

**2000 AWARD FOR PROFICIENCY IN LEGAL
WRITING AND ANALYSIS****Winning Paper: Part I*****The Advancement of Religion in the Age of Fundamental
Human Rights**

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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.¹

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 third head of charity. Faced once again with an unfavourable bureaucratic interpretation of a long-standing legal concept, Pemsel litigates to convince the Court that (a) the Moravian Church is a religious institution, and (b) activities

* So that readers may have the full text of this winner of *The Philanthropist’s* 2000 Award, Part I appears in this issue. Part II will follow in Volume 16, Number 3.

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, 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 a distribution of 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. 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) of the 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 1891.² The unique “public-private” nature of charitable trusts³ 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 *Vancouver Society*.⁴ Neither the common law definition nor the private law character of trust law disposes 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*,⁵ 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”, he declared, “that the *Charter* applies to the common law as well as legislation.”⁶ 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.⁷ While section 32(1) brings the legislative, executive and administrative branches of government within reach of the *Charter*, purely private litigation lies 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 workers’ union from *Charter* review.⁸

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 (ITA)*. As a constitutional matter, these benefits enable the federal government to rely on its s. 91(3) federal taxation power as a jurisdictional basis for the regulation of charities. The *Income Tax Act* also dictates the process by which organizations seek charitable status in Canada.⁹ 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.¹⁰

The designation of charitable status for purposes of the *Income Tax Act* is the responsibility of the Charities Division of 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.¹¹ 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.¹²

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*.¹³ 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.¹⁴ 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.¹⁵

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 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*¹⁶, a woman 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”¹⁷. 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*.¹⁸ *Hill v. Church of Scientology* is often cited as authority for holding that the common law is not subject to *Charter* scrutiny.¹⁹ However, in that case 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.²⁰

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”.²¹

The determination of charitable status by the Charities Division of 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).²² Section 900(8) of the *Income Tax Regulations*²³ 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.²⁴

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*.²⁵ 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 autonomy.²⁶ 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...”.²⁷ However, the Court held that “...in so far as they act in furtherance of a specific governmental program or policy”,²⁸ 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.”²⁹ 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.³⁰ 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 of *Charter* application, the courts are still bound by the *Charter*, and must develop the common law in accordance with *Charter* values.³¹

The *Charter* has occasionally been found *directly* applicable to orders of the judiciary. In *Dagenais v. Canadian Broadcasting Corp.*,³² 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 C.J. 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.”³³ Lamer C.J. 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.³⁴

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 slightly broader than the *Pemsel* classification. Although this statutory successor to the mortmain legislation refers only to gifts of land,³⁵ the Ontario courts have extended its scope to encompass all charitable gifts.³⁶ The existence of the statute, and its broad judicial interpretation, represent a significant rejection of the English charity law tradition in Ontario.³⁷ 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.³⁸

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."³⁹ 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 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.⁴⁰ 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".⁴¹ Reasons for refusal will be disclosed if the applicant exercises the statutory right of appeal,⁴² 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 is that Canadian jurisprudence pertaining to the third 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.⁴³ Although the bodies under consideration have often been “established” religious institutions⁴⁴, the status of more obscure institutions has also 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.”⁴⁵ 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.⁴⁶ 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 v. 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 L.J.S.C. held that theosophy did not come within the third head of charity because it provided no answer to the question: “what religion does the society advance and how does it advance it?”⁴⁷ 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”.⁴⁸ 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*.”⁴⁹

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 benefit of the community or for an appreciably important class of the community.”⁵⁰ However, there is little Canadian jurisprudence concerning 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 religion purpose may be shown not to be a charitable purpose.⁵¹

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”.⁵² *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 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.⁵³ 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”.⁵⁴ The definition of religious purposes set out in the CCRA pamphlet *Registering a Charity for Income 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*.⁵⁵

Unfortunately, an examination of English case law does not fully clarify the Canadian position since 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.⁵⁶ 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 CCRA's position are not legally binding and may be changed at any time. The definitions which they put forward could not be challenged in a court of law. The 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*".⁵⁷ 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 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 class 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 class includes admittedly secular organizations which believe that the third head of charity should either be drastically expanded to recognize groups which stand for matters of conscience, or struck out completely. These classes 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 its 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”.⁵⁸ 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 to these rights in order to assess whether the “advancement of religion” category violates the *Charter*.

Freedom of Religion and Conscience

s. 2(a): Everyone has the following freedoms...freedom of conscience and religion
The freedom to hold such beliefs as one chooses is axiomatic in democratic societies.

