicial or quasi-judicial process: see *Scarborough Community Legal Services v The Queen* [1985] 1 CTC 98 (FCA).

²⁹ *Eldridge v BC (AG)* [1997] 3 SCR 624 at 655.

³⁰ *Ibid* at 660.

³¹ *Dolphin Delivery*. (1986) 33 DLR (4th) 1 (SCC) at 198.

³² *Ibid* at 196, per MacIntyre J: "While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of government, that is, legislative, executive and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of government action."

of Charter application, the courts are still bound by the Charter, and must develop the common law in accordance with Charter values.³³

The Charter has occasionally been found *directly* applicable to orders of the judiciary. In *Dagenais v Canadian Broadcasting Corp.*,³⁴ for example, a s.2(b) challenge was raised against a publication ban, imposed by a trial judge on a fictional television program which paralleled four pending criminal trials. *Dagenais*, which began between two private parties, is at odds with the *Dolphin* holding that private, common-law actions are exempt from the scope of Charter review. Lamer CJC for the majority extended the *Slaight* principle regarding legislative discretion to hold that “a common-law rule conferring discretion cannot confer the power to infringe the Charter. Discretion must be exercised within the boundaries set by the principles of the Charter; exceeding these boundaries results in a reversible error of law”.³⁵ Lamer CJC avoided the possible result of this statement by reformulating the common law rule to bring it in line with the Charter, and measuring the decision of the trial judge against this revised standard. Commenting on her colleague’s pronouncement in a solo judgment, MacLachlin J noted its possible ramifications:

“While the question of whether a judicial act is government action is avoided, the practical result is the same as if one had answered that question in the affirmative; in either case, judicial acts must conform to the Charter. In fact, the practical effect of the Chief Justice’s approach may be even broader; it may mean that *all* court orders would be subject to Charter scrutiny.”³⁶

MacLachlin J subsequently attempted to narrow the range of court orders attracting the Charter by proposing a case-by-case determination. However, the majority’s statement supports the argument that a court’s discretion as to whether charitable status should be granted is confined by the Charter, and any decision which is out of line with Charter principles amounts to a reversible error of law.

The final point is that in at least one Canadian jurisdiction, the existence of a statutory definition of charitable purposes will automatically implicate the Charter. The Ontario Charities Accounting Act defines a “charitable purpose” in terms

³³ *Ibid.*

³⁴ *Dagenais v Canadian Broadcasting Corp.* (1994) 120 DLR (4th) 12 (SCC).

³⁵ *Ibid* at 36.

³⁶ *Ibid* at 85.

slightly broader than the *Pemsel* classification.³⁷ Although this statutory successor to the mortmain legislation refers only to gifts of land, the Ontario courts have extended its scope to encompass all charitable gifts.³⁸ The existence of the statute, and its broad judicial interpretation, represent a significant rejection of the English charity law tradition in Ontario.³⁹ However, the constitutional implication of the Charities Accounting Act may be that as a matter of provincial trust law, the definition of charitable purposes is only subject to the Charter in certain provinces.⁴⁰

As McIntyre J noted in *Dolphin Delivery*, "it is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the Charter by private litigants in private litigation".⁴¹ However, the nature of the charitable sector in Canada suggests that very few scenarios would not yield the requisite element of government action. If the various initiatives to enact a legislative definition of charity succeed, the matter

³⁷ Charities Accounting Act RSO 1985, c. 10, subsection 7:

In sections 8, 9, and 10, "charitable purpose" means:

- (a) the relief of poverty,
 - (b) education,
 - (c) advancement of religion, and
 - (d) any purpose beneficial to the community, not falling under clause (a), (b), or (c);
- "land" includes an interest in land other than an interest in land held as security for a debt.

³⁸ See *Re Laidlaw Foundation* (1985) 13 DLR 4th 491 (Ont. H.C.J.). Southey J adopted a passage from the earlier case of *Re Orr* (1917) 40 OLR 567 (Ont. CA). at 597, where Meredith C.J.O. extended the scope of the legislation to include gifts of personal property as well as land: "... (The Act) is an express declaration that the purposes which it enumerates shall be deemed to be charitable uses within the meaning of the Act; and the Courts of this Province are, in my opinion, warranted in looking to it, as the Courts in England look to the statute of Elizabeth, for the purpose of determining what in law is a charitable gift in the case of personalty, to which the provision does not apply."

³⁹ See *Re Laidlaw Foundation*, (1985) 13 DLR 4th 491 (Ont. H.C.J.). Southey J accepted that amateur sport was beneficial to the community within the spirit and intendment of the Preamble and that the recipients were charitable organizations at law. However, he deemed it "highly artificial and of no real value...to pay lip-service to the preamble of a statute passed in the reign of Elizabeth I."

⁴⁰ Although the Charities Accounting Act may be the only statute which sets out a definition of charitable purposes, all of the provinces have statutes and regulations which regulate charity in some way. This raises an interesting question: could the definition of charitable purposes be brought within the scope of the Charter based on its incorporation in various pieces of provincial legislation?

⁴¹ *Dolphin Delivery*. (1986) 33 DLR (4th) 1 (SCC) at 197.

will not even be open for question. As such, it is necessary to examine the legal parameters of “the advancement of religion” as well as the content of the relevant Charter rights in order to evaluate the likely success of a Charter challenge.

The Canadian Definition of ‘Religion’ in Charity Law

It is difficult to state with any authority the legal definition of “the advancement of religion” in Canada. This is largely attributable to the nature of the charitable registration process. Under s.241 of the Income Tax Act, individual fiscal matters are confidential.⁴² As a result, “applications for [charitable] registration that are rejected by the Department and the reasons for such refusal are regarded as confidential and cannot be disclosed”.⁴³ Reasons for refusal will be disclosed if the applicant exercises his statutory right of appeal.⁴⁴ However, the fact that the first court of appeal is the Federal Court of Appeal raises the costs and the stakes of litigation, and discourages applicants from challenging unfavourable decisions. The result of this scheme is that the Canadian jurisprudence pertaining to the second head of charity is scarce and dated. In fact, there is not a single Federal Court of Appeal case dealing with the refusal to register a religious organization as a charity.

The paucity of Canadian case law considering “the advancement of religion” is exacerbated by the general failure of the courts to define what religion means. The cases upholding charitable gifts to religious institutions generally proceed on the basis that a given belief system is a religion, without providing any legal justification for this assumption.⁴⁵ Although the bodies under consideration have often been ‘established’ religious institutions,⁴⁶ the status of more obscure institutions has also

⁴² The ITA s.241(1) provides that no official may knowingly provide or allow any person access to any taxpayer information. Subsection 241(3) provides that subsection (1) does not apply in respect of “any legal proceedings relating to the administration or enforcement of this Act”.

⁴³ Patrick J Monahan with Elie S Roth, “Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform” (unpublished) at 13. Monahan also notes that perhaps as a result of the disincentive created by the Administrative Fairness letters, only a small number of applications are formally rejected by the CCRA each year.

⁴⁴ ITA s.241(3) provides that subsection (1) does not apply in respect of “any legal proceedings relating to the administration or enforcement of this Act.”

⁴⁵ See *Re Johnson* (1902) 5 OLR 459, where the issue is resolved in one sentence: “The bequest...for the use of the (Reformed Protestant) church was a good charitable bequest for the advancement of religion.”

⁴⁶ See, for example, *Re Morton Estate* (1941) 1 WWR 311 (BCSC), where the ruling that the estate’s bequests were charitable was based on the presumption that the Baptist church was a valid religion.

been determined without any decipherable reasoning. In *Re Doering*, the question of whether two corporate beneficiaries qualified as religions for purposes of charity law was presented as a foregone conclusion: "The Association of the New Jerusalem Church...is a religious body which professes doctrines... based on the teachings of Emanuel Swedenborg."⁴⁷ In *Re Brooks Estate*, the court held that a bequest of money for "the work of the Lord" showed a "clear general intention" to make a charitable gift for religious purposes.⁴⁸ These decisions, rendered at a time before religious diversity was a fundamental feature of Canadian society, provide little guidance for courts trying to define the parameters of religion in the 21st century.

Such parameters as do exist must be gleaned from those cases refusing to uphold a trust for the advancement of religion. The 1977 case of *Re Wood and Whitebread* considered a gift for the benefit of the Theosophical Society, whose objects included forming "a nucleus of the universal brotherhood of humanity", and promoting the study of comparative religion. Following the English case of *Berry v St Marylebone*, Stevenson LJSC held that theosophy did not come within the second head of charity because it provided no answer to the question: "what religion does the society advance and how does it advance it?"⁴⁹ At best, he concluded, theosophy taught a doctrine. In *Re Orr*, the Ontario Court of Appeal set a further boundary, stating that "the uplifting of humanity is a benevolent but not a charitable purpose".⁵⁰ A statement by the Chief Justice of Canada in 1918 suggests that the judicial definition of religion may have been guided principally by popular opinion: "Perhaps, moreover, it may be said that Christian Science is rather a theory of all things in heaven and earth evolved by the foundress of the Scientist, than a religion as commonly understood."⁵¹

It is clear that the public benefit requirement which attaches to all charitable purposes is part of Canadian law. In *Vancouver Society*, the Supreme Court confirmed that in order to be charitable, the *Pemsel* purposes must also be "for the

⁴⁷ *Re Doering* (1949) 1 DLR 267 (Ont. HC) at 279.

⁴⁸ *Re Brooks Estate* (1969) 68 WWR 132 (Sask. QB) at 137.

⁴⁹ *Wood and Whitebread v The Queen in right of Alberta, Public Trustee of Alberta, The Theosophical Society et al.* (1977) 6 WWR 273 (Alta. SC).

⁵⁰ *Re Orr* (1917) 40 OLR 567 (Ont. CA.) at 671.

⁵¹ *Cameron v Church of Christ, Scientist* (1918) 43 DLR 668 (S.C.) at 673, per Fitzpatrick CJ.

benefit of the community or of an appreciably important class of the community".⁵² However, there is little Canadian jurisprudence on the nature of the public benefit provided by, or required for, religious charities. The 1941 case of *Re Morton Estate* suggests that Canadian law is in line with the traditional position that religion is presumed to provide a public benefit unless the contrary is established:

A bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a 'charitable' purpose in the legal sense of the word but in a particular case a religious purpose may be shown not to be a charitable purpose.⁵³

The leading English case states that public benefit is a necessary element in religious trusts as in other charitable trusts. According to *Gilmour v Coats*, the spiritual benefit flowing to mankind does not fulfill this requirement – public benefit must be something which is "capable of legal proof".⁵⁴ *Gilmour v Coats* has never been considered in Canada. However, it seems logical that in a pluralistic society, the public benefit provided by religious charities would have to be proved, rather than be necessarily implied.

The Canadian courts have always relied heavily on English rulings in the field of charity law. The *Pemsel* definition "has been approved countless times by Canadian courts", including the Supreme Court of Canada.⁵⁵ In the advancement of religion context, several Canadian cases have applied the *Thornton v Howe* principle, that a gift for the advancement of religion will be upheld unless the tenets of the society "inculcate doctrines adverse to the very foundations of all religion".⁵⁶ The definition of religious purposes set out in the CCRA pamphlet *Registering a Charity for Income*

⁵² *Vancouver Society* (1999) 169 DLR (4th) 34 (SCC) at 104-5, per Iacobucci J: "...this other notion of public benefit...reflects the general concern that 'the essential attribute of a charitable activity is that it seeks the welfare of the public; it is not concerned with the conferment of private advantage': Waters, *supra* at 550. This public character is a requirement that attaches to all the heads of charity, although sometimes the requirement is attenuated under the head of poverty."

