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The Advancement of Religion in the Age of Fundamental Human Rights

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Section 15: The Equality Guarantee

> s. 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. (*Canadian Charter of Rights and Freedoms*)

Unfortunately for latter-day John Pemsels (see *Commissioners for Special Purposes of the Income Tax Act* v. *Pemsel*, [1891] AC 531 (H.L.)), 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 *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.[107] However, Dickson C.J.C.'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.[108]

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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.[109]

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 s. 93 of the Constitution, "may sit uncomfortably with the concept of equality embodied in the *Charter*."[110]

Judicial Interpretation of the Equality Guarantee

The Supreme Court has noted that s. 15 is "perhaps the *Charter*'s most conceptually difficult provision."[111] 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 s. 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.[112] 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 s. 15 infringement. In order to violate s. 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",[113] the Supreme Court seems to have finally acknowledged the subjectivity which underlies the resolution of discrimination claims. *Law* emphasizes the importance of a flexible frame-

work which will ensure that s. 15(1) analysis "does not become mechanistic, but rather addresses the true social, political and legal context underlying each and every equality claim."[114] 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 courts' 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."[115] 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."[116] 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 nonrecognition as spouses would have resulted in greater tax benefits.[117]

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 important to note that unlike s. 2(a), access to s. 15 is limited to *individuals* who have personally suffered discrimination.[118] Nevertheless, the individuals who could potentially mount a s. 15 challenge can be divided into roughly the same categories as those 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.[119] 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.[120] 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,[121] 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).[122] A third possible consideration is that a law with an ameliorative purpose will probably not violate the human dignity of more advantaged individuals where their exclusion "largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation."[123] 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."[124]

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 courts' 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,[125] the Court could take judicial notice of the particular degree of stereotyping of a specific religious group. In the charities law context, this criterion suggests that the likelihood of a discrimination finding will rise relative to the level of public skepticism 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, i.e., 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 of the ameliorative state action is "more advantaged in a relative sense".[126] The third 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 underinclusive ameliorative law that excludes members of a historically disadvantaged group. Such a law is unlikely to escape the charge of discrimination.[127]

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 third 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."[128] 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 third head of charity was tantamount to "complete non-recognition"[129] 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 it 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.

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.[130] In *Thibaudeau* v. *Canada*,[131] the Supreme Court considered sections of the *ITA* which distinguished between custodial and noncustodial parents in its differential treatment of paid and received alimony payments.[132] 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.[133]

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 to be able to issue tax recipts, 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 third head 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 counterarguments to both of these. 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 organization'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 *Vancouver Society*,[134] a recent charity law case 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,[135] 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 third 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 properly constituted charitable organization."[136] 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, in *Pemsel* the Court has provided a coherent formulation of the strongest argument against the constitutionality of the third 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

> s. 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 C.J.C. in *R.* v. *Oakes*.[137] 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:

> 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".[138]

By allowing individual rights to be limited in cases where they are "inimical to the realization of collective goals of fundamental importance",[139] 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,[140] 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."[141]

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.[142] 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.

This point is illustrated by *Re Ontario Film & Video Appreciation Society*,[143] 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."[144] 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.[145]

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 its approval process and produced pamphlets which filmmakers 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 to justify the Board's decision to limit a *Charter* right.[146] The Court's holding that discretionary power exercised with reference only to nonbinding 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 third head of charity is found to be prescribed by law, the investigation 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 tested. 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 cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[147]

A law whose purpose is incompatible with these values will never be a justifiable limit on a *Charter* right.[148] In *Big M*, the early finding that the *Lord's Day Act* had an unconstitutional religious purpose led Dickson J. 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.[149]

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".[150] *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.[151]

The *Oakes* test applies to common law limitations on *Charter* rights just as it does to legislative limitations.[152] 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 is determined by reference to the initial legislative intent.[153] 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."[154]

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,[155] while others have considered only the purpose of the infringing measure.[156] *Vancouver Society* suggests one possible interpretation of *Pemsel*:

> 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.[157]

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 third 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 third head, combined with the criteria adopted by the Charities Division,[158] is to identify those activities and purposes which advance "religion" in order to allow them to enjoy the benefits 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 practise a religion",[159] and that "*any* religion is at least likely to be better than none."[160]

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 third 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 third 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 finding of a *Charter* violation, as administrative convenience cannot override the need to adhere to *Charter* principles.[161] As Lorraine Weinrib has written, "a different preference for allocation of resources cannot justify the encroachment of a right."[162]

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 third 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".[163] As a judge-made rule, the third head of charity will be subjected to a strict standard of justification.

