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The Possible Impact of the Charter on the Law of Religious Charitable Trusts

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Introduction

In an article published shortly after the Charter of Rights and Freedoms had been proclaimed,[1] Professor Noel Lyon expressed the fear that the new Charter would be no more than "an exercise in self-congratulation."[2] Lyon asserted that "Experience with the Canadian Bill of Rights[3] suggests . . . that judges will take the position that the Charter simply entrenches the rights and freedoms that have been perfected by the common law."[4] However, such a view of the Charter has since been repudiated by the Supreme Court of Canada in the case of *Regina* v. *Big M Drug Mart*.[5] Chief Justice Dickson (Dickson J. at the time of the hearing) contrasted the Charter with the Canadian Bill of Rights in this fashion:[6]

> The basis of the majority's interpretation in *Robertson and Rosetanni* is the fact that the language of the Bill of Rights is merely declaratory: by s.1 of the Bill of Rights, certain existing freedoms are "recognized and declared" . . . whatever the situation under that document, it is certain that the Canadian Charter of Rights and Freedoms does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment . . . the Charter is intended to set a standard upon which present as well as future legislation is to be tested.

Thus it is evident that the Charter's role is not merely to protect existing rights,

but also, where appropriate, to expand the scope of those rights or even to recognize new rights for the first time. Canadian constitutional law has been a dynamic, constantly changing body of law since the Charter came into force.

In contrast to this exciting, revitalized area of the law is the law of charity. Textbooks and casebooks in this area still refer the student to two antiquated primary sources of the relevant law,[7] The Statute of Charitable Uses,[8] passed and proclaimed in 1601, and Lord Macnaghten's judgment in *Income Tax Commrs.* v. *Pemsel*[9] given in 1891. It is from these two sources that Anglo-Canadian jurisprudence on charities, including charities for the advancement of religion, has flowed. Many of the other leading cases in the area of religious charitable trusts also date from the 19th century.[10]

How Might the Two Bodies of Law Conjoin?

It is the writer's belief that the effect of three recent judgments in the Supreme Court of Canada, [11] coupled with the emergence in recent years of numerous sects and cults that may not satisfy the old common-law tests for inclusion as charities under the head of "advancement of religion" (see discussion *infra*), will almost inevitably lead to an invasion of the staid old established body of law on religious charitable trusts by the brash young newcomer to the Canadian jurisprudential scene, the Charter-based constitutional challenge. In the process, in my view, the common-law definition of "religion" will be expanded.

Such a Charter challenge may also be brought by adherents of an older established religion such as Hinduism, Buddhism or Jainism, or by members of an agnostic or atheistic ethical society. Given the current common law it is very possible that any of these groups may experience problems in obtaining the recognition as a religious charity of a trust set up in favour of advancing their religious or quasi-religious purposes.

These problems may arise in one of two ways: (1) the validity of a trust's charitable purpose may be challenged by a residuary beneficiary under a will or by another who may have an interest in the trust fund if the trust fails[12], or (2) the trust may be refused registration as a charity by Revenue Canada Taxation. Clearly, in a pre-Charter context, the first-named situation would be resolved by a consideration of the common law. As we shall see presently, the dispute with Revenue Canada, again absent the Charter, would in the end be decided in the same fashion.

Registration of Charities Under the *Income Tax Act*

Under the *Income Tax Act*[13] donations to "registered charities" are tax-deductible under Section 110 (1) a (i). In addition, Section 149 (1)(f) of the *Act* reads:

> 149 (1) No tax is payable under this part upon the taxable income of a person when that person was ...

(f) a registered charity . . .

Thus the *Act* confers enormous advantages on "registered charities". Nevertheless, a clear statutory definition of "registered charity", "charity" or "charitable" is nowhere found in the *Act*. Section 110 (8)(c) reads in part:

110 (8) In this section . . .

(c) "registered charity" at any time means

(i) a charitable organization, private foundation, or public foundation, within the meanings assigned by subsection 149.1 (1) . . .

The relevant sections of s.149.1 (1) read as follows:

Definitions

149.1 (l) In this section, section 172 and Part V, . . .

(d) "charity" means a charitable organization or charitable foundation;

(a) "charitable foundation" means a corporation or trust constituted and operated exclusively for charitable purposes . . .

(b) "charitable organization" means an organization, whether or not incorporated,

(i) all the resources of which are devoted to charitable activities carried on by the organization itself, . . . and . . .

(iv) where it has been designated as a private foundation or public foundation pursuant to subsection 110(8.1) or (8.2) . . .

Since "charitable" is not defined in the *Act*, Revenue Canada officials make the determination whether or not a given applicant is charitable " . . . within the common law concept of that term."[14] The information pamphlet just quoted proceeds to define "common law" in these terms:[15]

> The term "common law" refers to the law as it has evolved primarily in Canada, Britain, and some Commonwealth countries. Canadian law may vary significantly from the laws of other countries, including the United States.

The same pamphlet goes on to give the potential applicant examples of charitable purposes[16] which are merely re-statements of the classifications found in *Pemsel's* case. Regardless then, of whether a dispute arises under a challenge to a trust by an interested party, or as a result of a denial of registration as a charity under the *Income Tax Act*, reference will be had by the courts to the common law arising out of the 1601 Statute and *Pemsel's* case.

Following the lead of Revenue Canada's informational pamphlet, I will first discuss those two primary sources of law, then move on to consider related jurisprudence from Britain, Australia, the United States and Canada. Both cases dealing specifically with religious charitable trusts and those concerned with the scope and definition of the freedom of religion will be considered.

Primary Sources: The Statute of Charitable Uses and *Pemsel*

The Statute of Charitable Uses,[17] or Statute of Elizabeth, as it is often called, was enacted in 1601 to remedy the prevalent abuses by trustees of the trust funds that had been entrusted to them. The preamble speaks of trust properties which " . . . nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence . . . "[18] The preamble also lists:[19]

> . . . those activities which the legislature felt to constitute the scope of what is charitable, and for over three and a half centuries that preamble has been the judicial lodestar as to what sort of activities (or trust purposes) fall within the common understanding.

Although the list in the preamble has been held not to be exhaustive in itself,[20] courts have generally felt that a valid charitable trust must at least fit " . . . by analogy within the spirit and intent of that list."[21] Among the purposes enumerated is the "repair of churches."