⁵³ *Re Morton Estate* (1941) 1 WWR 311 (BCSC) at 323.

⁵⁴ *Gilmour v Coats* [1949] 1 All ER 848 (HL).

⁵⁵ *Vancouver Society* (1999) 169 DLR (4th) 34 (SCC) at 105.

⁵⁶ See *re Orr* (1917) 40 OLR 567 (Ont. CA); *Re Knight* (1937) 2 DLR 285 (Ont. S C). In *Re Knight*, a gift to the True Christian Church Publishing Society, whose objects were the dissemination of the teachings of Swedenborg, and particularly of a book entitled 'Heaven and Hell', was found to be a good charitable bequest.

Tax Purposes seems to indicate that the Charities Division is following the leading English cases of *Re South Place Ethical Society* and *Gilmour v Coats*.⁵⁷

Unfortunately, an examination of English case law does not fully clarify the Canadian position. The English position is itself unclear, and rife with inconsistencies. In their recent consideration of the application of the Church of Scientology for charitable registration, the Charities Commissioners reviewed the legal authority of the 'leading cases' on the advancement of religion.⁵⁸ Their conclusion is significant:

the English legal authorities are neither clear nor unambiguous as to the definition of religion in English charity law, and at best the cases are of persuasive value...

With the authority of these cases being challenged by the Charities Commission in England, it seems highly implausible that they should be binding in Canada. Moreover, the pamphlets and Interpretation Bulletins which are taken as indicators of the CCRA's position are not legally binding, and may be changed at any time. The definitions which they adopt could not be challenged in a court of law. The instinctive conclusion that the judiciary would not have the jurisdiction to *assume* what elements of English law the CCRA is applying is supported by the case law. In *Renaissance International*, the Federal Court of Appeal held that "the appeal created by section 172(3) is...an ordinary appeal which the Court normally decides *on the sole basis of a record constituted by the tribunal of first instance*".⁵⁹ This suggests that if the constitutionality of the advancement of religion is litigated, the meaning of religion will have to be gleaned from the Charities Division's reasons for refusing charitable status to a particular organization. If the case arises under the deemed refusal provision, religion may find its first clear articulation in the CCRA's factum.

The effective result of this situation is that the legal definition of religion in Canadian charity law, so far as it exists, is an administrative secret protected by

⁵⁷ *Re South Place* [1980] 1 WLR 1566 (Ch D); *Gilmour v Coats* [1949] 1 All ER 848 (HL).

⁵⁸ *Re Application by the Church of Scientology (England and Wales) for Registration as a Charity: Decision of the Charity Commissioners* [hereinafter "*CC Scientology Decision*"]. The Commissioners considered that *R v Segerdal* and *Keren Kayemeth* were not binding authorities as to the definition of "religion" in charity law, that the *Bowman Secular Society* dicta were "neutral in relation to the...nature of religion", and that the *South Place Ethical Society* definition of religion was not necessary to the outcome of that case, although it could be given "due weight". Only *Gilmour v Coats* was described as "binding", and only in relation to the issue of public benefit and religious charities.

⁵⁹ *Renaissance International v MNR* [1983] 1 FC 860 (FCA) at 866, per Pratte JA.

s.241 of the Income Tax Act. The absence of a coherent, legally binding definition may itself have constitutional implications. It also means that any academic analysis of the constitutional issues relating to the advancement of religion will necessarily involve a large degree of abstraction. However, this does not obviate the need to undertake the inquiry, for the ambiguity of the definition is unlikely to deter a potential litigant who receives an unfavourable determination from the CCRA. This paper will assume that the definition of religion that emerges in litigation will be substantially similar to that set out in the current CCRA publication:

There has to be an element of theistic worship, which means the worship of a deity or deities in the spiritual sense. To foster a belief in proper morals or ethics alone is not enough to qualify as a charity under this category. A religious body is considered charitable when its activities serve religious purposes for the public good. The beliefs and practices cannot be what the courts consider subversive or immoral.

Given this set of criteria, the advancement of religion category is likely to face two classes of opposition in the foreseeable future. The first group consists of organizations which claim to be religions, and might widely be considered as such, but which do not fall within the common-law parameters of religion adopted by the Charities Division in their determination of charitable status. The second group includes admittedly secular organization who believe that the second head of charity should either be drastically expanded to recognize groups which stand for matters of conscience, or struck out completely. These classes of opponents could encompass a wide range of organizations with a wider range of objections to the 'advancement of religion' category, but all of them are likely to situate their claims in the constitutional guarantees of the Canadian Charter of Rights and Freedoms.

The Canadian Charter: Rights and Freedoms

The constitutionalization of rights previously subject to the will of the Legislature has shifted the parameters of legality in almost every area of the law. The rights and freedoms set out in the Charter are both far-reaching and abstract, and have produced a number of difficult interpretational questions since the document's enactment in 1982. The Canadian courts, the self-described "guardians of the Charter", have developed a basic framework of analysis to test the validity of any alleged Charter violation. The first step is to determine whether the government action infringes a Charter right or freedom. The second is to determine whether the infringement is justifiable under s.1, which provides that Charter rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in

a free and democratic society".⁶⁰ It is possible that the current state of charity law offends either freedom of religion and conscience, set out in s.2(a), or the equality guarantee of s.15. It is crucial, therefore, to examine the scope which the courts have given these rights in order to assess whether the 'advancement of religion' category violates the Charter.

Freedom of Religion and Conscience

Section 2(a): "Everyone has the following fundamental freedoms...freedom of conscience and religion"

The freedom to hold such beliefs as one chooses is axiomatic to democratic societies. The Canadian Supreme Court has recognized the long-standing existence of this value in our own society. Rand J expressed this opinion in 1953:

"From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable."⁶¹

The continued existence of the principle of religious freedom in Canada is not open to doubt. Nevertheless, the enactment of the Charter has brought about fundamental changes to the place of religion in the Canadian legal system. The Bill of Rights declaration that "freedom of religion" exists in Canada has been replaced by a constitutional guarantee of "freedom of religion and conscience".⁶² The degree to which the Charter has altered the meaning of religious freedom in Canada is indicated by the early Supreme Court pronouncement that Bill of Rights cases would not be determinative in the interpretation of s. 2(a).⁶³ *R v Big M Drug Mart Ltd.*,⁶⁴

⁶⁰ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, s.1. For the authoritative approach to Charter inquiries, see *R v Oakes* (1986) 26 DLR (4th) 200 (SCC).

⁶¹ *Saumur v City of Quebec and AG Quebec* (1953) 4 DLR 641 (SCC) at 668.

⁶² Religion is also mentioned in the Charter's preamble, which states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law", but it has been held that this controversial preamble "does not detract from the meaning of s. 2(a).": see *Zylberberg v Sudbury Board of Education* (1989) 65 OR (2d) (Ont. CA) at 641.

⁶³ *R v Big M Drug Mart Ltd.* (1985) 18 DLR (4th) 321 [hereinafter *Big M*].

⁶⁴ *Ibid.*

the first s.2(a) case to come before the Supreme Court, remains the leading authority on religious freedom in the age of the Charter. The judgment must be examined closely to identify what is and what is not said about the scope of the right.

Big M: The Scope of the “Freedom” of Religion

In 1985, charges were laid when the Big M retail store was caught selling merchandise on a Sunday, in contravention of the federal Lord’s Day Act. This innocuous offence provided the factual basis for challenging the constitutionality of Sunday closing legislation, and the context for the first judicial consideration of section 2(a). Dickson J began his landmark judgment by defining “freedom of religion”. As his definition remains the centerpiece of the Canadian jurisprudence on s.2(a), it is useful to set it out in full:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the definition means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.⁶⁵

Identifying the proper ambit of the freedom described by Dickson J is crucial to determining whether the charitable purpose of ‘the advancement of religion’ violates s.2(a). Recent arguments asserting that it does so have focused on specific doctrinal elements of the second head of charity, including the public benefit requirement, and the law’s preference for “religions” over other forms of belief.⁶⁶ These claims

⁶⁵ *Ibid* at 354.

⁶⁶ Jim Phillips, “Religion, Charity and the Charter of Rights” in Jim Phillips, Bruce Chapman and David Stevens (eds.) *Between State and Market: Essays on Charities Law and Policy in Canada* (forthcoming).

state 'protection' to registered religious charities. It is also plausible to argue that because not all religions get registered, this fiscal protection is applied disparately in a manner which is generally injurious to religious freedom in Canada.

However, Dickson J seems to be saying that disparate protection is the negative *result* of the state's coercion, rather than the source of the coercion itself. This suggests that the type of fiscal protection available to religious charities must either constitute or be linked to an act of coercion in order to violate the freedom of the non-protected. In *Big M*, the disparate protection of religious groups was the direct result of an act of state compulsion, legislation mandating that people act in a certain way on the Lord's Day. The strongest argument that the Income Tax Act entails a similar act of compulsion is that Canadian citizens are legally obliged to pay tax dollars, some of which are rerouted by the government to subsidize religious charities. However, this view of the tax regime as requiring citizens to make compulsory contributions to particular causes has been rejected by the courts.⁷⁰ In addition, the fiscal interest engaged by 'compelling' citizens to pay taxes is much farther from the 'core' of s.2(a) than the liberty interest which was at stake in *Big M*.

The Court's criticism of protecting one religion and not others presents a second argument against the constitutionality of the second head of charity: whether or not the conferral of tax benefits can be said to be coercive, the disparate fiscal protection of religions by the state amounts to state "establishment" of religion. In the United States, the "anti-establishment" principle contained in the First Amendment is often the basis for prohibiting state aid to religious schools.⁷¹ In *Big M*, the American approach was rejected as being "not particularly helpful", and the question of whether a similar "anti-establishment principle" exists in Canada was left unresolved.⁷² Although Dickson J did not endorse the establishment argument, however, he did leave it open by specifying that the issue of state financial support

⁷⁰ See *Re Mackay and Manitoba*, (1986) 24 DLR 4th 587 (Man. CA) at 595, where Philip J A rejected a similar argument that a tax benefit provision required citizens to make compulsory contributions: "The Consolidated Fund receives revenue from many sources and out of it many expenditures for different public purposes are made. It would be impossible and inappropriate to say which item of expenditure was supported by which item of revenue. The financial support given to a political candidate or his party cannot be attributed to any particular tax or to a payment by any particular individual or group. No citizen, by payment of tax or otherwise, is required to contribute to or support a political cause. The citizen pays a tax: the State uses it not as the citizen's money, but as part of a general fund."

⁷¹ *R v Big M* (1985) 18 DLR (4th) 321 at 357.

⁷² *Ibid* at 357.

for particular religions or religious institutions "is not before us in the present case".⁷³

The advantage of the establishment argument is that it does not rely on finding a coercive burden in the scheme of charitable tax benefits. Unlike the coercion argument, however, the establishment argument is weakened by the large number of religions whose applications are approved by the Charities Division every year. It would be difficult to argue that the state is trying to 'establish' every religion except the few who are denied registration.

The particular nature of the tax scheme for charitable organizations in Canada also raises the question of how much protection religious charities actually receive from the state. Unlike in England, where the charitable organization receives the tax benefit directly from the Treasury, the direct tax benefit of donating to charitable organizations in Canada accrues to the donor. Obviously, the Canadian system is an incentive-creating system which ultimately benefits registered charities. However, the indirect route through which charities receive most of their fiscal protection from the government suggests that, at least in a Canadian context, the establishment argument is tenuous at best.