It seems almost inevitable that the third head of charity would fail the proportionality test, however there may be an alternative to striking it down. In *R.* v. *Swain*, Lamer C.J.C. 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*.[164]

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.[165]

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 a similar question to that 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,[166] and the liberty guaranteed by s. 7 does not include economic liberty.[167] 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".[168] In *Big M*, Dickson J. held that s. 2(a) protects "those beliefs and opinions dictated by one's conscience".[169] This interpretation of "religion and conscience" was broadened further in *Ross* v. *New Brunswick School District No. 15*,[170] 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 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.[171]

Ross provides a preliminary answer to the constitutional enquiry: whether "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).[172] 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 C.J.C. seems to use the terms "freedom of religion" and "freedom of religion and conscience" interchangeably.[173] The term "religious freedom" is also employed loosely to describe the area of legal immunity under s. 2(a).[174] This fluctuating terminology indicates the extent to which religion and conscience have ellided 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 conscience as "personal morality which is not founded in religion" and as "conscientious beliefs which are not religiously motivated."[175] 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 thus: "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".[176] 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 L.J. 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.[177]

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 religious belief: it is not competent to investigate any such matter and it ought not to attempt to do so."[178]

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 British Columbia 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".[179] In *Edwards Books*, the Ontario Court of Appeal noted "the undesirability of a state-conducted inquiry into an individual's religious beliefs".[180]

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".[181]

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 religions[182] 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...[183]

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:

> 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...[184]

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 are "adverse to the very foundation of all religion" and which are simply "devoid of foundation". Although charity law does not theoretically distinguish among 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,[185] 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 without any inquiry as to their religious character "...would lead to many abuses".[186] 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, e.g., in 1917, the House of Lords held that a trust to advance "any kind of monotheistic theism" was a good charitable trust.[187] One year before *Gilmour* v. *Coats*, Jenkins J. articulated the world-view underlying many decisions as to the charitability of religious gifts:[188]

> 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* in which Dillon J. held that "two of the essential attributes of religion are faith and worship: faith in a god and worship of that god".[189] 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".[190]

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 will 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:

> 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...[191]

As such, the Commissioners concluded that "a positive and constructive approach, one which conforms to *ECHR* principles, 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 alter radically 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.[192] 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".[193] 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 counseling and the acquisition of knowledge. These activities were not found to entail "conduct which indicates reverence or veneration for that supreme being".[194]

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"[195] 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".[196]

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 a god. Rather than expand the meaning of religion to include nontheist beliefs, English law has treated Buddhism as an "exceptional case".[197] The courts have never satisfactorily answered the logical argument that if Buddhism is a religion, religion cannot necessarily be 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 nontheistic 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.[198] In a footnote to the judgment, the Court offered a list of "religions" which would not generally be considered theistic including "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.[199]

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 *United States* v. *Seeger,* the Supreme Court held that "religious training and belief" included nontheist 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".[200] 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.

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,*[201] however, this expansive reading of "religion" was applied to invalidate a high school course on Transcendental Meditation by citing 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 analogized to accepted religions".[202] 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]

The Australian Position

In 1982, the High Court of Australia granted special leave to the Church of the New Faith to argue that Scientology was a religion in order to address the meaning of religion as an area of legal freedom or immunity under s. 116 of the Australian Constitution.[204] The time had come, in the view of the Court, "to grapple with the concept and to consider whether the notions adopted in other places are valid in Australian law."[205] The definition of religion which emerged from *Church of the New Faith* v. *Commissioner for Pay-roll Tax* is particularly interesting from a Canadian perspective, both because it adopts a middle ground between the English and American extremes, and because it illustrates the continued difficulty of reaching a consensus on the meaning of religion within this middle ground.

For the High Court of Australia, as for the English Charities Commissioners, the doctrines and beliefs of Scientology proved a challenging backdrop against which to articulate the definition of religion. Perhaps in response to the multiplicity of definitions which had already emerged in the decisions of the lower courts, Mason A.C.J. and Brennan J. began their judgment by carefully clarifying what it was they were defining:

> The relevant enquiry is to ascertain what is meant by religion as an area of legal freedom or immunity, and that enquiry looks to those essential indicia of religion which attract that freedom or immunity. It is in truth an enquiry into legal policy.