As Professor D.W.M. Waters had indicated, after 1601 if the courts were required to pass judgment on whether or not a given trust was charitable, its purposes were compared with those in the preamble, and if they were sufficiently akin to those purposes, the trust was upheld. As the years passed and trust purposes became more and more removed from those in the minds of the legislators in Elizabeth's day, attempts were made to reduce the list in the preamble to a scheme of classification. In *Income Tax Commrs.* v. *Pemsel*,[22] an 1891 decision of the House of Lords, Lord Macnaghten formulated what is perhaps the clearest and best of these (at any rate it is the one that has been followed[23] ever since[24]):

> "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.

Waters points out that Lord Macnaghten recognized that, in addition to falling under one of the four heads mentioned, every valid charity had to " . . . be concerned with the benefit of the public, or some significantly large section of the public."[25]

Advantages At Common Law of Being Charitable

In addition to the tax advantages already mentioned, there are, at common law, additional advantages for the charitable trust over one which is non-charitable. One of these is that only a charitable trust can be established in perpetuity.[26] Another is that if a general charitable intent can be established:[27]

> . . . the doctrine of *cy-pres* can be applied, so as to re-arrange the terms of the charitable trust to enable the charitable fund to be applied in a way which it is thought is

nearest to what the settlor or donor would have intended. In the same way, if the object has become impracticable or unattainable, the doctrine of *cy-pres* can equally be applied.

It is also noteworthy that if the trust is held to fall under any of the first three heads the element of public benefit is generally assumed, whereas for trusts falling under the fourth head, the public benefit requirement is scrutinized more strictly.[28] Such scrutiny is exercised especially to make sure that, if not the public at large, then at least a sufficiently large section of the public, is benefited. For trusts falling under the religious head, this requirement is generally satisfied if "... the particular religious activities to be assisted by the funds of the trust are open to, or otherwise demonstrably for the benefit of, the public or a sufficiently large section of the public."[29] In the usual scheme of things this is not an onerous requirement.

The English Cases

The advancement of religion had been recognized as a charitable purpose in England even before the Statute of Elizabeth was passed in 1601. After that time, courts continued to recognize such trusts as charitable, pointing to the phrase, "the repair of churches," in the Statute's preamble as authority.

However, there was at first an important proviso: the trust had to be for the advancement of the "one true faith," the state religion, the Church of England.[30]

Later the English concept of "advancement of religion" expanded to include first, other Protestant churches in the eighteenth century, then Roman Catholicism and Judaism in the early nineteenth century and, finally, many religions outside the Judeo-Christian tradition.[31] However, the English courts still apparently refuse to consider "charitable" the advancement of *all* religions. Oosterhoff puts it this way: "... in England it would seem that for a trust to qualify as charitable under this head it must promote some form of monotheistic religion."[32]

Monotheism v. *Polytheism—The* Yeap Cheah Neo *Case*

Oosterhoff cites *Yeap Cheah Neo* v. *Ong Cheng Neo*[33] as authority for the proposition that, in England, a trust for the advancement of religion must promote a religion which is monotheistic in nature; however, a close reading of the judgment in this 1875 decision of the Privy Council[34] does not support this conclusion.

In this case a testatrix sought to set up certain trusts by her will, among which was one "... directing that a house, termed Sow Chong, for performing religious ceremonies to the testatrix's deceased husband and herself should be erected."[35] The will was challenged by the next of kin who, *inter alia*, challenged the above bequest as being a non-charitable bequest made in perpetuity. The gift was declared invalid on that ground. However it was nowhere stated by Sir

Montague Smith, who delivered the judgment in the case, that the grounds for so finding were that the gift was for the advancement of a religion which was polytheistic, or which promoted ancestor worship, as Oosterhoff suggests.[36]

Rather, the court seems to invalidate the gift on the ground that there is no public benefit in the proposed trust. In this respect Sir Montague Smith compares the gift to gifts made by Roman Catholics for the saying of private masses for the souls of deceased persons:[37]

> Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage, and can benefit or solace only the family itself. The dedication of this Sow Chong House bears a close analogy to gifts to priests for masses for the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her deceased husband's soul and her own, was held in *West* v. *Shuttleworth* not to be a charitable use, and although not coming within the statute relating to superstitious uses, to be void. The learned judge was therefore right in holding that the devise, being in perpetuity, was not protected by its being for a charitable use. It is to be observed that in this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for masses for the dead, or as a Christian of any church who may have devised property to maintain the tombs of deceased relatives. (See *Rickard* v. *Robson*, and *Hoare* v. *Osborne*.) All are alike forbidden, on grounds of public policy, to dedicate lands in perpetuity to such objects.

The Bowman *Case*

The case of *Bowman* v. *Secular Society Ltd.*[38] does provide Oosterhoff with support for his contention that English law recognizes only trusts to monotheistic religions. This case, which was heard by the House of Lords in 1917, concerned a testamentary devise in trust for an organization called the Secular Society Ltd. As in the *Yeap Cheah Neo* case, the gift was attacked by the next of kin, this time on the ground that the objects of the society were unlawful. The Court held that the Society's objects, which included the following: "(c) to promote the secularization of the State . . . [and] (d) to promote the abolition of all support, patronage or favour by the State of any particular form or forms of religion,"[39] were not unlawful. Moreover their Lordships did not have to consider whether there was a valid charitable trust because they found an absolute gift to the society.

However, Lord Parker took it upon himself to pronounce on the effect of the gift if it had been a trust. He said it would not be a valid charitable trust since it included political objects and was therefore not wholly charitable. He also proclaimed the following: " . . . a trust for the purpose of any kind of monotheistic theism would be a good charitable trust."[40] Lord Parker then proceeded to consider the case of *Pare* v. *Clegg*[41] in which money was lent to a

society which believed in a Supreme Being, but discouraged all ceremonial worship of this entity. Since the judge did not find the objects of the society to be illegal, Lord Parker concluded: "It follows that he cannot have thought that there was anything against public policy in advocating deism or (*a fortiori*) any form of monotheism"[42]. Although *Pare* v. *Clegg* did not deal with a charitable trust, it is clear that one member of the House of Lords at least considered that monotheism was an absolute requirement for a valid religious charitable trust.

It is questionable whether Lord Parker's opinion would carry the day if a trust for a polytheistic religion were to be challenged in England today. The authors of *The Modern Law of Charities*[43] make this statement on the state of the law in England:[44]

> Charity is not confined to the advancement of the Christian religion, though the cases do for the most part deal with religions (Christian, Jewish, Islamic) devoted to the worship of the same God. In some common law jurisdictions the advancement of other religions (e.g., the Hindu religion) has been held charitable, and presumably the same would happen in the British Isles.