Edwards Books, the second 'Sunday closing' case to come before the Supreme Court, weakens both the establishment and the coercion branches of the argument that distributing charitable tax benefits on the basis of religion is prohibited by s.2(a). In *Edwards Books*, the Retail Business Holidays Act was found unconstitutional because it left Saturday observers at a purely statutory, economic disadvantage relative to Sunday observers.⁷⁴ At first glance, this holding seems to bolster the case against the purely statutory, economic disadvantage which organizations without charitable status suffer relative to those who do. However, a closer examination of the source of the infringement in *Edwards Books* shows that the analogy should not be drawn too closely. The Court never suggests that the benefit derived by Sunday observers could *itself* constitute a violation of s. 2(a). Rather, the unconstitutional act lay in the Act's effect of "impeding conduct integral to the practice of a person's religion",⁷⁵ by creating an economic compulsion to open on a sacred day of rest.

⁷³ *Ibid.*

⁷⁴ *Edwards Books and Art Ltd. et. al. v The Queen* (1986) 35 DLR (4th) 1.(SCC) [hereinafter *Edwards Books*] The Ontario provincial closing statute prohibited retail stores from opening on Sundays and other holidays, subject to certain exceptions.

⁷⁵ (1986) 35 DLR (4th) 1.(SCC) at 35.

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⁷³ *Ibid.*

⁷⁴ *Edwards Books and Art Ltd. et. al. v The Queen* (1986) 35 DLR (4th) 1.(SCC) [hereinafter *Edwards Books*] The Ontario provincial closing statute prohibited retail stores from opening on Sundays and other holidays, subject to certain exceptions.

⁷⁵ (1986) 35 DLR (4th) 1.(SCC) at 35.

Edwards Books confirms the crucial (albeit fine) distinction between state-imposed benefits and burdens as they relate to religious freedom. In the words of one judge, *Edwards Books* stands for the proposition that “indirect aid to religion *per se* is not unconstitutional”.⁷⁶ The clear implication is that the tax privileges conferred on religious charities do not *per se* violate the religious freedom of those who are excluded from that privilege. This conclusion seems to limit an excluded group to the previously considered argument that the Income Tax Act provisions are a form of coercion. *Edwards Books* reaffirmed that “all coercive burdens on the exercise of religious beliefs are potentially within the ambit of s.2(a)”.⁷⁷ However, Dickson CJC narrowed the scope of this argument by defining the role of coercive burdens in relation to the purpose of the guarantee:

This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion. It means only that indirect and unintentional burdens will not be held to be outside the scope of Charter protection for that reason alone... The purpose of s.2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being... For a state-imposed cost or burden to be proscribed by s.2(a), *it must be capable of interfering with religious belief or practice*...⁷⁸

As mentioned above, the only coercive burden identifiable in the current charitable tax scheme is the mandatory payment of taxes, a fraction of which are redistributed to registered religious charities. It is difficult to see how this cost could be capable of interfering with a religious belief or practice.

Big M and *Edwards Books* remain the seminal statements on the meaning of s.2(a). However, they also mark a high point in belief in the Charter,⁷⁹ and in the idea of insulating the realm of personal beliefs from the arm of the state. Since the introduction of the s.15 equality guarantee in 1985, the scope of s.2(a) has been clarified, and narrowed somewhat to exclude claims of disparate fiscal protection. An examination of the subsequent case law on the relationship between government

⁷⁶ See *Zylberberg v Sudbury Board of Education* (1989) 65 OR (2d) (Ont. CA) at 677 where Lacourciere JA gives his interpretation of *Edwards Books*.

⁷⁷ *Edwards Books* (1986) 35 DLR (4th) 1.(SCC) at 34.

⁷⁸ *Ibid.*

⁷⁹ P Macklem et al., *Canadian Constitutional Law*, 2d ed. (Toronto: Emond Montgomery, 1997) at 679.

actions and religious freedom suggests that an element of state compulsion is necessary to establish a s. 2(a) violation.

It is beyond debate that the "enforcement of religious conformity" is no longer a legitimate object of government.⁸⁰ The minimum area of freedom from government interference mandated by the s.2(a) guarantee has been affirmed in a number of cases:

...whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious belief or to manifest a specific religious practice for a sectarian purpose.⁸¹

The stringent application of this principle has been illustrated in a number of constitutional challenges to religious education. In *Zylberberg v Sudbury Board of Education*,⁸² prescribed religious exercises in Ontario public schools were held to be unconstitutional, even though the regulation gave every student the right not to participate. The court found that peer pressure and class-room norms operate to "compel members of religious minorities to conform with majority religious practices" and that the existence of religious exercises "compels students and parents to make a religious statement".⁸³ Activities which exert pressure on people to act inimically to their beliefs fall squarely within the realm of s.2(a).

It is far less clear that the area of legal freedom encompassed by s. 2(a) prohibits all government actions which implicate the state in religious activities. As Dickson J's caveat in *Big M* suggests, a law which compels religious conformity is on a very different footing than one which confers positive benefits on the basis of religion. The underlying principle has been expressed in more general terms: "the Charter is written in terms of what the state cannot do to the individual, rather than in terms of what the individual can exact from the State..."⁸⁴

⁸⁰ *Zylberberg v Sudbury Board of Education* (1989) 65 OR (2d) (Ont. CA) at 653.

⁸¹ *R v Big M* (1985) 18 DLR (4th) 321 at 362.

⁸² *Zylberberg v Sudbury Board of Education* (1989) 65 OR (2d) (Ont. CA).

⁸³ *Ibid* at 655.

⁸⁴ *Baxter v Baxter* (1983) 6 DLR (3d) 557 (Ont. HCJ) at 560: Baxter claimed, unsuccessfully, that the Divorce Act violated his religious freedom by forcing him to break the marriage vows to which he was conscience-bound.

The case law suggests that if there is a constitutional basis for challenging the distribution of taxation benefits to support religious charities, that ground is not s.2(a). *Schachtschneider v Canada*⁸⁵ involved a Charter challenge to an ITA provision which allowed unmarried persons to claim extra tax credits in respect of dependent children, thereby giving such couples a fiscal advantage over married couples.⁸⁶ The applicant, a married woman, argued that because her religious beliefs precluded her from living in a common-law relationship with her husband, the tax assessment constituted indirect coercion which violated her freedom of religion and discriminated on the basis of religion as well as marital status. The facts of the failed appeal may seem trivial in relation to the issue of charitable status in a multi-million dollar industry. What is relevant, for these purposes, is the Federal Court of Appeal's unequivocal rejection of the claim that the existence of fiscal benefits which the applicant could not access because of her religious beliefs violated her freedom of religion.

Section 118(1) of the Income Tax Act does not, directly or indirectly, coerce anyone. It is not form of control of any description which determines or limits anyone's course of religious conduct or practices. It does not impose a sanction on anyone. It simply does not engage freedom of religion and conscience in any fashion whatsoever.⁸⁷

The fact that s.118(1) and s.118.1 are both personal tax credits falling under the same division of the ITA highlights the relevance of this case to the charitable tax scheme.

The Supreme Court case which comes closest to addressing the issues raised by the charitable status of the advancement of religion is *Adler v Ontario*,⁸⁸ which involved a s.2(a) challenge to the *absence* of government support for religious education. The Ontario government funds Roman Catholic separate schools and secular public schools, but not private religious schools. In *Adler*, a group of parents of children attending Jewish day schools and independent Christian schools challenged this allocation of funds, arguing that the non-funding of private denominational schools violated their s.2(a) and s.15 rights. As five judges found that the funding of both Roman Catholic and public schools was part of the s.93 Confederation compromise protecting religious minorities and, as such, immune from Charter scrutiny, the

⁸⁵ *Schachtschneider v The Queen* (1993) 105 DLR (4th) 162 (FCA).

⁸⁶ Income Tax Act, SC 1970-71-72, c. 63, s.118(1).

⁸⁷ *Schachtschneider v The Queen* (1993) 105 DLR (4th) 162 (FCA) at 169.

⁸⁸ *Adler v Ontario* (1996) 140 DLR (4th) 385 (SCC).

majority ruling does not address the substantive Charter issues raised by the case⁸⁹. However, the three dissenting judgments offer a rare insight into the Court's view of the relationship between state financial support of matters of religion or conscience, and Charter rights.

Starting from the premise that the province's plenary power to deal with education is subject to the Charter, the four remaining judges nonetheless agreed that the absence of funding for independent religious schools did not violate s. 2(a). The appellants, citing the *Big M* statement that "coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others", had argued that the violation lay in "the imposition of burdens on some religious minorities which people of other religions do not bear..."⁹⁰ McLachlin J, acknowledging that passages in *Big M* and *Edwards Books* "appear to support this proposition", nonetheless concluded that the burden imposed by the lack of government funding did not violate the appellants' religious freedom. Her ruling provides a reasoned way of distinguishing the issue of state financial support for certain religions from the Sunday closing cases, and provides guidelines for assessing whether the former burden would violate s.2(a).

McLachlin J's discussion of s.2(a) confirms and clarifies the parameters of religious freedom that were set in *Big M*. She articulates the principle differentiating the nature of the burden imposed in each case; unlike the Sunday closing legislation, the Education Act "does not involve a state prohibition on otherwise lawful conduct".⁹¹ This rationale explains Dickson J's hesitation to include state financial support under the rubric of 'protection', and suggests that the allocation of tax benefits to religious charities simply does not engage the freedom protected by s.2(a). Applying McLachlin J's rationale, the ITA provisions sanctioning the preferential tax treatment of religious institutions do not prohibit the otherwise lawful conduct of any religious group. As no individual is compelled by the state to act in a manner which offends his or her religious beliefs, the scope of religious liberty guaranteed by the Charter remains intact.

This conclusion is supported by the earlier case of *Re Mackay and Manitoba*, which considered "whether there is interference with freedom of conscience, and of thought, belief and opinion, when the State provides funding from general revenues

⁸⁹ (1996) 140 DLR (4th) 385 (SCC) at 404. Iacobucci J, finding s.93 to be parallel to the minority language rights embodied in s.23, adopted the ratio of Wilson J in *Reference re. Bill 30*: "It was never intended...that the Charter could be used to invalidate other provisions of the Constitution..."

⁹⁰ *Ibid* at 453.

⁹¹ *Ibid* at 454.

to assist certain parties to attain elective office - parties who espouse views which are inimical to the opinions of the complaining citizen".⁹² The appellants challenged the constitutionality of the Manitoba Elections Finances Act, which provided that candidates with 10% of the total vote were reimbursed for up to 50% of their authorized expenditures out of the government's consolidated fund.

The majority of the Manitoba Court of Appeal held that this legislated financial subsidy in no way limited the appellants' freedom of conscience.⁹³ Their comments provide a further answer to groups arguing that the state support of religious charities violates the 'freedom of religion and conscience' set out in s.2(a):

Monetary support by the State for the expression of minority views, however distasteful to the majority or to another minority group, cannot offend the conscience of those opposed to the viewpoint. No one is compelled to agree with the minority view nor forbidden to espouse or express a contrary one. To borrow the words of Dickson CJC in *R v Big M Drug Mart*, *supra*, "No one is...forced [by the impugned sections of the Elections Finance Act] to act in a way contrary to his beliefs or his conscience.

The Constitution does not guarantee that the State will not act inimically to a citizen's standard of proper conduct: it merely guarantees that a citizen will not be required to do, or refrain from doing, something contrary to those standards... The support given by the government to political causes hostile to the general, or a minority, viewpoint cannot induce in anyone a pang of conscience for the moral quality of their own conduct or the lack of it.

Assuming that religion and conscience are equally protected under s. 2(a), this reasoning should be equally applicable to the tax benefits conferred on religious charities.