The High Court unanimously concluded that Scientology is a religion. However, the five judges were far from reaching a consensus on how religion should be defined. Rejecting the American definition as too wide and the English definition as too narrow, Mason A.C.J. and Brennan J. offered their own, "correct" test of religion:

> ...for the purposes of law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.[206]

This test, widely regarded as the principal holding of the case, is a radical extension of the conventional English position that religion requires faith in a god and worship of that god. It is interesting to note that in Australia, the ramifications of broadening the definition of religion were limited by the fact that the meaning of charity for purposes of tax deductibility is restricted to the popular notion of "eleemosynary charity".[207] The definition has been widely cited in foreign jurisdictions, however, and was adopted the very next year by the New Zealand High Court for the purpose of determining the religious status of an institution claiming a charitable exemption from conveyance duty.[208]

Interestingly, this definition was not broad enough for the three other members of the bench. Wilson and Deane J.J. rejected the possibility of articulating a coherent, "correct" definition of religion and followed the American approach set out in *Malnak* v. *Yogi*:

> There is no single characteristic which can be laid down as constituting a formularised legal criterion...of whether a system of ideas and practices constitutes a religion...The most that can be done is to formulate indicia...[209]

Murphy J. was even more adamant in his refusal to set judicial boundaries to the meaning of religion. Characterizing Australia as a country of pragmatic individualism and skepticism, he denied the authority of the High Court to validate or invalidate any set of beliefs:

> The truth or falsity of religions is not the business of officials or the courts...There is no religious club with a monopoly of State privileges for its members. The policy of the law is "one in, all in".

In the opinion of Murphy J., "any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious."[210]

Towards a Canadian Definition of Religion

The case law survey is eloquently summed up by a passage from *The Golden Bough*, adopted by Mason A.C.J. and Brennan J. as a preface to their new, "correct" definition of religion:

> There is probably no subject in the world about which opinions differ so much as the nature of religion, and to frame a definition of it which would satisfy everyone must obviously be impossible.[211]

The truth of this statement becomes evident when one considers the variety of groups who could challenge the meaning of the "advancement of religion" in Canada. The inclusion of most minority religions could be accomplished simply by broadening the deism requirement to encompass other supernatural elements. If the challenge is raised by an ethical organization, on the other hand, the courts may be forced to consider whether this category can be expanded sufficiently to encompass the potentially analogous, but qualitatively distinct, concept of conscience.

If "the advancement of religion" is finally defined in Canada, the resulting definition will have to be consistent with *all* of the relevant provisions of the *Charter*.[212] In addition to s. 2(a) and s. 15, this will include section 27, which states that: "This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". Tarnopolsky J.A. discussed the relationship between section 27 and religion in *R.* v. *Videoflicks:*[213]

> Religion is one of the dominant aspects of a culture which it (s. 27) is intended to preserve and enhance...Section 27 determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where religious practices are recognized as permissible exceptions to otherwise justifiable homogeneous requirements.

The new definition will also have to be compatible with the s. 1 "values of a free and democratic society" set out in *R.* v. *Oakes*. Although the Charities Commissioners deemed "belief in a supreme being and worship of that being" to be compatible with the provisions of the *ECHR*, the English definition would likely be considered under-inclusive in Canada. Given the importance attached to the *Charter* values of diversity and multiculturalism, the Canadian courts would be likely to reject the English definition of religion on the same grounds as those cited by the Australian High Court:

> ...the guarantees in s. 116 of the Constitution would lose their character as a bastion of freedom if religion were so defined as to exclude from its ambit minority religions out of the main streams of religious thought.[214]

The test adopted in Australia and New Zealand would be much more likely to satisfy the *Charter* values of diversity and multiculturalism. Alternatively, Canada could adopt something akin to the definition of the Indian Supreme Court which has held that religion is not necessarily theistic but is based on a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual wellbeing.[215] Either of these definitions would have the advantage of encompassing Buddhism and other nontheistic religions, rather than treating them as exceptions.

The more difficult question is whether "the advancement of religion" needs to be expanded sufficiently to include groups who stand for matters of conscience.