The Canadian Supreme Court has recognized the long-standing existence of this value expressed by Rand J. 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.⁵⁹

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”.⁶⁰ 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)⁶¹. *R. v. Big M Drug Mart Ltd.*,⁶² 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.⁶³

Identifying the proper ambit of 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 third head of charity, including the public benefit requirement, and the law’s preference for “religions” over other forms of belief.⁶⁴ These claims require independent consideration. The threshold question, however, must be whether the “freedom” encompassed by “freedom of religion and conscience” is offended by the conferral of positive state benefits on the basis of religious status.

Putting *Big M* aside momentarily, the answer seems to be no. The federal government, by virtue of its s. 91(3) taxation power, has the jurisdiction to generate revenue for the government by “any Mode or System of Taxation”.⁶⁵ There is no constitutionally mandated regime for allocating either the burdens or benefits associated with taxation. This principle extends to the *Income Tax Act* provisions governing nonprofit and charitable organizations. Under s. 118(1), the United Nations, amateur athletics organizations, and registered religious charities can claim tax credits in respect of charitable donations. Amnesty International, the National Hockey League and religious organizations which are not registered as charities cannot. The mere fact that the latter group is the subject of a constitutionally protected right is not enough to sustain a s. 2(a) claim. Nonetheless, *Big M* presents two potential arguments that the government’s tax policy offends “freedom of religion and conscience”.

The principal s. 2(a) argument against the third head of charity is that distributing state benefits on the basis of religious status is coercive. This argument relies on Dickson J.’s broad interpretation of coercion as including “indirect

forms of control which determine or limit alternative courses of conduct available to others". It is supported by the postscript to his conclusion that the *Lord's Day Act* "works a form of coercion inimical to the spirit of the *Charter* and the dignity of all Canadians":

Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal. The arm of the State requires all to remember the Lord's day of the Christians and to keep it holy. *The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.*⁶⁶

Jim Phillips points out that this "wider meaning of coercion, the protection of one religion and the non-protection of another, seems engaged by charities law."⁶⁷ It is certainly possible to characterize the charitable tax regime as the extension of fiscal 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 unprotected. In *Big M*, the disparate protection of religious groups was the direct result of an act of state compulsion, i.e., 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.⁶⁸ 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 third head of charity, i.e., that 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 "antiestablishment" principle contained in the First Amendment is often the basis for prohibiting state aid to religious schools.⁶⁹ In *Big M*, the American approach was rejected as being "not particularly helpful" and the question of whether a similar "antiestablishment principle" exists in Canada was left unresolved.⁷⁰ Dickson J. did not endorse the establishment argument, however he did leave it open by specifying that the issue of state financial support for particular religions or religious institutions "is not before us in the present case."⁷¹

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 which 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 arguments 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.⁷² 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”⁷³, by creating an economic compulsion to open on a sacred day of rest.

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.”⁷⁴ 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).”⁷⁵ However, Dickson C.J.C. 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...*⁷⁶

As mentioned above, the only coercive burden identifiable in the current charitable tax scheme is the mandatory payment of taxes, some 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). They also mark a high point in belief in the *Charter*⁷⁷ 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 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.⁷⁸ 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.⁷⁹

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*⁸⁰, 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 classroom 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."⁸¹ 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...”⁸²

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*⁸³ 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.⁸⁴ 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 enjoy 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 a 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.”⁸⁵

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*⁸⁶ 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 nonfunding 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 majority ruling does not address the substantive *Charter* issues raised by the case.⁸⁷ 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...."⁸⁸ 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".⁸⁹ 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 to assist certain parties to attain elective office – parties who espouse views which are inimical to the opinions of the complaining citizen."⁹⁰ The appellants challenged the constitutionality of the Manitoba *Elections Finances Act*, which provided that candidates with 10 per cent of the total vote were reimbursed for up to 50 per cent 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.⁹¹ Their comments provide a further rebuttal 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 determined by reference to the historical origins of the concepts enshrined.⁹² 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.⁹³ 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”⁹⁴ 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 portray the law as a source of religious discrimination.