McLachlin J's judgment touches on another theme which surfaces repeatedly in the s.2(a) case law, the historical context of the impugned law. It is a general principle of Charter interpretation that the purpose of a guaranteed right or freedom must be

⁹² *Re Mackay and Manitoba*, (1986) 24 DLR 4th 587 (Man. CA) at 590, per Huband J A.

⁹³ A further appeal to the Supreme Court was dismissed because insufficient evidence was presented to enable the Court to consider the Charter arguments: see *Mackay v Manitoba* [1989] 2 SCR 357.

determined by reference to the historical origins of the concepts enshrined.⁹⁴ In the freedom of religion jurisprudence in particular, the courts have frequently considered whether the law has historically been a source of religious discrimination before reaching a decision on its constitutionality.⁹⁵ This suggests that the outcome of s.2(a) challenge may depend in part on the Court's evaluation of the historical role of the *Pemsel* rule.

It is difficult to envisage what form a historical analysis of the *Pemsel* rule and the broader role of religion in the law of charity would take. The legal treatment of gifts to religious causes has varied throughout the ages. In Tudor England, the Established Church ensured that all religions other than the Church of England were denied the privileges which it enjoyed. Edward VI's statutory suppression of "superstition and errors in Christian Religion"⁹⁶ made void any gift promoting a religion not tolerated by law. Only gradually, through the Toleration Acts, did the number of recognized religions increase. On the other hand, the Mortmain Act 1736, which rendered void testamentary gifts of land given to a charitable purpose, illustrates that the charitability of religious purposes was not always advantageous. Some of the early Canadian cases can be held up as examples of religious tolerance: in 1871, for example, an Ontario court refused to apply the English 'doctrine of superstitious uses' to declare a religious society for the saying of masses void. However, the interpretations of religion which have excluded belief systems such as theosophy and Christian Science from the benefits of charity law might be used to cast the law as a source of religious discrimination.

The historical analysis of the second head of charity may not yield any clear answers. However, the historical analysis of s.2(a) has already indicated the centrality of state compulsion to the historical understanding of freedom of religion. In *Big M*, Dickson J situated the origins of freedom of religion in post-Reformation Europe, where the changing religious allegiances of the royalty and the shifting of national frontiers led to the creation of laws which imposed religious beliefs and practices on unwilling citizens.⁹⁷ During the Interregnum, the growing opposition to

⁹⁴ *R v Big M* (1985) 18 DLR (4th) 321 at 360.

⁹⁵ See *Adler v Ontario* (1996) 140 DLR (4th) 385 (SCC) at 454, where McLachlin J examines the Education Act in its historical context, concluding that because the lack of funding for independent religious schools was never seen as religious persecution, it should not now be deemed to violate religious freedom. See also *Zylberberg v Sudbury Board of Education* (1989) 65 OR (2d) (Ont. CA) at 648 where the Ontario Court of Appeal examines the history of opening and closing religious exercises in the schools.

⁹⁶ Statute of Superstitious Uses, 1 Edw. VI c. 14.

⁹⁷ *R v Big M* (1985) 18 DLR (4th) 321 at 360.

the State imposition of religion was based on a strong feeling that “belief itself was not amenable to compulsion”.⁹⁸ The criticism of these laws was not primarily that the wrong beliefs were being promoted, or that belief itself was suspect, but that compelling belief or practice “denied the reality of individual conscience and dishonoured the God that had planted it in his creatures”.⁹⁹ This historical emphasis on the compulsion of belief or practice is consistent with the case law’s delineation of what type of state action violates ‘freedom of religion and conscience’.

In conclusion, it is unlikely that the taxation benefits allocated to certain religious charities would be found to violate s.2(a) of the Charter. The element of state compulsion necessary to offend freedom of religion and conscience simply does not exist where the State confers a positive benefit on one group. The state can use its tax dollars to support activities protected by s.2(a), just as it can use them to support other activities. Conversely, s.2(a) does not oblige the state to support religious activities equally, or to support them at all.¹⁰⁰ There is, however, at least one important limitation on the government’s freedom to make fiscal policy with regard to religious charities.

Although it is unlikely that the advancement of religion category *per se* offends the s.2(a) guarantee of religion and conscience, it seems that the state support of any activity which offends a fundamental right or freedom must be unconstitutional. This argument finds support in the case of *Re Canada Trust*, which declared a discriminatory charitable trust void on the grounds that it violated public policy. According to Tarnopolsky J A, the public nature of charitable trusts mandated that they conform to the clear public policy against discrimination.¹⁰¹ A wide variety of sources were deemed to form this public policy, including “provincial and federal statutes, official declarations of government policy and the Constitution.” As Mayo Moran points out, it seems logical that the Constitution, as the “supreme law of Canada” is also the primary source of Canada’s public policy, and that “any

⁹⁸ 1985 18 DLR (4th) 321 at 361.

⁹⁹ *Ibid.*

¹⁰⁰ The conclusion that the second head of charity does not offend the Charter because the relevant State action lies outside the scope of the protected right has an important corollary, which is that recognized religious organizations have no right to state funding of their activities. They could not use s.2(a) to dispute the legislature’s decision to discontinue the favourable tax treatment of religious charities.

¹⁰¹ *Re Canada Trust and Ontario Human Rights Commission* (1990) 69 DLR (4th) 321 (Ont. CA).

organization that offends basic principles of the Charter cannot be registered as a charity".¹⁰²

Moran's observation raises an interesting question: what is the scope of constitutionally permissible activities falling under the advancement of religion? Would Elizabeth Bates' trust, aimed at converting the heathen to the Moravian Church, be constitutional? The activities comprehended by the second head of charity are set out in the Canadian case of *Re Anderson*:

The words 'advancement of religion', as used to denote one class of legally charitable objects, mean the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which it rests and of the observances which serve to promote and manifest it.¹⁰³

For most religions, the promotion of spiritual teaching must be considered a fundamental 'manifestation of belief', and therefore a constitutionally protected activity. Nothing in the Charter indicates that evangelism *per se* offends human rights. This conclusion is consistent with Article 9 of the European Convention of Human Rights, which provides that freedom of thought, conscience and religion includes the right to manifest belief in "worship, *teaching*, practice and observance".¹⁰⁴ On the other hand, it is not difficult to imagine that both spiritual teaching and the maintenance of doctrines and observances encompass activities that are deeply objectionable to some. These activities would almost certainly include aggressive proselytising and recruitment, and could arguably extend to a range of missionary activities.

The problem is legitimate, but the principle to resolve it lies within the tenets of constitutional law. Freedom of religion, like the other rights and freedoms guaranteed by the Charter "...is inherently limited by the rights and freedoms of others".¹⁰⁵ While the beliefs protected by s.2(a) are potentially unlimited, "the same cannot be said of religious practices, notably when they impact on the fundamental

¹⁰² Mayo Moran, "Rethinking Public Benefit: The Definition of Charity in the Age of the Charter" in Jim Phillips, Bruce Chapman and David Stevens, eds. *Between State and Market: Essays on Charity Law and Policy in Canada* (forthcoming).

¹⁰³ *Re Anderson* (1943) 4 DLR 268 (Ont. H.C.) at 271; see also *Keren Kayemeth Le Jisroel Ltd. v Commissioners of Inland Revenue* [1931] 3 KB 465 (CA) at 477.

¹⁰⁴ European Convention on Human Rights, Article 9.

¹⁰⁵ *P (D) v S (C)* [1993] 4 SCR 141 at 182, per L'Heureux-Dube J.

rights and freedoms of others.”¹⁰⁶ The Supreme Court formulated the principle this way in relation to the anti-Semitic publications of a New Brunswick school teacher:

Freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience. This freedom is not unlimited, however, and *is restricted by the right of others to hold and manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others.*¹⁰⁷

Freedom of religion is also “subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.”¹⁰⁸

These restrictions on freedom of religion delineate the outer bounds of the activities that religious charities can legitimately undertake. They also indicate the limits of the government's authority to allocate tax benefits to religious charities. The state support of any evangelical activity that impedes or injures someone else's freedom of religion would constitute a violation of s.2(a). This principle would presumably extend to all of the relevant provisions of the Charter, so that a religious activity which discriminated on the basis of sex, or that impeded freedom of expression or association, could not legitimately be supported by the state. It is interesting to speculate on the variety of ways that Elizabeth Bates' trust for the conversion of the heathen might invoke this limitation.

Section 15: The Equality Guarantee

Section 15(1): “Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Unfortunately for John Pemsel, a ruling that allocating tax benefits to charitable religious purposes does not violate the religious freedom of groups not enjoying those benefits will not be the end of the story. Religious organizations enjoying charitable status will face a far greater challenge to their privileged position from the

¹⁰⁶ *B (R.) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315 at 383, per La Forest J.

¹⁰⁷ *Ross v New Brunswick School District No. 15* [1996] 1 SCR 825 at 866.

¹⁰⁸ *R v Big M* (1985) 18 DLR (4th) 321 at 337.

Charter's equality guarantee. At the time that the charges at issue in *Big M* and *Edwards Books* were laid, s.15 had not yet taken effect.¹⁰⁹ However, Dickson CJC's conclusion regarding the Lord Day's Act employs much of the rhetoric which characterizes the current approach to s.15.:

To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and *the dignity of all non-Christians*. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, *and gives the appearance of discrimination* against, non-Christian Canadians.... The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.¹¹⁰

In the current legal environment, it is likely that 'discrimination' will be a more forceful argument than 'indirect coercion' in relation to state benefits. This view is supported by the *Adler* case, where the judges who addressed the Charter issues seemed to agree that any infringement created by the Education Act would offend the equality guarantee rather than freedom of religion. In her solo judgment, L'Heureux-Dube J distinguished s.2(a) and s.15:

While s.2(a) of the Charter is primarily concerned with the necessary limits to be placed on the state in its potentially coercive interference with the original, objectively perceived religious "choice" that individuals make, s.15 ensures that consequences in behaviour and belief, which flow from this initial choice and are not perceived by the rights claimant as an option, not be impacted upon by state action in such a way as to attack the inherent dignity and consideration which are due all human persons.¹¹¹

Only two judges in *Adler* found that the funding of certain schools violated s.15. Interestingly, however, the majority of the Court noted that the privileged status of religious and linguistic minority groups, although explicitly authorized by s.23 and

¹⁰⁹ See *Adler v Ontario* (1996) 140 DLR (4th) 385 (SCC). at 443, per Sopinka J: "The Court in *Edwards Books* explicitly did not consider the issue under s. 15 because that section was not in force at the time the appellants were charged with breaching the Sunday closing legislation."

¹¹⁰ *R v Big M* (1985) 18 DLR (4th) 321 at 354.

¹¹¹ *Adler v Ontario* (1996) 140 DLR (4th) 385 (SCC) at 414. MacLachlin J expresses a similar sentiment at 454: "...the cost issue is more appropriately considered under the equality provision..."

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s.93 of the Constitution, “may sit uncomfortably with the concept of equality embodied in the Charter”.¹¹²

Judicial Interpretation of the Equality Guarantee

The Supreme Court has noted that section 15 is “perhaps the Charter's most conceptually difficult provision”.¹¹³ The general principle is that a law expressed in a way which binds all citizens should not be more burdensome to some because of irrelevant personal differences. The difficulty of applying section 15 without creating an impossible requirement that lawmakers create laws which are free from any distinctions has often produced a divergence of views amongst members of the judiciary.¹¹⁴ However, the recent unanimous decision of the Supreme Court in *Law v Canada* is an authoritative statement of the framework of analysis for discrimination claims.