Non-Belief In God

Whatever the state of the law in England concerning the validity of polytheistic religious trusts, it seems clear English courts are not prepared to find a valid charitable trust for the advancement of religion in the absence of a belief in a Supreme Being. The leading case in this regard is *Re South Place Ethical Society*.[45] In this case a society which began in 1824 as a Unitarian congregation, evolved over the years into the South Place Ethical Society, an organization of agnostics whose objects were "the study and dissemination of ethical principles and the cultivation of rational religious sentiment."[46] They held public meetings at which lecturers spoke and they gave musical concerts of high quality which were likewise open to the public. They were seekers after truth by way of " . . . intellectual appreciation or reason, and not revelation."[47] The trust deed had been amended to reflect the changes in the society's objects since its inception and the trustees applied to the court to determine whether or not these objects were still charitable, either under the head of advancement of religion or some other head.

Dillon J. acknowledged the worthiness of the Society's actions and intentions. After the usual reference to *Pemsel*, he grappled with the question of under which head, if any, the trust as constituted at that time would fall. The Society's main contention was that it was still a religious charity. It urged the court not to follow the *Bowman* case because:[48]

> The society says 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.

Dillon J. was unable to accede to that argument and expressly declined to follow the American cases of *Seeger*[49] and *Washington Ethical Society*[50] which will be discussed later in this paper. Instead he made this statement of principle:[51]

> Religion, as I see it is concerned with man's relations with God, and ethics are concerned with man's relations with man. The two are not the same . . . If reason leads people not to accept Christianity or any known religion, but they do believe in the platonic concept of the ideal, their beliefs may be to them the equivalent of a religion, but viewed objectively they are not religion.

It is also noteworthy that although Dillon J. refers to Lord Parker's comments on monotheism he neither adopts nor rejects them. In the result, the trust was upheld as charitable, not under the head of religion, but under the head of education or, alternatively, under the fourth head of charity.

A somewhat similar English case is *United Grand Lodge of Ancient Free and Accepted Masons of England and Wales* v. *Holborn Borough Council.*[52] This concerned another society which promoted ethics among its members and required each member to believe in God, though it did not require any mandatory religious sentiment beyond that. The trust in this case was not upheld under the third head of charity because there was no evidence of "advancement of religion." Per Lord Justice Donovan:[53]

> Masonry really does something different. It says to a man, "whatever your religion or your mode of worship, believe in a Supreme Creator and lead a good moral life." Laudable as this precept is, it does not appear to us to be the same thing as the advancement of religion. There is no religious instruction, no programme for the persuasion of unbelievers, no religious supervision to see that its members remain active and constant in the various religions they may profess, no holding of religious services, no pastoral or missionary work of any kind.

The Court of Appeal here adopted a fairly stringent test of what "advancement of religion" must entail. It was not enough that the Masons urged their members to believe in God and lead moral lives, they must also have all the ceremonial trappings, observances, and practices that the Court is used to in the churches within its experience. (The English courts are the least broad-minded of any among the jurisdictions surveyed for this article.)

Wisdom of Belief and Subversive Doctrines

The last English case to be considered will be *Thornton* v. *Howe.*[54] This case illustrates that the court will, as a general rule, decline to invalidate a gift on the basis of its opinion as to the wisdom or foolishness of the belief being supported. The Master of the Rolls, Sir John Romilly, found that a gift to promote the works of Joanna Southcote, who "thought that she was with child by the Holy

Ghost,"[55] was a good trust under the third head (advancement of religion) in *Pemsel's* case. Sir John offered this assessment of Southcote: "she was, in my opinion, a foolish ignorant woman"[56] but went on to state:[57]

> Neither does the Court, in this respect make any distinction between one sect or another. It may be that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void . . . But if the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests.

The Master of the Rolls found that Southcote was a sincere Christian, and that the testatrix sincerely thought that the propagation of her works would advance Christianity. Since he could find in Southcote's writings "nothing which could shake the faith of any sincere Christian,"[58] he upheld the bequest.

The State of Australian Law

For our purposes, the state of Australian law can be quite adequately canvassed by consideration of the judicial history of the recent case of *The Church of The New Faith* v. *Commissioner For Pay-Roll Tax.*[59] I am indebted to Mark Darian-Smith for his excellent case comments on the judgments in this case and freely acknowledge my heavy reliance on his analysis.[60]

> The case arose out of an application by the Church of The New Faith Inc. (an organization of Scientologists) for "an exception from having to pay pay-roll tax on the basis that it was a 'religious institution' for the purposes of Section 10(6) of the *Pay-Roll Tax Act 1971 (Vic.).*"[61] The application for an exemption was denied on the ground that the applicant was not a "religious institution." An objection by the Church was rejected by the Commissioner. The Church then appealed to the Victorian Supreme Court.

The Trial Decision

Crockett J. at trial conceded that the applicant was an institution but considered that the mere fact that it called itself a church was not determinative of the issue of whether or not it was religious. His chief difficulties in coming to such a determination were twofold: "(1) . . . the Scientologists had not always called themselves a church . . . [and] (2) . . . that in more than one place in their own literature they expressly rejected the notion that they were a religion."[62] The literature and trappings of the Scientologists had changed almost overnight into something that resembled those of a Christian Church, after the passing of the *Psychological Practices Act.* This statute prohibited the commercial practice of certain psychological techniques favored by the Scientologists,

including the use of an E-meter. However the *Act* did provide for an exemption for "... any person who is a priest or minister of a recognized religion in accordance with the usual practice of that religion."[63]

It also appeared that after an unfavorable decision by Lord Denning in the English Court of Appeal in *R.* v. *Registrar General: ex parte Segerdal*,[64] the church again showed remarkable adaptability. Denning had determined that Scientology was not a religion but "... a philosophy of the existence of man or of life."[65] Subsequently Scientology began incorporating "... into its services reverential references to a deity referred to as the author of the universe or supreme being."[66] On this and similar evidence, Crockett J. concluded that Scientology was not a religion but a "sham"[67] which he roundly denounced for its lack of sincerity of belief and cynical adaptability.[68]

He then consulted Australian and English authorities and derived the following principle from the cases:[69]

> As a religion is essentially a dynamic relation between man and a non-human or superhuman being, it can never dispense with a higher form of knowledge which is concerned not with the human subject but with the divine object.

The trial judge then found as a fact that this ingredient was missing from the evidence before him and dismissed the appeal. "Crockett J. concluded that some of the present adherents of scientological thought might believe they were practicing religious belief but that fact was irrelevant to the issue."[70] The Scientologists then appealed to the Full Court of the Victorian Supreme Court.