The historical analysis of the third 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 royalty and the shifting of national frontiers led to the creation of laws which imposed religious beliefs and practices on unwilling citizens.⁹⁵ During the Interregnum, the growing opposition to the State imposition of religion was based on a strong feeling that “belief itself was not amenable to compulsion.”⁹⁶ 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.”⁹⁷ 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 all.⁹⁸ 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.⁹⁹ A wide variety of sources was 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 organization that offends basic principles of the *Charter* cannot be registered as a charity.”¹⁰⁰

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 third 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.¹⁰¹

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 on Human Rights*, which provides that freedom of thought, conscience and religion includes the right to manifest belief in “worship, *teaching*, practice and observance.”¹⁰² 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 proselytizing 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.”¹⁰³ 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 rights and freedoms of others.”¹⁰⁴ The Supreme Court formulated the principle this way in relation to the anti-Semitic publications of a New Brunswick schoolteacher:

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.¹⁰⁵

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.”¹⁰⁶

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 gender, 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.

FOOTNOTES

1. *Commissioners for Special Purposes of the Income Tax Act v. Pemsel*, [1891] AC 531 (H.L.) (hereinafter *Pemsel*).
2. *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".
3. 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).
4. *Vancouver Society of Immigrant and Visible Minority Women v. MNR* (1999), 169 DLR (4th) 34 (S.C.C.) (hereinafter *Vancouver Society*) at 94, 129.
5. *Retail, Wholesale and Department Store Union, Local 580 et al v. Dolphin Delivery Ltd.* (1986), 33 DLR (4th), 1(S.C.C.) (hereinafter *Dolphin Delivery*).
6. *Ibid.*, at 190.
7. *Ibid.*, at 191.
8. *Ibid.*, at 199.
9. *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1, [hereinafter *ITA*], s.248(1):
In this Act, "registered charity at any time means
 - a) 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,

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";
10. See *Vancouver Society*, *supra*, footnote 4 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).
11. *ITA*, s. 172(4).
12. *Ibid.*, s. 172(3).
13. *Ibid.*, s. 149(1)(f).
14. *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.
15. *Vancouver Society*, *supra*, footnote 4, at 95.
16. (1993), 110 DLR (4th) 470 (S.C.C.).

17. *Ibid.*, at 550.
18. This principle has been confirmed repeatedly by Canadian courts: see *Vancouver Society*, *supra*, footnote 4 at 102.
19. (1995), 126 DLR (4th) 129 (S.C.C.) at 152.
20. *Ibid.*, at 156.
21. *Ibid.*, at 153.
22. *ITA*, s. 220(1). See also s. 229(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”.
23. *Income Tax Regulations*, Can. Reg., c. 945, s. 900(8).
24. *Slaight Communications Inc. v. Davidson* (1989), 59 DLR (4th) 416 (S.C.C.).
25. *Eldridge v. BC (AG)*, [1997] 3 SCR 624 at 654.
26. 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 C.T.C. 98 (F.C.A.).
27. *Supra*, footnote 25, at 655.
28. *Ibid.*, at 660.
29. *Dolphin Delivery*, *supra*, footnote 5 at 198.
30. *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.”
31. *Ibid.*
32. *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 DLR (4th) 12(S.C.C.).
33. *Ibid.*, at 36.
34. *Ibid.*, at 85.
35. *Charities Accounting Act*, R.S.O. 1985, c. 10, subsection 7:
 7. In sections 8, 9, and 10, “charitable purpose” means:
 - (a) the relief of poverty,
 - (b) education,
 - (c) the 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.
36. *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. C.A.) 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 personality, to which the provision does not apply”.
37. *Ibid.* 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”.
 38. 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?
 39. *Dolphin Delivery, supra*, footnote 5, at 197.
 40. The *ITA*, s. 241(1) provides that no official 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”.
 41. 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 CCRA each year.
 42. As noted, *supra*, footnote 40, *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”.
 43. *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”.
 44. See, for example, *Re Morton Estate* (1941), 1 WWR 311 (B.C.S.C.), where the ruling that the estate’s bequests were charitable was based on the presumption that the Baptist church was a valid religion.
 45. *Re Doering* (1949), 1 DLR 267 (Ont. H.C.) at 279.
 46. *Re Brooks Estate* (1969), 68 WWR 132 (Sask. Q.B.) at 137.
 47. *Wood and Whitebread v. the Queen in right of Alberta, Public Trustee of Alberta, The Theosophical Society et al.* (1977), 6 WWR 273 (Alta. S.C.).
 48. *Re Orr, supra*, footnote 36 at 671.
 49. *Cameron v. Church of Christ, Scientist* (1918), 43 DLR 668 (S.C.) at 673, per Fitzpatrick C.J.
 50. *Vancouver Society, supra*, footnote 4, 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”.
 51. *Re Morton Estate, supra*, footnote 44, at 323.
 52. *Gilmour v. Coats*, [1949] 1 A11 ER 848 (H.L.)