Law maintains the three-part inquiry for establishing a section 15 infringement. In order to violate section 15, a law must impose differential treatment, whether in purpose or effect. The differential treatment must be based on an enumerated or analogous ground. Finally, the law must have a purpose or effect which is discriminatory within the meaning of the equality guarantee. Applied to a charity law context, it seems clear that the preferential tax treatment of certain organizations, based on the definition of religion adopted by the CCRA, would fulfill the first two requirements. The third requirement is more problematic, for the term discrimination has proven to be amenable to a broad range of judicial interpretations.

Having begun its equality jurisprudence with the admission that the equality guarantee is an “admittedly unattainable ideal”,¹¹⁵ the Supreme Court seems to have finally acknowledged the subjectivity which underlies the resolution of discrimination claims. *Law* emphasizes the importance of a flexible framework which will ensure that s.15(1) analysis “does not become mechanistic, but rather

¹¹² *Ibid* at 402; see also *Reference Re Act to Amend the Education Act (Ontario)* [1987] 1 SCR 1148 at 1197.

¹¹³ *Law v Canada (Minister of Employment and Immigration)* (1999) 170 DLR 4th 1 (SCC) [hereinafter “*Law*”] at 6.

¹¹⁴ See, for example, *Egan v Canada* (1995) 2 SCR 513, where four members of the Court tried to insert a requirement that the distinction at issue be “irrelevant” to the purpose of the legislation in order to violate s. 15. The Court has also disagreed on the proper standard of justification which should be imposed under s. 1: see *Andrews v Law Society of BC* (1989) 1 SCR 143.

¹¹⁵ *Andrews, Ibid* at 184.

addresses the true social, political and legal context underlying each and every equality claim".¹¹⁶ Under this framework, the purpose of s.15 is paramount:

to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

The important implication of this focus on 'essential human dignity and freedom' is that when John Pemsel contests the CCRA's preferential treatment of certain recognized religions, the discrimination analysis may be pared down to a single question: does the impugned law have the effect of demeaning the human dignity of the appellant?

Law clarifies the considerations which will guide the Court's answer to this complex question. Human dignity, for purposes of s.15, "means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment".¹¹⁷ The determination of whether a law is discriminatory must be conducted from the perspective "of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to and under similar circumstances as, the claimant".¹¹⁸ The objective component of this test means that it is insufficient for a claimant to assert that his or her dignity has been adversely affected; the larger context of the law and the claimant's position in society must be considered. The subjective component, on the other hand, confirms the human rights or dignity theme which runs through the discrimination inquiry. The significance of the subjective perspective was illustrated in *Egan*, where a statutory definition of "spouse" which excluded homosexual partners was deemed to discriminate against a homosexual couple, even though non-recognition as spouses would have resulted in greater tax benefits.¹¹⁹

The implication of the *Law* approach is that the outcome of a s.15 challenge to the *Pemsel* rule will depend to a large extent on the identity of the complainant. It is

¹¹⁶ *Law*, (1999) DLR (4th) 1 (SCC) at 49. See also Wilson in *Turpin* (1989) 1SCR 1296 (SCC): "It is my view that the constitutional questions must be examined in their broader political, social and historical context in order to attempt any kind of meaningful constitutional analysis."

¹¹⁷ *Law*, (1999) DLR (4th) 1 (SCC) at 30.

¹¹⁸ *Ibid* at 26.

¹¹⁹ *Egan v Canada* (1995) 2 SCR 513.

important to note that unlike s.2(a), access to s.15 is limited to *individuals* who have personally suffered discrimination.¹²⁰ Nevertheless, the individuals who could potentially mount a s.15 challenge can be divided into roughly the same categories as under s.2(a): members of organizations which claim to be religious but do not fall within the common-law parameters adopted by the Charities Division, and members of admittedly secular organizations standing for matters

of conscience.¹²¹ The essence of either claim would be that the advancement of religion category promotes the view that the individual is less worthy of recognition because of his or her membership in a group that is not a recognized religion.¹²² However, the important distinctions between the two categories will affect the balancing of the contextual factors set out in *Law*.

Law discusses four contextual factors which may influence whether a law offends s.15. Pre-existing disadvantage is "probably the most compelling factor" favouring a finding of discrimination,¹²³ although it is neither conclusive nor indispensable to a successful claim. The second factor is the relationship between the ground on which the claim is based and the nature of the differential treatment. A distinction which corresponds with need, capacity or circumstances will be less likely to violate s.15(1).¹²⁴ A third possible consideration is that a law with an ameliorative purpose will likely not violate the human dignity of more advantaged individuals where their exclusion "largely corresponds to the greater need or the different circumstances

¹²⁰ While a law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a), s.15 focuses on whether the law has drawn a distinction between the claimant and another based on personal characteristics: See *R v Church of Scientology* [1997] OJ No. 1548 (Ont. CA).

¹²¹ The possibility of a secular organization raising a discrimination challenge raises an interesting question: would conscience be considered an analogous ground? It may be argued that as conscience is not an "immutable personal characteristic", it should not be an analogous ground. However, the following comments of Peter Hogg suggest that there may be no principled distinction between religion and conscience in this regard: "There is no natural or legal impediment to a change of religion, and some people do in fact switch from one to another. In the case of most individuals, however, a religious affiliation was acquired early and became deeply embedded in the individual's consciousness, so that 'the changes of inner conviction may be beyond the individual's control.': see Dale Gibson, *The Law of the Charter: Equality Rights* (Carswell: Toronto, 1990) at 158.

¹²² *Law*, (1999) 170 DLR 4th 1 (SCC) at 28: "...any demonstration by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a member of Canadian society will suffice to establish an infringement of s.15(1).

¹²³ *Ibid* at 27.

¹²⁴ *Ibid* at 29.

experienced by the disadvantaged group being targeted by the legislation".¹²⁵ The final contextual factor examined by the Court is the nature of the interest affected by the law: "the more severe and localized the consequences on the affected group", the more likely the distinction responsible for these consequences is discriminatory within the meaning of s.15."¹²⁶

Application of the *Law* Approach to the *Pemsel* Rule

The identity of the complainant will be particularly relevant in determining the extent to which pre-existing disadvantage figures in the Court's assessment of the *Pemsel* rule. Although Canada's legal tradition has espoused a relatively high level of religious tolerance, there is no doubt that many minority religions have experienced prejudice and stereotyping in Canadian society. And while *Law* clarified that creating a strict classification scheme of disadvantage would be inappropriate,¹²⁷ the Court could take judicial notice of the particular degree of stereotyping of a specific religious group. In the charities law context, this criteria suggests that the likelihood of a discrimination finding will rise relative to the level of public scepticism about the beliefs of a religious body that is refused registration. The religious context raises another interesting question related to disadvantage. What happens to the pre-existing disadvantage criteria if the social pendulum swings, so that the power and privilege of historically powerful groups wane, while the historically vulnerable become both accepted and powerful? At what point, in other words, does historical disadvantage become moot, because the disadvantage no longer exists? The widespread secularization and diversification of Canadian society over the last 50 years may require the courts to clarify the historic disadvantage criterion.

The second factor will work against the *Pemsel* rule. The distinction drawn between various belief systems does not seem to be related in any way to the particular need, capacity or circumstances of the claimant. The 'ameliorative purpose' factor seems more promising for the constitutionality of the *Pemsel* rule. The general ameliorative purpose of the law of charity is reflected in the definition of a charitable trust: it is a dedication of property to exclusively charitable purposes in a way that provides a public benefit. However, the Court was careful to limit this factor's application to situations where the person or group that is excluded from the scope

¹²⁵ *Ibid* at 31.

¹²⁶ *Ibid* at 32.

¹²⁷ *Ibid* at 27.

of the ameliorative state action is “more advantaged in a relative sense”.¹²⁸ The second head of charity, excluding as it does those belief systems that do not fit the common law parameters of religion, would more likely be characterized as an under inclusive ameliorative law that excludes members of an historically disadvantaged group. Such a law is unlikely to escape the charge of discrimination.¹²⁹

Section 15(2), on the other hand, is a broader endorsement of ameliorative government action:

15(2): Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Prima facie, s.15(2) seems to encompass any law aimed at ameliorating the position of disadvantaged individuals, whether or not their disadvantage is linked to an enumerated ground. It will be interesting to see whether the Court interprets this section broadly enough to save the law of charity from a discrimination charge.

The characterization of the complainant's affected interest is likely to be the determinative factor in the outcome of a discrimination challenge to the second head of charity. As l'Heureux-Dube J explained in *Egan*, “the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the *constitutional and societal significance* attributed to the interest or interests adversely affected by the legislation in question”.¹³⁰ Personal inner convictions pertaining to the existence of a higher spiritual or moral order are very close to the core of the values which the Charter is bound to protect, and a finding that the second head of charity was tantamount to “complete non-recognition”¹³¹ of those beliefs would very likely support a finding of discrimination. On the other hand, the finding that a group's predominant objection to the *Pemsel* category was the fiscal disadvantage which they suffered would be less likely to support a finding of discrimination. The case law supports this view that the finding of a s.15 violation will depend on the nature and scope of the affected interest.

¹²⁸ *Ibid* at 31.

¹²⁹ *Ibid*.

¹³⁰ See *Law* (1999) 170 DLR 4th 1 (SCC) at 32, where the Court adopts l'Heureux-Dube J's approach in *Egan v Canada* (1995) 2 SCR 513.

¹³¹ *Ibid* at 32.

The suggestion that fiscal disadvantage alone will seldom produce a s.15 violation finds support in several recent cases where the unequal distribution of government benefits was found not to constitute discrimination. In *Law*, the Canada Pension Plan scheme which awarded pension benefits on the basis of the enumerated ground of age was held not to discriminate against the appellant.¹³² In *Thibaudeau v Canada*,¹³³ the Supreme Court considered sections of the ITA which distinguished between custodial and non-custodial parents in its differential treatment of paid and received alimony payments.¹³⁴ The majority of the Court held that requiring the applicant to include the alimony payments in her computed income did not constitute a burden within the meaning of the discrimination clause. Gonthier J, in a concurring judgment, commented on the relationship between the right to equality and fiscal equity:

“It is of the very essence of the ITA to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests. In view of this, the right to the equal benefit of the law cannot mean that each taxpayer has an equal right to receive the same amounts, deductions, or benefits, but merely a right to be *equally governed* by the law.”¹³⁵

In light of this jurisprudence, the strongest argument against finding a s.15 violation would run thus. The interests at stake in the registration of charities are overwhelmingly fiscal. Organizations apply for charitable status because they want tax deductions, not because they want governmental recognition of their intrinsic worth. Subjecting determinations of charitable registration to strict Charter scrutiny, therefore, would amount to overextending the scope of the Charter guarantee in a way which may lead to the dilution of the meaning of the right.

An additional argument that the *Pemsel* rule does not discriminate within the meaning of the equality guarantee focuses on the limited scope of the impugned law. The Charities Division’s refusal to register an organization under the second head

¹³² *Ibid* at 49.

¹³³ (1995) 2 SCR 627.

¹³⁴ *Ibid* at 628. Section 56(1)(b) of the ITA requires a separated or divorced parent to include in computing income any amounts received as alimony, while s. 60(b) allows a parent who has paid such amounts to deduct them from income.

¹³⁵ *Ibid* at 676, per Gonthier J, Cory J and Iacobucci J expressed a related opinion that “intrinsic to taxation policy is the creation of distinctions which operate, as noted by Gonthier J, to generate fiscal revenue while equitably reconciling what are often divergent, if not competing, interests.” (at 702).

of charity does not reflect the view that the group is less worthy *per se*, or even that it is not charitable, but simply that it is not appropriately classified as a group advancing religion. This argument is strengthened by the existence of the fourth head of charity, which recognizes the charitability of "other purposes beneficial to the community."