The Full Court Decision

Young C.J. expressed misgivings about Crockett J.'s determination that the church was a sham. Although he conceded that it was sometimes open to the court to make such a determination, and that there was some supporting evidence in this case, he was not convinced the evidence was sufficiently strong to merit the conclusion in this case. He cautioned that courts must be careful about appearing to determine the truth of any religion unless the evidence was clear that a claim was fraudulent.[71]

The Chief Justice went on to attempt to formulate a generalized test by which to measure the claim of a particular organization that it was "religious". Counsel for the appellant recommended the test formulated in *Malnak* v. *Yogi*[72] by Circuit Judge Adams. This test in essence is as follows:

1) The nature of the ideas - do they deal with fundamental questions like man's nature or his place in the universe?
2) Comprehensiveness - a religion must be broad in scope. It should deal with many fundamental questions, not just one or two.

3) The trappings - are they analogous to those of recognized religions?

To these the Chief Justice added three of his own:

4) Public acceptance;
5) Method of joining - he was not impressed with the appellant's charging a five-dollar membership fee; and
6) Commercialism.

Testing the appellant against these six criteria, the Chief Justice found it lacking or suspect on all counts.

Kaye J. agreed generally with the Chief Justice but did not adopt his six-part test. Instead he consulted dictionaries and considered case law to come up with a definition of "religion". He rejected the definition outlined in *U.S.* v. *Seeger*[73] " . . . in which it was decided that the test of a 'religious' belief would be an objective one based upon the importance of the belief held to its holder."[74] Instead he came up with his own definition which essentially required the recognition of a Supreme Being or Beings.[75] Thus in the view of Kaye J. either a monotheistic or polytheistic belief is acceptable so long as there is an element of personal relationship between an adherent and his god or gods and he believes he owes his existence to that power or those powers.[76] The learned justice considered the inconsistent literature of the appellant and concluded there was no evidence of this essential belief by all the members of the church. There was " . . . nothing to stop each member from holding quite individual beliefs in different deities."

Brooking J. also upheld the trial judge's decision but he did it without resort to a consideration of religion. In his opinion the Church was formed for an illegal purpose, that being to circumvent the *Psychological Practices Act.* That being so, the church was entitled to no privileges from the State as they would be accruing to it through the commission of a crime.

In the result, the Full Court unanimously upheld the decision of the trial judge. Nevertheless, the church sought to appeal to the High Court and leave to appeal was granted.

The Decision of the High Court

The five judges sitting on the High Court produced three judgments and three definitions of religion. The first of these was that of Australian Chief Justice Mason and Brennan J. These two disagreed with the approach of Crockett J. with regard to his inquiry into the *bona fides* of the administrators and leaders of Scientology. The important question, they said, was whether or not the members of the general body of adherents were sincere in their beliefs. They concluded that the "five or six thousand believers in Scientology in Victoria were quite sincere . . . "[77]

The two justices formulated a working definition of religion as follows:[78]

> . . . the criteria for 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 which offend against the ordinary laws are outside the area of any conferred on the grounds of religion.

This test was thought by the justices to be superior to that of Adams J. in *Malnak* v. *Yogi*[79] which they thought too wide " . . . because it included not only non-theistic systems of belief but also those which did not comprise any supernatural element."[80] They also formulated their test to be wider than that of Dillon J. in the *South Place Ethical Society*[81] case which they thought too narrow since it was confined to theistic systems of belief. They felt that this would exclude such established religions as Theraveda Buddhism.[82]

Wilson and Dean J.J. produced another joint judgment which is more liberal than that just reviewed. They accepted the three tests outlined in *Malnak* v. *Yogi*[83] as useful and came up with five of their own. These were:[84]

(i) That the collection of ideas and practices involve a belief in the supernatural . . . ;

(ii) That the ideas relate to man's nature and place in the universe and his relation to things supernatural;

(iii) That the adherents accept certain ideas requiring them or encouraging them to observe particular codes of conduct or specific practices having some supernatural significance;

(iv) That the adherents themselves form an identifiable group or groups;

(v) That the adherents themselves see the collection of ideas, beliefs and practices as constituting a religion.

Their Honours indicated that it was neither a strictly subjunctive nor a conjunctive test but rather that, if an organization met all or most of the criteria, it would probably be religious, whereas if it failed to meet all or most of the criteria, an inference would be raised that it was not religious.[85] On the facts, they concluded that Scientology met their five indicia as well as the first two in *Malnak* v. *Yogi*[86]. It was therefore their view that Scientology was a religion.

The judgment of Murphy J. produces the most liberal test that I have come across for the determination of the validity of a claim for religious status. The essence of his views is contained in this quotation from his judgment: " . . . any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious."[87] The basis of Murphy J.'s judgment is that, if one group claiming to be religious is given privileges, then all such groups must be given the same privileges. In his view, the court has no business looking into the *bona fides* of any religion and, as to commercialism, " . . . very few organized religions could be moralistic when it came to commercialism."[88]

In the result, all five judges of the High Court characterized Scientology as a religion, allowed the appeal, and exempted the Church of The New Faith from the payroll tax assessment.

The American Cases

Some of the leading American cases dealing with the legal definition of religion have been referred to in the discussion of the law in England and Australia and it will be noted that the American decisions are generally more liberal than their Commonwealth counterparts, although none of them goes quite so far as Murphy J. does in *The Church of The New Faith.*

In the *Malmak* v. *Yogi*[89] decision, discussed in the context of *The Church of The New Faith,* Circuit Judge Adams formulated three indicia by which an organization claiming religious status could be measured. The important point to appreciate here is that all three, (i) the metaphysical nature of the ideas, (ii) comprehensiveness, and (iii) religious trappings, could be satisfied by a non-theistic ethical society with a comprehensive metaphysical philosophy.

U.S. v. *Seeger*[90] in the United States Supreme Court has also been mentioned. This case arose out of an attempt by the defendant, Seeger, to exempt himself from the draft on the ground that he was a conscientious objector, even though he did not admit to a personal belief in a deity. He was an agnostic, but not an atheist, which may have had some bearing on the disposition of the case. However, the case is generally cited for the test propounded by Mr. Justice Clark:[91]

> . . . the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.

This is the test that Dillon J. in *Re South Place*[92] and Kaye J. in *The Church of The New Faith*[93] refused to follow.

However the judgment may not be quite as liberal as it appears. Although upon application for the exemption, Seeger declined to affirm a belief in the existence of God, the learned judge makes a point of asserting that "He did not disavow any belief, 'in a relation to a Supreme Being', indeed he stated that 'the cosmic order does, perhaps, suggest a creative intelligence.'"[94] Interestingly, this court expressly reserved the right, unlike Murphy J. of the Australian High Court, to determine the sincerity of the applicant's belief:[95]

> . . . while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case.