At one level, there seems to be nothing preventing the expansion of the third head of charity to include ethical groups. As the courts have so often repeated, the law of charity is a moving subject, which "may well have evolved since 1891".[216] The courts could simply adopt counsel's argument in *South Place* that "religion does not have to be theist or dependent on a god; any sincere belief in ethical qualities is religious, because such qualities as truth, love and beauty are sacred, and the advancement of any such belief is the advancement of religion".[217]

The common law has always sought to exclude matters of conscience from the charitable purpose of the advancement of religion. One reason for this is the perceived incongruity of holding that a trust set up to *prevent* the advancement of religion is a trust for the advancement of religion. This type of reasoning prevailed in *Bowman* v. *Secular Society,* where one of the stated objects of the applicant society was to promote the principle that human conduct should be based upon natural knowledge and not upon supernatural belief. The Court's reason for refusing to uphold the trust under the third head of charity was clear: "It is not a religious trust, for it relegates religion to a region in which it is to have no influence on human conduct".[218]

The English judiciary in particular has always placed great emphasis on the rather obvious point that religion and conscience are not the same thing. In *South Place,* Dillon J. offered the following comments on the definition of religion set out in *United States* v. *Seeger:*

> The ground of the opinion of the court...that any belief occupying in the life of its possessor a place parallel to that occupied by belief in God in the minds of theists prompts the comment that parallels, by definition, never meet.[219]

While Dillon J. was willing to accept that ethical principles encompassed laudable beliefs in "the excellence of truth, love and beauty" , the absence of belief in anything supernatural was sufficient to resolve all of the conceptual dilemmas raised by the case.

Part of the justification for insisting on maintaining this distinction is that charity law has other mechanisms for dealing with "conscientious" purposes. Many of the charity cases denying that a group is a religion have granted it charitable status on other grounds.[220] In the Canadian case of *Wood* v. *Whitebread,* the Court held that a gift benefiting the Theosophical Society was not a trust for the advancement of religion. Nonetheless, in upholding part of the gift as a charitable trust for the advancement of education, the Court recognized the value of the society's pursuits. "It seems to me that the study of comparative religion, philosophy and society is *prima facie* charitable."[221]

The history of charity law has also been held up as a reason for limiting the third head of charity to the advancement of *religious* belief. In the Middle Ages the very concept of charity was described as *"ad pias causas"*, causes which

honoured God and his Church.[222] In Tudor England, during a period when society did not offer any fiscal or tax benefits to donors, religion could easily be identified as a motivating force behind charitable gifts. The *Statute of Elizabeth I*,[223] insofar as it represented the monarch's attempt to secure religious money for secular purposes, was an implicit recognition of the centrality of religion to the existence of the altruistic impulse and the charitable gift. As Donovan Waters writes, "...no pre or post Reformation court could or would deny that the very word 'charity' was derived from religious writing. Judeo-Christian belief has proved for centuries to be the spring of charitable activity."[224] Just as the relief of poverty is "central to the meaning of charity"[225] for the donee, therefore, it has been argued that, in its historical context, religion was central to the meaning of charity for the donor.

The type of reasons given for excluding conscientious purposes from the third head of charity indicates the extent to which context and history have shaped the legal meaning of religion in charity law. Prior to the advent of human rights documents, it was deemed acceptable to adopt a more generous definition of religion for registering a place of worship than for effectuating a large charitable gift. The flexibility of the heads of charity is particularly convenient in relation to the charitable tax scheme in Canada. Indeed, *Vancouver Society* revealed the Supreme Court's hesitation to explore the *Charter* values of multiculturalism and equality in their relation to state spending. However, the *Charter* has very little room to accommodate concepts of functional use or fiscal significance. Although the precise effect which the *Charter* may have on the definition of charity is therefore unclear, its fundamental significance is clear. Any definition of religion adopted by the charitable sector must accord with the meaning of religion as an area of legal immunity in the *Charter*.

What this means is that the decision about whether to expand the third head category to include "conscience" must be based on an assessment of whether it is constitutionally mandated. It is noteworthy that no jurisdiction except the United States has expanded the meaning of religion to encompass conscientious beliefs. The Charities Commissioners, having considered the equality and religion guarantees in the *ECHR*, nonetheless thought it proper to maintain the distinction in English charity law between religious and nonreligious belief. Australia, having considered its own constitutional guarantees, has also concluded that religion can be defined so as to exclude "parallel" systems of belief. All of the *Charter* considerations canvassed in this paper will have to guide this decision in Canada, however if the category is to be expanded, it would seem preferable to recognize explicitly the advancement of matters of conscience as a *parallel* charitable purpose, rather than to dilute the definition of "religion".