However, there are strong counter-arguments to both of these arguments. In many cases, the refusal to recognize a belief system as a religion for the purpose of charitable registration is injurious to more than the organization's fiscal interest. Because the bulk of the taxation benefit stemming from charitable gifts goes to the donor, the organisation's fiscal gains are quite indirect. It is perfectly plausible to imagine that, quite aside from the fiscal interest at stake, a devout person would find it deeply insulting and demeaning that the government of Canada did not recognize that his religion was, in fact, a religion. *Law* established that discrimination need not be intentional. The Court has also stated that the existence of a distinction based on enumerated or analogous grounds will generally suffice to establish discrimination.

The equality issue surfaced briefly in the *Vancouver Society* case,¹³⁶ the most recent charity law case to come before the Supreme Court. Although the central issue was whether the society's purposes were charitable under the second and fourth *Pemsel* heads, a group of intervenors argued that the *Pemsel* rule, as incorporated in ss.248(1) and 149.1(1) of the ITA, discriminated against immigrant and visible minority women on the basis of immigrant status, race, gender, and national or ethnic origin. The Court's decision that this argument was without merit, while disappointing to some,¹³⁷ could easily be interpreted as a judicial indication that the law of charity is an inappropriate venue in which to allege discrimination.

However, a closer examination of the passage reveals that it may actually support a s.15 challenge to the second head of charity. Iacobucci J's summary dismissal of the s.15 argument was based on his conclusion that the rejection of the Society's application for registration was *not* a consequence of the characteristics of its intended beneficiaries. The implication, that the deemed validity of the Society's purposes had nothing to do with enumerated or analogous grounds, found its way into the Court's conclusion: "Simply put, nothing in the law operates to prevent immigrant and visible minority women from forming the beneficiary class of a

¹³⁶ *Vancouver Society* (1999) 169 DLR (4th) 34 (SCC).

¹³⁷ Mayo Moran, "Rethinking Public Benefit: The Definition of Charity in the Age of the Charter" in Jim Phillips, Bruce Chapman and David Stevens, eds. *Between State and Market: Essays on Charity Law and Policy in Canada* (forthcoming).

properly constituted charitable organization".¹³⁸ If the Society's application had been rejected because the organization did not fit the common-law definition of a religious body, however, this rationale would not apply. Ironically, the Court has provided a coherent formulation of the strongest argument against the constitutionality of the second head of charity: "Simply put, something in the law prevents members of the Moravian Church from forming the beneficiary class of a properly constituted charitable organization."

Conclusion

It is quite possible that the *Pemsel* rule would be found to discriminate against a group which was denied charitable status because it did not fit within the common-law parameters of religion articulated by the Charities Division. However, the breadth of the analytical framework also makes it possible to argue that although the *Pemsel* classification distinguishes between groups based on an enumerated ground, the recognition of the advancement of religion as a charitable purpose does not demean the dignity of those who do not qualify under this head. The outcome will ultimately depend on whether the Court focuses on the fiscal benefit to which the complainant is denied access, or the symbolic effect of failing to recognize the equal charitable status of ethical groups and minority religions.

The Justification Clause

Section 1: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

If the *Pemsel* rule is found to be a *prima facie* violation of either s.2(a) or s.15(1), the Court will face the challenging task of applying a section 1 justification analysis to a common law rule. The authoritative test for justifying a Charter infringement was set out by Dickson CJC in *R v Oakes*.¹³⁹ In essence, the government must show that the limitation is "prescribed by law", that the objective of the limitation is of sufficient importance to warrant overriding a guaranteed right or freedom, and that the means chosen are reasonable and demonstrably justified. This involves a three-step "proportionality test", aimed at balancing societal and individual interests:

¹³⁸ *Vancouver Society* (1999) 169 DLR (4th) 34 (SCC) at 130.

¹³⁹ *R v Oakes* (1986) 26 DLR (4th) 200 (SCC).

“First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means...should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of “sufficient importance”.¹⁴⁰

By allowing individual rights to be limited in cases where they are “inimical to the realization of collective goals of fundamental importance”,¹⁴¹ the “saving words of section 1” affirm the state’s right to protect societal interests. However, the section is not a blanket endorsement of state actions. The general presumption of constitutional validity applicable to legislation ceases once a *Charter* infringement has been found,¹⁴² and the state bears the burden of proving that the limit can be justified under s.1. The “stringent standard of justification” which has evolved has led one constitutional scholar to note that “section 1 has probably had the effect of *strengthening* the guaranteed rights”.¹⁴³

Prescribed by Law

The threshold requirement of the justification test is that any limitation on a fundamental right or freedom be ‘prescribed by law’. The limit must have legal force, and it must be ascertainable and understandable in order to fulfill the dual requirements of accessibility and precision which attach to the rule of law.¹⁴⁴ These requirements restrict the right of decision-making bodies to limit *Charter* rights through the exercise of their discretionary power. Although a statutory grant of discretion which is constrained by legal standards may be ‘prescribed by law’, unfettered discretion will be more difficult to justify.

¹⁴⁰ *Ibid* at 139.

¹⁴¹ *Ibid* at 136.

¹⁴² *Quebec Association of Protestant School Boards et al. v AG Quebec et al* (No.2) (1982) 140 DLR (3d) 33.

¹⁴³ P W Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1996) at 864.

¹⁴⁴ *Ibid*, at 872: “The values of the rule of law are satisfied by a law that fulfils two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it and to provide guidance to those who apply the law.”

This point is illustrated by *Re Ontario Film & Video Appreciation Society*,¹⁴⁵ where a statute empowering the Ontario Board of Censors to “censor any film” was held to violate s.2(b). Responding to the Board’s argument that the provision was a justifiable limit on freedom of expression, the court stated that such limits “cannot be left to the whim of an official”; they must be “articulated with some precision or they cannot be considered to be law”.¹⁴⁶ The Court of Appeal affirmed the lower court’s ruling, stating that a provision that set *no* limit on the Board’s discretion could not possibly be a ‘reasonable limit prescribed by law’ within the meaning of s.1.¹⁴⁷

The details of *Re Ontario Film* are particularly relevant to the scheme of charitable registration. Like the Charities Division, the Ontario Board of Censors had internal criteria to guide their approval process, and produced pamphlets which film-makers could consult as an indication of how their work would be judged. However, because the criteria were not binding on the board, and had no legal force, they could not help justify the board’s decision to limit a Charter right.¹⁴⁸ The court’s holding that discretionary power exercised with reference only to non-binding standards is not ‘prescribed by law’ suggests that the decisions of the Charities Division pertaining to the registration of religious charities would also fail this initial test.

If the second head of charity is found to be prescribed by law, it will pass to the first step of the *Oakes* test – is the objective of the law of sufficient importance to warrant overriding a constitutional right? The characterization of the purpose of a law is generally the most difficult and the most determinative step in the justification analysis. The objective must be consistent with the values of a free and democratic society, which are the “ultimate standard” against which a limit on a right or freedom must be shown.” These include:

“respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for

¹⁴⁵ *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1983) 41 OR (2d) 583 (SC).

¹⁴⁶ *Ibid* at 592.

¹⁴⁷ *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984) 45 OR (2d) 80 at 82 (CA).

¹⁴⁸ *Re Ontario Film*, (1983) 41 OR(2d) 583 (SC) at 592.

cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”¹⁴⁹

A law whose purpose is incompatible with these values will never be a justifiable limit on a Charter right.¹⁵⁰ In *Big M*, the early finding that the Lord’s Day Act had an unconstitutional religious purpose led Dickson to conclude that a s. 1 analysis was unnecessary:

“The characterization of the purpose of the Act as one which compels religious observance renders it unnecessary to decide the question of whether s. 1 could validate such legislation whose purpose was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced”.¹⁵¹

Subsequent decisions have confused the meaning of this statement by suggesting that a law cannot be justified under s. 1 if its purpose is “religious”.¹⁵² *Big M* does not stand for the proposition that any finding of a religious purpose obviates the need for a s. 1 inquiry. What it does suggest is that a law with a religious purpose which is *incompatible* with the purposes of the Charter will never be saved by the justification clause.¹⁵³

The *Oakes* test applies to common law limitations on Charter rights just as it does to legislative limitations.¹⁵⁴ However, the inherent difficulties of applying the *Oakes* test in the absence of a specific piece of legislation become quickly evident when one attempts to articulate the purpose of the law. The purpose of a statutory enactment

¹⁴⁹ *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) at 136.

¹⁵⁰ *R v Big M* (1985) 18 DLR (4th) 321 at 349.

¹⁵¹ *Ibid* at 353.

¹⁵² *Zylberberg v Sudbury Board of Education* (1989) 65 OR (2d) (Ont. CA) at 661. However, Lacourciere J A, dissenting, pointed out the important distinction between a religious purpose, and a religious purpose which violated 2(a): “The Lord’s Day Act...was held to violate the Charter, not because it was aimed at facilitating or encouraging sabbatical observance, but by reason of the criminal sanction which creates the elements of compulsion, coercion or constraint for sabbatical observance on a day preferred by the Christian religion.” (at 667).

¹⁵³ See Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1996) at 864 at 885.

¹⁵⁴ See *R v Swain* [1991] 1 SCR 933. Although it was not crucial to the majority’s resolution of the appeal, Lamer CJC decided it would be “appropriate and helpful” to apply *Oakes* to the common law rule of evidence which had violated the respondent’s s. 7 rights. His application of the *Oakes* test is indeed a helpful guide to the analysis of common law rules.

is determined by reference to the initial legislative intent.¹⁵⁵ Where the common law is subjected to s.1, on the other hand, “the task of the Court... is not to construe the objective of Parliament or of a legislature, but rather to construe the *overall* objective of the common law rule which has been enunciated by the Courts”.¹⁵⁶

The characterization of the purpose of a law can be framed at various levels of generality. The courts have fluctuated as to the proper focus of the s.1 analysis; some cases have examined the purpose of the law in its entirety,¹⁵⁷ while others have considered only the purpose of the infringing measure.¹⁵⁸ The *Vancouver Society* case suggests one possible interpretation of the *Pemsel* rule:

“The purpose of the *Pemsel* rule is to support socially desirable activities of registered charities for the benefit of their beneficiaries by facilitating the raising of revenue to fund these activities.”¹⁵⁹

This characterization (which was not explicitly adopted by the Court) raises some interesting questions about the purpose of ‘the advancement of religion’. The simple step of inserting the word “religious” into the phrase “registered charities” transforms the sentence into a highly generalized characterization of the purpose of the second head of charity. It seems unlikely, however, that the sole objective of the categorization of charitable purposes is to “support” charitable activities. The *Vancouver Society* definition ignores one of the key functions of the *Pemsel* rule, which is to *identify* which activities are socially desirable, and to *distinguish* between purposes which are charitable and purposes which are not.

This ‘identification’ objective of the *Pemsel* rule is particularly controversial as it relates to ‘the advancement of religion’. The purpose of the second head, combined with the criteria adopted by the Charities Division,¹⁶⁰ is to identify those activities and purposes which advance ‘religion’ in order to allow them to enjoy the benefits

¹⁵⁵ See *R v Big M* (1985) 18 DLR (4th) 321 at 353, where Dickson J rejects the “shifting purpose” doctrine.

¹⁵⁶ See *R v Swain* [1991] 1 SCR 933. at 981.

¹⁵⁷ See *Miron v Trudel* [1995] 2 SCR 418; *Egan v Canada* (1995) 2 SCR 513.