Another case which looked to the sincerity of the applicant's beliefs is *Theriault* v. *Silber*,[96] in which a convict who had set up a self-styled "Church of the New Song" and had demanded steak and wine for religious services was held by the United States District Court in Texas to be lacking in *bona fides*. The refusal of his requests by the prison authorities was consequently not held to conflict with his First Amendment (i.e., freedom of religion) rights.

In *Torcaso* v. *Watkins*,[97] a 1960 decision of the Supreme Court, an atheist notary public was denied a commission because he refused to declare his belief in God, as required by the Maryland Constitution. This provision was stuck down as being unconstitutional, because it violated his right to freedom of belief and religion which right was held to extend to non-belief.

The Washington Ethical Society v. *District of Columbia*[98] is the American case perhaps most instructive in the area of religious charity. The court held that the Washington Ethical Society was entitled to exemption from taxes " . . . in respect of its premises under an exemption accorded for buildings belonging to religious corporations or societies and used for worship."[99] The decision appears to be based on the definition of religion as "devotion to some principle."[100] A lack of belief in a divinity was held in no way to disqualify the society from the exemption.

Finally there is the spectre raised by Judge Brevard Hand, a Federal District Judge in Alabama. In a Mobile courtroom on March 4, 1987, Judge Hand ruled that more than 40 textbooks must be removed from Alabama classrooms since they were promoting a religion called "secular humanism."[101] Judge Hand stated that "For purposes of the First Amendment, secular humanism is a religious belief system, entitled to the protections of and subject to the prohibition of, the religion clauses."[102]

What is secular humanism? In Judge Hand's view its essential belief is that " . . . salvation is through one's self rather than through a deity."[103] An example from the evidence was " . . . a home economics textbook called *Contemporary Living* [which] taught adolescents to decide for themselves rather than relying on absolute God-given values."[104]

The successful plaintiffs were also upset that many history textbooks appeared to play down or omit the role of religion in the country's history.

It is noteworthy that another recent decision of Judge Hand on a question of prayer in school was overruled by the United States Supreme Court. It is thought that his textbook ruling will suffer a similar fate. "Legal experts doubt that Hand's ruling will survive an appeal to a higher court."[105]

The State of Canadian Law

Some authors believe that Canadian courts have traditionally been more liberal in this area than their English counterparts, as a natural consequence of Canada's multicultural heritage.[106] Gordon Fairweather claims that his-

torically, Canadians have been quicker to recognize religious minority rights than have the English. He points out:[107]

> Emancipation for Canadian Catholics has existed for two and one quarter centuries—since the *Quebec Act* of 1760;
>
> Entitlements for Jews both to practice their faith and to hold public office, also came about much earlier in Canada than in the United Kingdom;
>
> Fundamental rights pertaining to language and religion always have been essential ingredients of Canadian federalism.

Let us go on to test this proposition by reference to the case law.

The Canadian Decisions

One of the reasons the Australian High Court granted leave to appeal in *The Church of The New Faith*[108] case despite the unanimous ruling in the court below, was that "The factual situation allowed the High Court to address itself to an area in which there were very few pre-existing Australian decisions."[109]

Similarly in Canada there is at present a dearth of major decisions concerning the definition of "religion" for charitable purposes. However, I will endeavour to review those cases which may have some relevance.

To begin, there are a number of decisions from other jurisdictions which have been expressly followed in Canada. The classification scheme in *Pemsel's*[110] case was adopted by the Supreme Court of Canada for the purpose of determining whether or not a gift is charitable in *Guaranty Trust of Canada* v. *Minister of National Revenue.*[111] As was previously mentioned, this test is also incorporated into Revenue Canada policy.[112] Both *Bowman*[113] and *Yeap Cheah Neo*[114] have been followed in Canada, but *not* in relation to any definition of religion found in either case, or to anything else of relevance to our pur-

Sir John Romilly's pronouncement in *Thornton* v. *Howe* that a court would invalidate any gift whose tenets inculcated " . . . doctrines adverse to the very foundations of all religion . . . "[117] has been adopted by various Canadian courts. In *Re Knight*[118] a bequest to finance the publishing of books containing the writings of Emmanuel Swedenborg was upheld since it could not be said that these writings offended the test set out by the Master of the Rolls. The same test was employed by the Ontario Supreme Court Appellate Division in *Re Orr*[119] with respect to a gift for the benefit of certain Christian Science Churches. Such a gift was also held not to be contrary to public policy as formulated in *Thornton* v. *Howe.*[120] The gift was invalidated by the Supreme Court of Canada on other grounds."[121] Finally, in *Re Grand*[122] the same test was applied to a gift to the Baha'i Temple at Chicago, Illinois. Again the court found no evidence that the beneficiary offended the test. The Baha'i faith was

found to be "... based on a belief in God and the universal brotherhood of man."[123]

Some general observations should be made at this point. First, no reported Canadian case has adopted Lord Parker's view in the *Bowman*[124] case that only a gift to a monotheistic religion could be valid. On the other hand, neither have his words been expressly rejected, nor has a trust for the advancement of polytheistic religion been upheld.

It is also clear that the situation which arose in *Re South Place Ethical Society*[125] has not arisen in Canada. No trust for the benefit of a high-minded ethical society has been advanced in our courts as a religious trust. This writer believes it *will* inevitably, arise here—as it has in England and the United States—because of the combination of tax benefits for charities and the relative ease of meeting the requirement of public benefit once you have established a religious purpose. This advantage has been recognized both in legal literature[126] and in *Re McDonagh*.[127] In that case Logie J. stated: "It is conceded that a gift for religious purposes is *prima facie* a gift for charitable purposes."[128]

The combination of this presumption with the natural reluctance of a court or of Revenue Canada to make intrusive judgmental inquiries into the activities of a religious group makes this head of charity an attractive one for a potential applicant for registration. In addition it may be a matter of pride or public relations with some groups that they should be included under this head instead of being shunted off into another classification.

Since the law of charitable trusts under the third head of charity is so unsettled in Canada, a court hearing a dispute in this area is sure to be referred to general statements about religion made by Canadian courts in other contexts. However, before examining the most recent and authoritative of these, found in *R.* v. *Big M Drug Mart*[129] and *R.* v. *Edwards Books and Art Ltd.*,[130] it will be necessary to consider some of the pre-Charter cases.