53. *Vancouver Society*, *supra*, footnote 4 at 105.
54. See *Re Orr*, *supra*, footnote 36; *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.
55. *Re South Place*, [1980] 1 WLR 1566 (Ch. D.); *Gilmour v. Coats*, *supra*, footnote 52.
56. *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 v. 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.
57. *Renaissance International v. MNR*, [1983] 1 FC 860 (F.C.A.) at 866, per Pratte J.A.
58. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, s.1. For the authoritative approach to *Charter* inquiries, see *R v. Oakes* (1986), 26 DLR (4th) 200 (S.C.C.).
59. *Saumur v. City of Quebec and AG Quebec* (1953), 4 DLR 641 (S.C.C.) at 668.
60. 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. C.A.), at 641.
61. *R v. Big M Drug Mart Ltd.* (1985), 18 DLR 4th 321 [hereinafter *Big M*].
62. *Ibid.*
63. *Ibid.*, at 354.
64. Jim Phillips, *supra*, footnote 3.
65. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 s.91(3), reprinted in R.S.C. 1985, App. II, No., s. 91(3).
66. *Big M*, *supra*, footnote 63.
67. Phillips, *supra*, footnote 3.
68. See *Re Mackay and Manitoba* (1986), 24 DLR 4th 587 (Man. C.A.), at 595, where Philp 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.
69. *Big M*, *supra*, footnote 61, at 357.

70. *Ibid.*
71. *Ibid.*
72. *Edward Books and Art Ltd. et. al. v. the Queen* (1986), 35 DLR (4th)1.(S.C.C.) [hereinafter *Edwards Books*]. The Ontario provincial closing statute prohibited retail stores from opening on Sundays and other holidays, subject to certain exceptions.
73. *Ibid.*, at 35.
74. See *Zylberberg, supra*, footnote 60, at 677 where Lacourciere J.A. gives his interpretation of *Edwards Books*.
75. *Edwards Books, supra*, footnote 72, at 34.
76. *Ibid.*
77. P. Macklem *et al.*, *Canadian Constitutional Law*, 2d ed. (Toronto: Emond Montgomery, 1977), at 679.
78. *Zybelberg, supra*, footnote 60, at 653.
79. *Big M, supra*, footnote 61, at 362.
80. *Zylberberg, supra*, footnote 60.
81. *Ibid.*, at 655.
82. *Baxter v. Baxter* (1983), 6 DLR (3d) 557 (Ont. H.C.J.), 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.
83. *Schachtschneider v. the Queen* (1993), 105 DLR (4th) 162 (F.C.A.).
84. *Income Tax Act*, SC 1970-71-72, c. 63, s. 118(1).
85. *Schachtschneider, supra*, footnote 83, at 169.
86. *Adler v. Ontario* (1996), 140 DLR (4th) 385 (S.C.C.).
87. *Ibid.*, at 404. Iacobucci J., finding s. 93 to be parallel to the minority language rights embodied in s. 23, adopted the rationale of Wilson J. in *Reference re. Bill 30*: "it was never...that the *Charter* could be used to invalidate other provisions of the Constitution...".
88. *Ibid.*, at 453.
89. *Ibid.*, at 454.
90. *Re Mackay and Manitoba, supra*, footnote 68, at 590, per Huband J.A.
91. 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.
92. *Big M, supra*, footnote 61, at 360.
93. See *Adler, supra*, footnote 86, 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 *Zybelberg, supra*, footnote 60, at 648 where the Ontario Court of Appeal examines the history of opening and closing religious exercises in schools.
94. *Statute of Superstitious Uses*, 1Edw. VI c. 14.
95. *Big M., supra*, footnote 61, at 360.

96. *Ibid.*, at 361.
 97. *Ibid.*
 98. The conclusion that the third head of charity does not offend the *Charter* because the relevant state action lies outside the scope of the projected 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.
 99. *Re Canada Trust and Ontario Human Rights Commission* (1990), 69 DLR (4th) 321 (Ont. C.A.).
 100. Moran, *supra*, footnote 3.
 101. *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 (C.A.), at 477.
 102. *European Convention on Human Rights*, Article 9.
 103. *P.(D.) v. S.(C.)*, [1993] 4 SCR 141, at 182, per L'Heureux-Dube J.
 104. *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, at 383, per La Forest J.
 105. *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 at 866.
 106. *Big M*, *supra*, footnote 61, at 337.
- [Part II of this paper will appear in *The Philanthropist*, Volume 16, Number 3.]