¹⁵⁸ See, for example, *RJR Macdonald Inc. v Canada (AG)* [1995] 3 SCR 199, per MacLachlin J.

¹⁵⁹ *Vancouver Society* (1999) 169 DLR (4th) 34 (SCC) at 129.

¹⁶⁰ See *R v Swain* [1991] 1 SCR 933 at 983. at 981-3, where Lamer CJC considered both the common law rule of evidence and the criteria adopted by the Ontario Court of Appeal in his s. 1 analysis.

of charitable status. The underlying motive revealed by an overall analysis of the common law rule is equally controversial – the category seems to be impelled by the legal assumption that “it is good for man to have and practice a religion”,¹⁶¹ and that “any religion is at least likely to be better than none”.¹⁶²

The characterization of the purpose of ‘the advancement of religion’ category will determine whether it passes the first step of the *Oakes* test. The *support* of religious charities seems to be consistent with the values of a free and democratic society. Religious charities assuredly fall into Dickson J’s category of “social institutions which enhance the participation of individuals and groups in society.” However, if the rule is characterized as *distinguishing* those religions which are deemed charitable from those which are not, ‘the advancement of religion’ is likely to conflict with another important Charter value, such as “respect for cultural and group identity”, or the “accommodation of a wide variety of beliefs”. These considerations suggest that the purpose of the second head of charity will have to be phrased at a high level of generality if it is to pass this stage of the test.

Proportionality

Although the flexibility of the purpose test may save the second head of charity in the first step of the *Oakes* test, a broad interpretation of its purpose will have a negative impact on the outcome of a proportionality analysis. This is because the more general the purpose of a law, the more difficult it is to justify the means used to achieve that purpose. A multitude of variables will influence the proportionality analysis. However, when the breadth of the purpose and the nature of the state’s justification are considered, it seems very unlikely that the *Pemsel* rule would be upheld as a justifiable infringement of a Charter right. Essentially, the court would be balancing the state’s allocation of tax dollars to support socially desirable activities against an individual’s “dignitary” interest in the recognition of a profoundly personal belief. The Supreme Court has held that budgetary considerations alone are insufficient to justify a Charter violation, as administrative convenience cannot override the need to adhere to Charter principles.¹⁶³ As Lorraine

¹⁶¹ *Gilmour v Coats* [1949] 1 All ER 848 (HL).

¹⁶² *Neville Estates v Madden* [1962] Ch. 832 at 853.

¹⁶³ *Re Singh and Minister of Employment and Immigration* (1985) 1 SCR 177 at 218.

Weinrib has written, "a different preference for allocation of resources cannot justify the encroachment of a right".¹⁶⁴

It is possible that a law conferring benefits based on an administrative designation of religious status would fail the rational connection test as being "arbitrary, unfair or based on irrational considerations." However, the second head of charity is more likely to be struck down on the basis that the 'advancement of religion' category, considered with the criteria enunciated by the Charities Division, does not violate Charter rights as little as possible in order to achieve its objective. If the rule was a legislated provision of the ITA, the Court might afford a generous measure of deference to Parliament, in recognition of the fact that it is an elected body which must weigh competing social and economic interests. However, where a common law rule is challenged under the Charter, "there is no room for judicial deference".¹⁶⁵ As a judge-made rule, the second head of charity will be subjected to a strict standard of justification.

It seems almost inevitable that the second head of charity would fail the proportionality test. However, there may be an alternative to striking it down. In *R v Swain*, Lamer CJC noted that the absence of judicial deference which raised the standard of scrutiny for common law rules also left the Court free to reformulate this 'judge-made' law:

"If a new common law rule could be enunciated which would not interfere with [the accused person's] right... I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s.1 of the Charter."¹⁶⁶

The possibility of reformulating the common law definition of religion to make it consistent with the Charter offers a feasible way of maintaining the current categories of charitable purposes in Canada. The Court could presumably repeat its approach to the 'advancement of education' category in the *Vancouver Society* case and adopt "a more inclusive approach" to religion for the purposes of the law of charity.¹⁶⁷

¹⁶⁴ L Weinrib, "The Supreme Court of Canada and Section 1 of the Charter" (1988) 10 Supreme Court LR 469.

¹⁶⁵ See *R v Swain* [1991] 1 SCR 933 at 983.

¹⁶⁶ *Ibid* at 978.

¹⁶⁷ *Vancouver Society* (1999) 169 DLR (4th) 34 (SCC) at 112.

The important difference, of course, is that this more inclusive approach will be dictated by the supremacy of the Constitution and the provisions of the Charter. The issue will be whether it is possible to articulate a definition of 'religion' which satisfies both the law of charity and the Constitution. In order to decide this, the Supreme Court will have to answer the same question faced by the Australian High Court in *Church of the New Faith*: "What is meant by religion as an area of legal freedom or immunity under the Canadian Charter of Rights?"

The Meaning of Religion under the Charter

Every guarantee set out in the Charter raises two basic questions. The first – 'What is protected?' – relates to the meaning of concepts such as liberty, equality and religion. The second – 'How far is it protected?' – relates to the scope of the area in which the government cannot interfere. The task presented by the first question, of attaching substantive meanings to constitutionally guaranteed rights and freedoms, has been a pivotal issue since the advent of the Charter. 'What is protected' does not always accord with the plain and ordinary meaning of the word. The expression guaranteed by s.2(b), does not include violent expression,¹⁶⁸ and the liberty guaranteed by s.7 does not include economic liberty.¹⁶⁹ The substantive meaning of religion must be ascertainable if 'the advancement of religion' is to be reformulated to bring it in line with the Charter.

The case law is fairly clear that 'what is protected' by 2(a) is very broad. The Court has repeatedly affirmed its commitment to refrain from "formulating internal limits to the scope of freedom of religion".¹⁷⁰ In *Big M*, Dickson J held that s.2(a) protects "those beliefs and opinions dictated by one's conscience".¹⁷¹ This interpretation of "religion and conscience" was broadened further in *Ross v New Brunswick School District No. 15*,¹⁷² where disciplinary measures taken against a school teacher for publishing anti-Semitic statements were held to violate his s.2(a) and 2(b) rights. Although Iacobucci J cited *Big M*, his application of the principle was not stringent. Ross was not required to show that his statements were *dictated* by his religion and conscience; the fact that his publications were "thoroughly honest religious

¹⁶⁸ *Irwin Toy Ltd. v Quebec (AG)* [1989] 1 SCR 927 at 969.

¹⁶⁹ *Re. ss.193 and 195 of the Criminal Code* (Prostitution Reference) [1990] 1 SCR 1123 at 1170-71, per Lamer J.

¹⁷⁰ *Ross v New Brunswick School District No. 15* [1996] 1 SCR 825 at 869.

¹⁷¹ *R v Big M* (1985) 18 DLR (4th) 321 at 321.

¹⁷² [1996] 1 SCR 825.

statements” was enough to invoke the guarantee. *Ross* suggests that s.2(a) protects any act which an individual claims is related to his or her religious beliefs, as long as the Court is satisfied that the claim is made honestly and sincerely.¹⁷³

Ross provides a preliminary answer to the constitutional inquiry - “religion and conscience”, as an area of legal freedom or immunity, encompasses any honestly and sincerely held belief. However, this begs the question of what ‘religion’ means under the Charter. It seems fair to assume that religion and conscience are equally protected under s.2(a).¹⁷⁴ However, to state that two concepts are equally protected reinforces the fact that they do not mean the same thing. Section 15, which prohibits discrimination on the grounds of religion, but makes absolutely no mention of conscience, confirms that these concepts have distinct meanings under the Charter.

Because courts have rarely found it necessary to distinguish between ‘religion’ and ‘conscience’ for purposes of s.2(a), this area of the jurisprudence is of little assistance in determining the constitutional meaning of ‘religion’ itself. Although *Big M* provides a detailed analysis of the *freedom* guaranteed by 2(a), it provides little guidance on the meaning of either the *conscience* or *religion* which is guaranteed. In fact, Dickson CJC seems to use the terms “freedom of religion” and “freedom of religion and conscience” interchangeably.¹⁷⁵ The term “religious freedom” is also employed loosely to describe the area of legal immunity under s.2(a).¹⁷⁶ This fluctuating terminology indicates the extent to which religion and conscience have elided in relation to the legal freedom guaranteed by s.2(a). This seems entirely appropriate, but it also suggests that it may be impossible to extract a definition of religion from the s.2(a) jurisprudence. The meaning of ‘religion’ under the Charter will have to be explicitly articulated by the Courts.

The meaning of conscience is only slightly less ambiguous. In *Morgentaler*, Wilson J defined the term solely by reference to its counterpart, describing freedom of

¹⁷³ R Grant, “Charter of Rights and Freedoms-Civil” published in Annual Review of Law and Practice, Continuing Legal Education Society of British Columbia 1997.

¹⁷⁴ See *R v Big M* (1985) 18 DLR (4th) 321, where Dickson J states that belief and non-belief are equally protected under the Charter. See also *Rodriguez* [1993] 3 SCR 519 at 584, where Sopinka J infers that the s. 7 rights to life, liberty and security of the person are equally protected by stating that “none of these values prevails *a priori* over the others”.

¹⁷⁵ *R v Big M* (1985) 18 DLR (4th) 321 Although Dickson CJC begins his judgment by defining “freedom of religion” in the terms set out above, he moves to the expression “freedom of conscience and religion” when he starts comparing s. 2(a) to the American First Amendment and Bill of Rights guarantees.

¹⁷⁶ See, for example, *Zylberberg v Sudbury Board of Education* (1989) 65 OR (2d) (Ont. CA) at 661.

conscience as “personal morality which is not founded in religion”, and as “conscientious beliefs which are not religiously motivated”.¹⁷⁷ In *Re Mackay*, the Manitoba Court of Appeal adopted a passage from the Oxford English Dictionary which defined conscience as “the sense of right and wrong as regards things for which one is responsible: the faculty which pronounces upon the moral quality of one’s actions or motives, approving the right and condemning the wrong”. The Court summarized: “It is self-judgment on the moral quality of one’s conduct or the lack of it. Disapproval of the thoughts or conduct of another person is not a matter of conscience.”¹⁷⁸ However, it appears that no court has been bold enough to adopt a dictionary definition for the purposes of interpreting the meaning of religion under the Charter.

The advantage of having a minimal amount of constitutional authority on the meaning of ‘religion’ is that Canadian courts face few jurisprudential obstacles to articulating a ‘more inclusive approach’ to religion for the purposes of the law of charity. Nonetheless, the meaning of religion is both more controversial and more elusive than the meaning of education. Defining religion has proven throughout the ages to test the limits of judicial reasoning.

Things Left Unsaid: The Difficulty of Defining the Scope of “Religion”

Courts become distinctly uncomfortable when confronted with questions of religious doctrine. The reaction is understandable, given the formidable task of assigning legal rhetoric to concepts as elusive as conscience and religion. One of the most candid admissions of the shortcomings of the judicial treatment of religion is the concluding statement of Winn LJ in *R v Segerdal*:

For myself, therefore, without feeling that I am really able to understand the subject-matter of this appeal, I have formed, for what it may be worth, a possibly irrational, possibly ill-founded, but very definite opinion that here the applicants have failed to show...that their building is a place of meeting...for the purpose of religious worship.¹⁷⁹

Gilmour v Coats offers a more coherent statement of the limits of judicial reasoning in its discussion of the difficulty of assessing the public benefit flowing from intercessory prayer: “No temporal court of law can determine the truth of any

¹⁷⁷ *R v Morgentaler* [1988] 1 SCR 30 at 178.