The *Saumur*[131] case in the Supreme Court of Canada produced the following pronouncement on the freedom of religion in Canada from Rand J.: "From 1760 ... to the present ... religious freedom has ... been recognized as a principle of fundamental character."[132] In *Hofer* v. *Hofer*[133] Pigeon J. in the same court, accepts that the court must determine the *bona fides* of an alleged right. His words are similar in meaning to what was said in the *Seeger*[134] case. Per Pigeon J.: "What is a religion, what is a Church in the eyes of the law does not depend on the religious beliefs of any confessions."[135] Specifically, the learned justice was not convinced the Hutterite colony under discussion was a religious institution, just because its members claimed it was.

In *Robertson and Rosetanni* v. *The Queen*,[136] the constitutionality of *The Lord's Day Act* (a Sunday closing statute) was challenged under s. 1(c) of the Canadian Bill of Rights as being contrary to the guarantee of freedom of religion.

The majority of the Supreme Court found that *The Lord's Day Act* did not conflict with the Bill of Rights since s.1 (c) protected only such freedoms as were in existence before that *Act* was proclaimed. Since legislation had been enacted in Canada enforcing Sunday closure from the earliest times and had never been considered an interference with freedom of religion, it followed that the Bill of Rights was not violated.

The Charter Decisions on Freedom of Conscience and Religion

Whatever definition of religion may be adduced from the review of all of the cases we have discussed, it seems certain that the definition will be expanded by the Supreme Court decisions in *R.* v. *Big M Drug Mart*[137] and *R.* v. *Edwards Books and Art Ltd.*[138] These decisions were both concerned with freedom of religion under section 2 (a) of the Charter which reads as follows:[139]

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

The interpretation of this fundamentally protected right in these cases is a liberal one and one that can be used by a party seeking religious status.

In *R.* v. *Big M Drug Mart,*[140] the court considered the constitutional validity of *The Lord's Day Act* again, this time with regard to section 2 (a) of the Charter. As was illustrated at the beginning of this paper, Chief Justice Dickson made it clear that the Charter was not limited to protecting rights recognized before its proclamation, but was free to recognize new rights.[141] There are, for our purposes, many other useful passages from the majority judgment of the Chief Justice.

Speaking of the way in which the impugned *Act* affected non-Christian Canadians he said:[142]

> The theological content of the legislation remains as a subtle reminder to religious minorities within the country of their differences with and alienation from, the dominant religious culture . . . The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.

On the purpose of the freedom, Chief Justice Dickson has this to say:[143]

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and manifest whatever beliefs and opinions his or her conscience dictates.

On the protection of religious non-belief: "Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice."[144]

The overall sense of the judgment, in my opinion, is of a broad interpretation of freedom of conscience and religion. The major problem facing our hypothetical applicant would be to convince the court that these were broad statements of principle which apply as much to the withholding of a privilege on the basis of belief as they do to the coercion of belief, i.e., in the holiness of Sunday. In my view, additional statements made in the *Edwards*[145] case offer further support for this argument.

Before leaving the *Big M*[146] case, however, it is also interesting to note that Wilson J. makes a strong argument to the effect that any law which purports to curtail religious freedom cannot be saved under section one:[147]

> . . . legislation cannot be regarded as embodying legitimate limits within the meaning of s.1 where the legislative purpose is precisely the purpose at which the Charter is aimed.

Thus if non-belief is protected, as is suggested by the Chief Justice's comments, in the view of Wilson J. a law distinguishing between believers and non-believers in the awarding of benefits would not be justifiable under section one.

The *Edwards*[148] case expands and bolsters the wide definition of the section 2 (a) right formulated in *Big M.*[149] In *Edwards,* the Chief Justice states that if the *Retail Business Holidays Act* were " . . . intended by the legislators to promote or prefer certain Christian faiths, it would not only be *ultra vires* but would also be inconsistent with the Charter guarantee of freedom of religion . . . "[150] Later in the judgment he adds that section 27 of the Charter is "relevant to the interpretation"[151] of section 2(a). Section 27 reads:[152]

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Chief Justice Dickson, still later in the judgment, quotes with approval from a judgment of Chief Justice Warren of the United States Supreme Court in relation to a Sunday closing law which "operated so as to make the practice of their [non-Sabbatarian competitors'] religious beliefs more expensive."[153] Dissenting, Chief Justice Warren stated:[154]

> . . . if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid.

Chief Justice Dickson also states: "The purpose of s.2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perceptions of oneself, humankind, nature, *and in some cases,* a higher or different order of being."[155] (emphasis added) Note that a belief in a higher

order of being is not necessary to garner protection. This passage suggests a test of profundity of belief very similar to that in the *Seeger* case.[156]

This is doubly interesting in light of the following pronouncement by the Chief Justice in *Videoflicks*:[157]

> In my view, state sponsored inquiries into any person's religion should be avoided wherever reasonably possible, since they expose an individual's most personal and private beliefs to public airing and testing . . .

These last two quotations suggest to me that the Chief Justice is moving very close to the kind of test proposed by Murphy J. of Australia's High Court, i.e., "You are religious if you say you are." However, he has left an opening with the phrase "where reasonably possible." It could be that where an organization is seeking a valuable benefit from the state, like exemption from taxes, an avoidance of such an enquiry could be held to be not "reasonably possible." At any rate, in my view, the Chief Justice's words are broad enough to support designation of either a polytheistic sect or a sincere ethical society as a religion.

Charter Litigation

How to Bring The Charter Into The Law of Charity

I have said that there are two ways that the issue of the definition of "religion" for the purposes of the law of charity is likely to go before the courts. Let us consider now the second of these, an appeal from a decision of Revenue Canada that one is not charitable if one does not fit within the common-law head of "advancement of religion." If our tax authorities followed *Bowman*[158] in coming to this determination, this fate could befall any established polytheistic religion like Hinduism[159] or Mahayana Buddhism.[160] However in conversation with Jane Newcombe, a senior officer in Revenue Canada's Charity Division, I was assured that such a religion would experience no problem with registration under the *Income Tax Act.* Much more likely to be refused registration would be an organization like the Washington or South Place Ethical Societies. Ms. Newcombe assures me that if there was no belief in God or gods, registration would surely be refused, regardless of the profundity of the belief in such values as love, truth, and beauty. It is interesting to note that some other established Eastern religions such as Jainism,[161] and Theravada Buddhism[162] can also be said not to be based on theistic belief.

An appeal from a decision denying registration is, by section 172 (3)(a) of the *Income Tax Act*, to the Federal Court of Appeal. Were I acting for an ethical society which had been refused I would advise an appeal, claiming that in refusing to register a trust for the society as a charity on the ground that it was not for the advancement of religion, Revenue Canada was acting in violation of sections 2(a) and 15(l) of the Charter. section 15(1) reads:

15 (1) Every individual is equal before and under the law and has a right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on . . . religion.