Conclusion

Donovan Waters has written that the story of religion in Canadian charity law is "a story of silence and of misunderstanding".[226] We do not know what

religion means as a matter of charity law in Canada. The CCRA says we rely on the English common law but the English Charities Commissioners say that the law is ambiguous and unclear. The administrative secrecy shrouding the process of charitable registration suggests that the current meaning of the advancement of religion is not even prescribed by law. The story of religion in Canadian constitutional law is as yet untold. We do not know the meaning of "religion" as an area of legal immunity under the *Charter*. All of this suggests that the articulation of a coherent definition is not only desirable but a constitutional imperative. As the High Court of Australia suggested, religion is "a concept of fundamental importance to the law",[227] and the conflicting jurisdictional definitions only amplify the uncertainty of its legal meaning in Canada.

It seems, therefore, that "the time has come" to grapple with the concept of religion and to consider whether the definitions adopted in other places are valid in Canadian law. The challenge raised by John Pemsel and the Moravian Church in 1886 will have far greater ramifications when it is raised by a powerful religious institution such as the Church of Scientology in Canada in the 21st century. The radical conclusion that no coherent definition of religion exists in Canada has not yet permeated the national consciousness. If that realization arises in the context of a constitutional challenge to the third head of charity, it is likely that the "silent" stories of religion in Canadian charity law and constitutional law will both be told at the same time, and that they will elide.

FOOTNOTES

107. Part I, footnote 86, 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."

108. Part I, footnote 61, at 354.

109. Part I, footnote 86, at 414. MacLachlin J. expresses a similar sentiment at 454: "...the cost issue is more appropriately considered under the equality provision...".

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

111. *Law* v. *Canada (Minister of Employment and Immigration)* (1999), 170 DLR 4th 1 (S.C.C.) [hereinafter *Law*], at 6.

112. 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.

113. *Ibid.*, at 184.

114. *Supra,* footnote 111, at 49. See also Wilson in *Turpin* (1989), 1SCR 1296 (S.C.C.): "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."

115. *Ibid.*, at 30.

116. *Ibid.*, at 26.

117. *Supra, Egan*, footnote 112.

118. 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. C.A.).

119. 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.

120. *Supra,* footnote 111, 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).

121. *Ibid.*, at 27.

122. *Ibid.*, at 29.

123. *Ibid.*, at 31.

124. *Ibid.*, at 32.

125. *Ibid.*, at 27.

126. *Ibid.*, at 31.

127. *Ibid.*

128. *Ibid.*, at 32, where the Court adopts l'Heureux-Dube J.'s approach in *Egan, supra,* footnote 112.

129. *Ibid.*

130. *Ibid.*, at 49.

131. (1995), 2 SCR 627.

132. *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.

133. *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)

134. Part I, footnote 4.

135. Part I, footnote 3.

136. Part I, footnote 4, at 130.

137. *R.*. v. *Oakes,* Part I, footnote 58.

138. *Ibid.*, at 139.

139. *Ibid.*, at 136.

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

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

142. *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."

143. *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1983), 41 OR (2d) 583 (S.C.).

144. *Ibid.*, at 592.

145. *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984), 45 OR (2d) 80, at 82 (C.A.).

146. *Supra,* footnote 143, at 592.

147. Part I, footnote 58, at 136.

148. Part I, footnote 61, at 349.

149. *Ibid.*, at 353.

150. *Zylberberg,* Part I, footnote 60, 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)

151. See Hogg, *supra,* footnote 141, at 885.

152. See *R.* v. *Swain,* [1991] 1 SCR 933. Although it was not crucial to the majority's resolution of the appeal, Lamer C.J.C. 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.

153. Part I, footnote 61, at 353, where Dickson J. rejects the "shifting purpose" doctrine.

154. *Supra,* footnote 152, at 981.

155. See *Miron* v. *Trudel,* [1995] 2 SCR 418; *Egan, supra,* footnote 112.

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

157. Part I, footnote 4, at 129.

158. *Supra*, footnote 152, at 981-3, where Lamer C.J.C. considered both the common law rule of evidence and the criteria adopted by the Ontario Court of Appeal in his s. 1 analysis.

159. Part I, footnote 52.

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

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

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

163. *Supra*, footnote 152, at 983.

164. *Ibid.*, at 978.

165. Part I, footnote 4, at 112.

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

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

168. Part I, footnote 105, at 869.

169. Part I, footnote 61, at 321.

170. Part I, footnote 105.

171. R. Grant, "Charter of Rights and Freedoms - Civil", published in the *Annual Review of Law and Practice*, Continuing Legal Education Society of British Columbia, 1997.

172. Part I, footnote 61, where Dickson J. states that belief and nonbelief 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".