¹⁷⁸ *Re Mackay and Manitoba*, (1986) 24 DLR 4th 587 (Man. CA) at 594.

¹⁷⁹ *R v Registrar General, Ex parte Segerdal and another* (1970) 2 QB 697 (CA).

religious belief: it is not competent to investigate any such matter and it ought not to attempt to do so".¹⁸⁰

This aversion to clarifying the outer boundaries of what constitutes a 'religion' can also be detected in the Canadian jurisprudence. When members of the Church of Christ in China brought a dispute based on doctrinal differences before the BC Supreme Court, the judge introduced his ruling with the following caveat: "It is, of course, axiomatic that Courts of law deal with secular matters only. They do not normally concern themselves with matters of religious doctrine or government unless those matters become elements in disputes relating to property or other legal rights".¹⁸¹ In *Edwards Books*, the Ontario Court of Appeal noted "the undesirability of a state-conducted inquiry into an individual's religious beliefs".¹⁸²

In *Ross*, the Supreme Court accepted the argument of an acknowledged anti-Semite that "it is not the role of this Court to decide what any particular religion believes".¹⁸³

The acknowledgment that religious belief is not a justifiable issue is truthful but problematic. It implies that the legal definition of religion must not rely on any value judgment, or any notion of what is true. The principle that the law stands neutral between religions¹⁸⁴ has been embraced by charity law as an indication of the religious tolerance of English courts since the separation of Church and State:

Before the Reformation only one religion was recognized by the law and in fact the overwhelming majority of the people accepted it... But since diversity of religious beliefs arose and became lawful the law has shown no preference in this matter to any church and other religious body. Where a belief is accepted by some and rejected by others the law can neither accept nor reject, it must remain neutral...¹⁸⁵

¹⁸⁰ *Gilmour v Coats* [1949] 1 All ER 848 (HL). at 455 per Lord Reid.

¹⁸¹ *Re Christ Church of China* (1983) 15 ETR 272 (BCSC) at 278.

¹⁸² *Edwards Books*, 35 DLR (4th) 1 (SCC) at 26.

¹⁸³ *Ross v New Brunswick School District No. 15* [1996] 1 SCR 825 at 866.

¹⁸⁴ *Neville Estates v Madden* [1962] Ch. 832 at 853: "As between different religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none."

¹⁸⁵ *Gilmour v Coats* [1949] 1 All ER 848 (HL). at 457.

The law's claim of neutrality is sustainable only because it is meaningless. It is meaningless because it is entirely self-referential, depending on charity law's own definition of religion to set the parameters of equal treatment. All religions may be equal in the eyes of the law, but only because not every religion comes within the law's scope of vision.

The role which the court has formulated for itself, of delineating the outer bounds of religion while remaining neutral about beliefs, is a logical impossibility. A passage commonly cited as the most liberal definition of religion indicates the great paradox of the equality of religions:

Neither does this Court, in this respect, make any distinction between one sect and another"... If the tenets of a particular sect inculcate doctrines adverse to the very foundation of all religion, and are "subversive of all morality" they will be void, but a charitable bequest will not be void just because the Court might consider the opinions foolish or devoid of foundation...¹⁸⁶

Thornton v Howe indicates that even the broadest definition of religion involves value judgments. The Court, which makes no distinctions between sects, will nonetheless decide which sects which are "adverse to the very foundation of all religion", and which are simply "devoid of foundation". Although charity law does not theoretically distinguish between religions, in other words, it effectively distinguishes between different belief systems by conferring the identity of "religion" on those which meet its criteria.

Although the charity law principles pertaining to religion may be theoretically deficient, they are not completely unjustifiable. If the courts abdicated their power to determine the outer limits of religion, the whole objective of limiting the purposes which the law deems charitable would be subverted. In *R v Segerdal*, Lord Denning emphasized that a registrar must have the authority to refuse to register a certification for 'a place of meeting for religious purposes'. Although the Act extended registration privileges to places of religious worship for all denominations,¹⁸⁷ Lord Denning warned: "If the place is *not* truly such a place, then it is not entitled to be registered..." His concern was that registration of occupants

¹⁸⁶ *Thornton v Howe* (1862) 31 Bea 14.

¹⁸⁷ The Places of Religious Worship Registration Act 1855 provided that every place of meeting for religious worship for Protestant dissenters or other Protestants, Roman Catholic, people of the Jewish religion, and any other body or denomination...may be certified in writing to the Registrar General: see *R v Registrar General, Ex parte Segerdal*, *supra* note 179 at 697.

without any inquiry as to their religious character "...would lead to many abuses."¹⁸⁸ All jurisdictions have, in some way, sought to delimit the outer bounds of religion.

The English Position

English charity law has the most restrictive definition of religion. Historically, the views expressed by the judiciary were unabashedly monotheistic: in 1917, the House of Lords held that a trust to advance 'any kind of monotheistic theism' was a good charitable trust.¹⁸⁹ One year before in *Gilmour v Coats*, Jenkins J articulated the world-view underlying many decisions as to the charitability of religious gifts:¹⁹⁰

There can be no doubt that the expression 'God's work' is capable of an extremely wide meaning and, since God created the universe and all that therein is, everything that goes on on earth is, in a sense, God's work...

Until recently, the leading case in England was *Re South Place Ethical Society*. Dillon J held that "two of the essential attributes of religion are faith and worship: faith in a god and worship of that god".¹⁹¹ Worship was characterized by "some at least of the following characteristics: submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession".¹⁹²

The recent decision of the English Charities Commission on the application of the Church of Scientology for registration as a charity entailed a re-evaluation of the definition of religion in English law. Significantly, the definition was re-evaluated in light of the European Convention on Human Rights [ECHR] which is soon to be incorporated into English law under the Human Rights Act 1998. Before addressing the merits of the Church of Scientology's application, the Commissioners acknowledged the impact of human rights documents on the charitable sector, and on their own decisions:

¹⁸⁸ *Ibid.*

¹⁸⁹ *Bowman v Secular Society Ltd.* [1917] AC 406 (HL).

¹⁹⁰ *In Re Barker's Will Trusts* [1948] WN 155 considered whether several testamentary gifts to a Baptist minister "for God's work" were valid charitable gifts.

¹⁹¹ [1980] 1 WLR 1566 at 1572.

¹⁹² *R v Registrar General, Ex parte Segerdal and another* (1970) 2 QB 697 (CA). at 709, per Buckley J.

Once the Human Rights Act is implemented it will...be unlawful for the Commission to act in a way incompatible with ECHR rights. This would include its decisions with regard to the registration of charities where any common law authorities would need to be interpreted...¹⁹³

As such, the Commissioners concluded that "a positive and constructive approach and one which conforms to ECHR principles, to identifying what is a religion in charity law could and should be adopted".

The recognition that the law of charity is confined by human rights law did not lead the Commissioners to radically alter the legal definition of religion. The Commissioners did not feel compelled by the ECHR to reject "theism" altogether, or to expand religion to encompass belief in a supernatural principle.¹⁹⁴ Their final position represents only a slight modification of the *South Place* definition: "...religion is characterized by a belief in a supreme being and an expression of that belief through worship".¹⁹⁵ The Commissioners concluded that although Scientology demonstrated belief in a supreme being, it did not fulfill the worship requirement. The principal activities of the Church, auditing and training, were likened to counselling and the acquisition of knowledge. These activities were not found to entail "conduct which indicates reverence or veneration for that supreme being".¹⁹⁶

The application of the Church of Scientology was rejected. Nevertheless, the Commission's adoption and generous interpretation of the "belief in a supreme being" criterion represents a significant development in the definition of religion in English charity law. Scientology doctrine divides an individual's existence into "dynamics" which are areas of life where every individual has an urge to survive. The eighth dynamic is the urge to exist as infinity. It was this eighth dynamic, "a thoroughly abstract concept analogous to eastern enlightenment and realisation"¹⁹⁷ which was accepted to be a supreme being. Although the Commissioners noted that this supreme being "did not appear to be of the kind indicated by the decided cases", they refused "to specify the nature of that supreme being or to require it to be analogous to the deity or supreme being of a particular religion".¹⁹⁸

¹⁹³ *CC Scientology Decision*, at 7.

¹⁹⁴ *Ibid* at 21.

¹⁹⁵ *Ibid* at 14.

¹⁹⁶ *Ibid* at 24.

¹⁹⁷ *Ibid* at 15.

¹⁹⁸ *Ibid* at 21.

The Church of Scientology decision has expanded the English definition, but it has not resolved all of its inconsistencies. One anomaly which remains is the status of Buddhism, which is recognized as a religion even though its adherents may choose whether or not to believe in God. Rather than expand the meaning of religion to include non-theist beliefs, English law has treated Buddhism as an "exceptional case".¹⁹⁹ The courts have never satisfactorily answered the logical argument that if Buddhism is a religion, religion cannot be necessarily theist or dependent on a God. Dillon J's dismissal of the issue in *South Place* is particularly telling: "I do not think it is necessary to explore this further because I do not know enough about Buddhism."

The American Position

The expansive American definition of religion provides a stark contrast to its English counterpart. For one thing, it includes non-theistic religions. In 1961, the Supreme Court struck down a Maryland law requiring officials to declare a belief in God in order to hold office in that state.²⁰⁰ In a footnote to the judgment, the Court offered a list of 'religions' which would not generally be considered theistic – the list included "Buddhism, Taoism, Ethical Culture, Secular Humanism and others." The implication, that religion cannot be defined solely in terms of a Supreme Being if it is to accord with First Amendment values, has been noted by subsequent courts.²⁰¹

A series of cases considering a statute which granted conscientious objector status to those who opposed war "by reason of religious training and belief" established that in the United States, "religion" also encompasses belief systems which are analogous to religions. In *US v Seeger*, the Supreme Court held that "religious training and belief" included non-Theist faiths, provided only that they were "...based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."²⁰² Any sincere and meaningful beliefs which held for its possessor "a place *parallel* to that filled by the God of those admittedly qualifying for the exemption" also fell within the statutory definition.

¹⁹⁹ *R v Registrar General, Ex parte Segerdal and another* (1970) 2 QB 697 (CA) at 707.

²⁰⁰ *Torcaso v Watkins*, 367 US 488 (1961).

²⁰¹ See, for example, *Malnak v Yogi* 592 F. 2d 197 (1979) at 206.

²⁰² *United States v Seeger*, 380 US 163 (1965).

For comparative purposes, it is perhaps relevant to note that the American definition of religion has evolved predominantly under the free exercise clause, and in situations where there was a very strong personal interest at stake. In the leading case of *Malnak v Yogi*,²⁰³ however, this expansive reading of religion was applied to invalidate a high school course on Transcendental Meditation under the establishment clause. Citing the need to articulate a unitary definition of religion for both clauses of the First Amendment, Adams J proposed a “definition by analogy”:

The modern approach thus looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted ‘religions’.

Adams J formulated three indicia which would enable one to conclude by analogy that a particular group or cluster of ideas is religious. First, since religion is always connected to concepts that are “of the greatest depth”, the cluster of ideas should address questions of “ultimate concern”. Second, the set of ideas should have an element of comprehensiveness. A final indicia of a religion is the existence of “any formal, external or surface signs that may be analogised to accepted religions.”²⁰⁴ Similarly broad criteria have been applied in other contexts, including a determination that the facility used by a humanist group qualified as a ‘place of worship’ entitled to receive a property tax exemption.

²⁰³ *Malnak v Yogi* 592 F 2d 197 (1979) at 206.

²⁰⁴ *Ibid* at 208-210.