Although section 15 was not applied in either *Big M*[163] or *Edwards*[164] I believe its applicability is self-evident. The phrase "every individual" does not present any difficulty since the appeal could be brought in the name of a trustee.

The main argument at trial would not be based on s.15 but on the broad statements of principle enuciated by Chief Justice Dickson in *Big M*[165] and *Edwards*[166] with regard to the meaning of s. 2(a), in conjunction with the following important statement of law by McIntyre J. in *Dolphin Delivery*:[167]

> Action by the executive or administrative branches of government will generally depend upon legislation, that is statutory authority . . . The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a Charter right or freedom.

Thus I would argue in this context that if Revenue Canada found that my client was not a valid charitable trust on the basis that it was not a valid religion, then the Department must have relied for that determination on an interpretation of the common law which offends the fundamental right enshrined in s.2(a) as defined by the Chief Justice. The effect of McIntyre J.'s words, as I read them, is to compel a court to prefer Dickson C.J.'s interpretation to that of the common law to the extent that they conflict in the context of an action by the administrative branch of government. I am confident my client would succeed.

The remedy sought under s. 24(1) of the Charter would be either a declaration of my client's right to registration, *mandamus* compelling registration, or both. That these remedies are available under s. 24(1) is confirmed both by learned authors[168] and by case law.[169]

Private Litigation

However, even if our hypothetical religious trustees succeed in obtaining registration under the *Income Tax Act*,[170] they are still liable to attack by a residuary beneficiary under a will or by some other party with an interest in the trust fund if the trust should fail. This presents my client with a new problem. McIntyre J. in *Dolphin Delivery* also stated " . . . the Charter applies to the common law but not between private parties."[171] But he continues:[172]

> This is a distinct issue from the question whether the judiciary ought to develop the principles of the common law in a manner consistent with the fundamental values. The answer to this question must be in the affirmative.

My client will, of course, argue that his situation is the perfect one in which to put this strong statement of principle into effect. The common law in this area is certainly unsettled and there has never been a strong statement by an authoritative Canadian court on what the definition of "religion" is for the purpose of upholding a trust as charitable under the head of "advancement of religion". This would be, therefore, a tailor-made opportunity to "develop the principles of the common law" consistently within the fundamental freedom enshrined in s. 2(a) of the Charter, as interpreted in *R.* v. *Big M Drug Mart*[173] and *R.* v. *Edwards Books and Art Ltd.*[174]

FOOTNOTES

1. *The Constitution Act,* 1982 Part I, was proclaimed on April 17, 1982.
2. Noel Lyon, "The Teleological Mandate of the Fundamental Freedoms Guarantee: What To do With Vague But Meaningful Generalities" (1982), 4 Supreme Court L.R. 57, at 57.
3. R.S.C. 1970 App. III.
4. *Supra,* footnote 2.
5. (1985), 18 D.L.R. 321.
6. *Ibid.* at 358–359.
7. See A. Oosterhoff, *Cases and Materials on the Law of Trusts.* (2nd ed. 1983) 495–495; and D.W.M. Waters, *Law of Trusts in Canada.* (2nd ed. 1984) 550.
8. 43 Eliz. 1 C.4 (1601).
9. [1891] A.C. 531 (H.L.).
10. For example, Oosterhoff, *supra,* footnote 7, includes an excerpt from *Thorton* v. *Howe* (1862), 54 E.R. 1042 and reference to *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381.
11. *R.* v. *Big M. Drug Mart, supra,* footnote 5; *R.* v. *Videoflicks.* (1987), 71 N.R. 161 and *R.W.D.S.U.* v. *Dolphin Delivery* (1987), 71 N.R. 83.
12. Sometimes if the charitable purpose is denied, the trust fails for perpetuity as will be discussed *infra.*
13. *Income Tax Act* R.S.C. 1970 C.I-5, as amended.
14. Revenue Canada Taxation Informational Pamphlet P-135-E, "Registering Your Charity" (Sept. 1985) at 1.
15. *Ibid.*
16. *Ibid.* at 2–5.
17. *Supra,* footnote 8.
18. Oosterhoff, *supra,* footnote 7 at 495.
19. Waters, *supra,* footnote 7 at 550.

20. See Lord Macnaghten's speech in *Pemsel* as cited in Oosterhoff, *supra,* footnote 7 at 496.
21. Oosterhoff, *supra,* footnote 7 at 494.
22. *Supra,* footnote 9.
23. "Charity Law and Voluntary Organizations" (1976), *Report* of the Goodman Committee, at 8.
24. *Supra,* footnote 9 at 583.
25. Waters, *supra,* footnote 7 at 550.
26. Oosterhoff, *supra,* footnote 7 at 493.
27. *Supra,* footnote 23 at 9.
28. *Ibid.* at 8–9.
29. Waters, *supra,* footnote 7 at 581.
30. G.W. Keeton and L.A. Sheridan, *The Modern Law of Charities* (1962) at 52.
31. *Ibid.*
32. *Supra,* footnote 7 at 544.
33. *Supra,* footnote 10.
34. A decision of the Privy Council would not be binding on English courts in any event.
35. *Supra,* footnote 10 at 392.
36. Oosterhoff, *supra,* footnote 7 at 544.
37. *Supra,* footnote 10 at 396.
38. [1917] A.C. 406 (H.L.).
39. *Ibid.* at 408.
40. *Ibid.* at 449–450.
41. 29 Beav. 589 at 596 (1861), 54 E.R. 756.
42. *Supra,* footnote 38 at 451.
43. *Supra,* footnote 30.
44. *Ibid.* at 53.
45. [1980] 1 W.L.R. 1565, 3 All E.R. 918 (Ch.D.).
46. *Ibid.*
47. *Ibid.* at 1569.
48. *Ibid.* at 1570.
49. (1965), 380 U.S. 163 (U.S.S.C.).
50. (1957), 249 F.2d. 127.
51. *Supra,* footnote 45 at 1571.
52. [1957] 3 All E.R. 281 (C.A.).
53. *Ibid.* at 285.
54. *Supra,* footnote 10.
55. Oosterhoff, *supra,* footnote 7 at 546.
56. *Supra,* footnote 10 at 1043.
57. *Ibid.* at 1044.
58. *Ibid.*
59. [1983] V.R. 97 (Victoria S.C.) revd. (1983), 57 A.L.J.R. 785, 154 C.L.R. 120 (High Court).