173. *Ibid.* Although Dickson C.J.C. 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.

174. See, for example, *Zybelberg*, Part I, footnote 60, at 661.

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

176. Part I, footnote 68, at 594.

177. *R.* v. *Registrar General, Ex parte Segerdal and another* (1970), 2 QB 697 (C.A.).

178. Part I, footnote 52, at 455, per Lord Reid.

179. *Re Christ Church of China* (1983), 15 ETR 272 (B.C.S.C.), at 278.

180. Part I, footnote 72, at 26.

181. Part I, footnote 105, at 866.

182. *Supra*, footnote 160: "As between different religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none."

183. Part I, footnote 52, at 457.

184. *Thornton* v. *Howe* (1862), 31 Beav. 14.

185. *The Places of Religious Worship Registration Act, 1855* provided that every place of meeting for religious worship for Protestant dissenters or other Protestants, Roman Catholics, 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,* footnote 177, at 697.

186. *Ibid.*

187. *Bowman* v. *Secular Society Ltd.,* [1917] AC 406 (H.L.).

188. *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.

189. [1980] 1 WLR 1566, at 1572.

190. *Supra,* footnote 177, at 709, per Buckley J.

191. *CC Scientology Decision,* Part I, footnote 56, at 7.

192. *Ibid.*, at 21.

193. *Ibid.*, at 14.

194. *Ibid.*, at 24.

195. *Ibid.*, at 15.

196. *Ibid.*, at 21.

197. *Supra,* footnote 177, at 707.

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

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

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

201. *Supra,* footnote 199.

202. *Ibid.*, at 208-210.

203. *Fellowship of Humanity* v. *County of Alameda* 153 Cal. App. 2d 673 (1957). The Court identified four characteristics of religion: "a belief not necessarily referring to supernatural power, a cult involving a gregarious association openly expressing the belief, a system of moral practice resulting from adherence to the belief, and an organization within the cult designed to observe the tenets of the belief".

204. *Church of the New Faith* v. *Commissioner for Pay-roll Tax* (1982), 49 ALR 65 (H. C. Aust.).

205. *Ibid.*

206. *Ibid.*, at 74.

207. *Young Men's Christian Association of Melbourne* v. *FCT,* [1926] 37 C.L.R. 351.

208. *Centrepoint Community Growth Trust* v. *Commissioner of Inland Revenue,* [1985] 1 NZLR 673 (H.C.).

209. *Supra,* footnote 199, at 106.

210. *Supra,* footnote 204, at 86.

211. Sir James Frazer, *The Golden Bough* (Abridged ed., 1954) at 50, cited in *Church of the New Faith, supra,* footnote 204, at 71.

212. *R.* v. *Swain, supra,* footnote 152, at 989, per Lamer C.J.C.: "If this Court is to enunciate a new common law rule to take the place of the old rule, it is obliged to consider the status of that new rule in relation to *all* relevant aspects of the Charter".

213. *R.* v. *Videoflicks* (1984), 48 OR (2d) 395 (Ont. C.A.), at 427-8.

214. *Supra,* footnote 204, per Mason A.C.J. and Brennan J., at 70.

215. *The Commissioner Hindu Religious Endowment Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954) – Indian Supreme Court, [1954] SCR 1005. The Indian Supreme Court, on the other hand, has held that religion is not necessarily theistic, but is based on a system of beliefs or doctrines which are regarded by those who profess that system as conducive to their spiritual wellbeing.

216. *Scottish Burial Reform and Cremation Society Ltd.* v. *Glasgow Corporation,* [1968] AC 138 (H.L.), per Lord Wilberforce.

217. Part I, footnote 55, at 1570.

218. *Bowman* v. *Secular Society Ltd.,* [1917] AC 406, at 445.

219. Part I, footnote 55, at 1571.

220. See, for example, *Re South Place,* Part I, footnote 55, where the ethical society's objects were found charitable under "the advancement of education" and "other purposes beneficial to the community".

221. Part I, footnote 47, at 284.

222. Gareth Jones, *History of the Law of Charity 1532–1827* (Cambridge University Press, 1969), at 3-4.

223. 43 Elizabeth I, c. 4.

224. Donovan Waters, *The Law of Trusts in Canada,* 2nd ed. (Toronto, 1984), at 569.

225. Part I, footnote 3.

226. Donovan Waters, "The Advancement of Religion – A Form of Charity?", (1973), 1 *Philanthrop.*, No. 2, at 9.

227. *Supra,* footnote 204, at 69.