60. Mark Darian-Smith, *"Church of The New Faith"* etc. (1983), 14 M.U.L.R. 318 and (1984), 14 M.U.L.R. 539.
61. (1983), 14 M.U.L.R. 318 at 319.
62. *Ibid.*
63. 1965 Vic. s.2(3).
64. [1970] 2 O.B. 697.
65. *Ibid.* at 707.
66. [1983] V.R. 97 at 106.
67. *Ibid.* at 108.
68. *Ibid.* at 109.
69. *Ibid.* at 111.
70. *Supra,* footnote 61 at 321.
71. *Ibid.* at 322.
72. (1979), 592 F2d 197.
73. *Supra,* footnote 49.
74. *Supra,* footnote 61 at 323.
75. *Ibid.*
76. *Ibid.* at 324.
77. (1984), 14 M.U.L.R. 539 at 542.
78. (1984), 57 A.L.J.R. 785 at 789.
79. *Supra,* footnote 72.
80. *Supra,* footnote 77 at 541.
81. *Supra,* footnote 45.
82. *Supra,* footnote 78 at 791.
83. *Supra,* footnote 72.
84. *Supra,* footnote 78 at 807.
85. *Ibid.*
86. *Supra,* footnote 72.
87. *Supra,* footnote 78 at 796.
88. *Supra,* footnote 77 at 544.
89. *Supra,* footnote 72.
90. *Supra,* footnote 49.
91. *Ibid.* at 166.
92. *Supra,* footnote 45.
93. *Supra,* footnote 59.
94. *Supra,* footnote 49 at 187.
95. *Ibid.* at 185.
96. (1975), 391 Fed. Supp. 578.
97. (1960), 367 U.S. 488.
98. *Supra,* footnote 50.
99. [1980] 1 W.L.R. 1565 at 1571

100. *Supra,* footnote 50 at 129.
101. Unreported, but see *The New York Times,* March 5, 1987, A12. (The style of cause is not given in the article.)
102. *Ibid.*
103. *Ibid.*
104. *Ibid.*
105. R. Glenn Martin, "An anti-religious religion?", *The Edmonton Sun,* March 10, 1987, p. 11. [The decision was reversed on appeal. Ed.]
106. See Oosterhoff, *supra,* footnote 7 at 545 and footnote 107 *infra.*
107. Gordon Fairweather, "The Rights of Religious Minorities" (1986), 27 *Les Cahiers de Droit 89* at 92.
108. *Supra,* footnote 59.
109. *Supra,* footnote 77 at 539.
110. *Supra,* footnote 9.
111. [1967] S.C.R. 133 at 141. See also *Scarborough Community Legal Services* v. *M.N.R.* (1985), N.R. 369 at 377-78 (F.C.A.) and *Re Orr* (1917), 40 O.L.R. 567 at 595 Ont. S.C.A.D.
112. *Supra,* footnote 16.
113. *Supra,* footnote 38.
114. *Supra,* footnote 10.
115. For *Bowman* see *Yew* v. *A.G. of B.C.* 33 B.C.R. 109 in which Lord Parker's warning against equating Christian tenets with the law was adopted and *Re Knight* [1937] O.R. 462 in which a trust was found to be not charitable because it had political objects as per Lord Parker's dicta in *Bowman.* For *Yeap Cheah Neo* see *Kennedy* v. *Kennedy* (1913), 26 O.L.R. 105 in which the *Yeap* case was cited for the proposition that a gift not charitable cannot be given in perpetuity.
116. *Supra,* footnote 10.
117. *Ibid.* at 1044.
118. [1937] O.R. 462.
119. (1917), 40 O.L.R. 567.
120. *Supra,* footnote 10.
121. (1918), 57 S.C.R. 298; 43 D.L.R. 668.
122. [1946] 1 D.L.R. 204.
123. *Ibid.* at 206.
124. *Supra,* footnote 38.
125. *Supra,* footnote 45.
126. *Supra,* footnote 26.
127. (1920), 18 O.W.N. 154.
128. *Ibid* at 155.
129. *Supra,* footnote 5.
130. (1987), 35 D.L.R. (4th) 1 (S.C.C.; 71 N.R. 161 *sub. nom R.* v. *Videoflicks).*
131. *Saumur* v. *City of Quebec* [1953] 2 S.C.R. 299.
132. *Ibid.* at 327.
133. (1970), 73 W.W.R. 644 (S.C.C.).

134. *Supra,* footnote 49.
135. *Supra,* footnote 131 at 662.
136. [1963] S.C.R. 651.
137. *Supra,* footnote 5.
138. *Supra,* footnote 130.
139. *Supra,* footnote 1.
140. *Supra,* footnote 5.
141. *Supra,* footnote 6.
142. *Supra,* footnote 5 at 354.
143. *Ibid.* at 361.
144. *Ibid.* at 362.
145. *Supra,* footnote 130.
146. *Supra,* footnote 5.
147. *Supra,* footnote 5 at 374.
148. *Supra,* footnote 130.
149. *Supra,* footnote 5.
150. *Supra,* footnote 130 at 184 (N.R.).
151. *Ibid.* at 203.
152. *Supra,* footnote 1, s. 27.
153. *Braunfeld* v. *Brown* (1961), 366 U.S. 599 at 605.
154. *Ibid.* at 606-7. Cited at 71 N.R. 206.
155. *Ibid.* at 212 (N.R.).
156. *Supra,* footnote 49.
157. *Supra,* footnote 130 at 237 (N.R.).
158. *Supra,* footnote 38.
159. W. Bingham, 1 *A History of Asia* (1974), at 135.
160. *Ibid.* at 170.
161. *Ibid.* at 142.
162. *Ibid.* at 147.
163. *Supra,* footnote 5.
164. *Supra,* footnote 130.
165. *Supra,* footnote 5.
166. *Supra,* footnote 130.
167. *R.W.S.D.S.U.* v. *Dolphin Delivery* (1987), 33 D.L.R. (4th) 174, 71 N.R. at 114 (S.C.C.).
168. See A. Anne McLellan and Bruce P. Elman, "The Enforcement of The Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1982), 21 A.L.R. 205 at 221. See also Mcleod et al 2 *The Canadian Charter of Rights* 28-106.10-28-107.
169. For mandamus see *Levesque* v. *A.G. Can.* (1985), 25 D.L.R. (4th) 184 (F.C.T.D.). For declaration see *Hoogbrain* v. *A.G.B.C.* 70 B.C.L.R. 1 (B.C.C.A.).
170. *Supra,* footnote 13.
171. *Supra,* footnote 167 at 114 (N.R.).
172. *Ibid,* at 119.
173. *Supra,* footnote 5.
174. *Supra,* footnote 130.