The Charity Law & Practice Review

JOHN PEMSEL GOES TO THE SUPREME COURT OF CANADA IN 2001: THE HISTORICAL CONTEXT IN ENGLAND[1]

E Blake Bromley[2] &
Kathryn Bromley[3]

The Scheme of the Papers

The Canadian Council of Christian Charities assigned "the role of religion in charity law: past, present and future" as the topic of the opening plenary paper of this special confere The "advancement of religion"[4] is the third head of charity in Lord Macnaghten's classification of charitable purposes in the case which has been called the "the *locus classicus* at common law",[5] *Income Tax Special Purposes Commissioners v Pemsel* ("*Pemsel*"). The issue is of current importance because of the various initiatives this year to modernize the definition of charity in Canada.[6] Many observers are concerned that either the secret agenda or the unintended result of these initiatives may be to remove religion from the definition of charity which qualifies for tax benefits.

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1 This paper was written for The Place of Religion in Modern Society Conference organized by the Canadian Council of Christian Charities held in Toronto, Ontario, on 29th September, 1999.

2 Blake Bromley, Barrister and Solicitor, Suite 790, 1500 West Georgia Street, Vancouver, BC V6G 2Z6 Tel (604) 683-7006; Fax (604) 683-5676; Email:bromley@axionet.com

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

4 [1891] AC 531 (HL) at p. 583 ("*Pemsel*").

5 *NDG Neighbourhood Association v Revenue Canada, Taxation Department*, 88 DTC 6279 (FCA) (hereafter cited as "*NDG*") at p. 6280.

6 See Blake Bromley's article *Answering the Broadbent Question: The Case for a Common Law Definition of Charity, Charity Law and Practice Review*, Vol. 6, 1999, Issue 1, p. 45 and in Estates, Trusts and Pensions Journal, 1999.

This issue was given national prominence just yesterday when Diane Francis in her column in the National Post argued that tax exemptions should no longer be granted to churches, synagogues and other religious organisations. She wrote:

> "The role of the 'church' has been taken over by the role of the state. The care, feeding, nurturing and protection of families, individuals, groups or refugees and foreign aid has been assumed by the taxpayer, not the church member. This means that taxes are the modern-day equivalent of the collection plate."[7]

We share the concern that the future holds some very real threats to the privileged position that religion currently enjoys in charity and tax law. Apart from any modernizing initiatives by activists or politicians, this is because "the advancement of religion" has never been considered in light of the fundamental freedoms and equality provisions of the *Canadian Charter of Rights and Freedoms*[8] ("*Charter*").

Due to the amount of historical and legal research required to do justice to this complex topic, we have written five separate but complementary papers to deal with the past, the present and the future. We suspect that many activists involved in the present debate in Canada will take the view that only the future merits consideration and consign the past to academic irrelevancy. While that may be convenient for certain agendas, the history of the evolution of the law of charity helps us to understand the present and contains insights as to the future. We believe that the definition of religion in the law of charity will in the future, as it has been in the past, be influenced by political considerations and the temper of the times. Further, the definition in the future, as in the past, will be determined by what Parliament has said in legislation much more than by what judges have said in the common law.

The difference in the future is that the determining legislation will not be an ordinary statute but will be the *Charter* which is part of the Constitution of Canada. Section 52(1) of the *Constitution Act, 1982* states:

> "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

The irrefutable ramification of section 52(1) is that any aspect of charity law which is found to be inconsistent with the fundamental freedoms or equality provisions in the *Charter* will be declared void. It will not matter how many statutes or decided

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7 *Financial Post*, Tuesday, 28th September 28, 1999, C3.

8 Part I of Constitution Act, 1982 ("*Charter*").

cases of the greatest authority or antiquity exist to the contrary. It is inconceivable that the debate in Parliament on a statutory definition of charity will not focus on *Charter* values when discussing "the advancement of religion". It is incontrovertible that any resulting statutory definition will be susceptible to a *Charter* challenge in the courts. Activists who oppose the privileged place of religion in charity law know that they will have their day in court as intervenors if not as applicants for charitable registration.

The leading document seeking a modern definition of charity, the Broadbent Report, takes the position that Canada should throw off the shackles of 400 years of English legal history and have Parliament legislate "what a democratic nation wants today"[9] We take courage in our significant detour into history in the extent to which the Supreme Court of Canada has turned to history in construing statutes, particularly those dealing with religion.[10] It is possible that historical analysis may be more persuasive in John Pemsel's argument before the Supreme Court than decided cases. In any event, there is value in adding a historical perspective to this issue which is so important to many ordinary Canadians.

This first paper[11] will focus on the past by examining the historical context in England. It will provide the history of the legal definition of charity up until 1891 when John Pemsel appeared in front of the House of Lords. The second paper[12] will document the adoption of English law into Canada and discuss the extent to which statutes govern the definition of charity. The third paper[13] will focus on the present and discuss the existing definition of "the advancement of religion" in the common law. The fourth paper [14] will examine the impact of the *Charter* on the legality of

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9 Titled "Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector," and issued by The Panel on Accountability and Governance in the Voluntary Sector on February 8, 1999 at p. 9, it can be found on the web at www.pagvs.com.

10 See Dickson J's judgment in *Regina v Big M Drug mart Ltd.* 1985 18 D.L.R. (4th) 321 ("Big M") at pp. 359-63 where he discusses "*The purpose of protecting freedom of conscience and religion*" as well as Sopinka J's judgment in *Adler v Ontario* 1996 140 D.L.R. (4th) 385 ("Adler") at pp. 437-441 where he discusses the "Historical Background" to the protection of minority religious rights in the negotiations leading to Confederation.

11 John Pemsel Goes to the Supreme Court of Canada in 2001: The Historical Context in England ("Pemsel SCC History").

12 John Pemsel Goes to the Supreme Court of Canada in 2001: The Impact of Canadian Statutes ("Pemsel SCC Canadian Statutes").

13 John Pemsel Goes to the Supreme Court of Canada in 2001: The Present Common Law ("Pemsel SCC Common Law").

14 John Pemsel Goes to the Supreme Court of Canada in 2001: The *Charter* Issues ("Pemsel SCC *Charter*").

religion's privileged position in the law of charity. The final paper[15] will juxtapose the liberal interpretations of religion which have developed in the United States, Australia and New Zealand against the more traditional and conservative English definition. It will consider the Canadian *Charter,* as well as the European Convention on Human Rights,[16] with a view to developing a modern definition of religion. The legal definition of religion in the future must necessarily move beyond historical conceptions of traditional worship of a monotheist god and take into account the fundamental human rights guaranteed to individuals and associations in a civil society.

Having assigned this highly technical and legally confusing topic, the conference organizers reminded us that the attendees were neither lawyers nor academics. We were told to present this paper in terms which could be understood by lay persons rather than lawyers. However, in the field of charity law, that challenge is much more than a question of speaking or writing in "plain English". The fundamental problem in understanding charity law is to understand the difference between the "popular" meaning of "charity" as opposed to its "legal" meaning.

In his dissenting judgment in *Pemsel*, Lord Chancellor Halsbury said that advancement of religion was not a charitable purpose unless it was related to the relief of poverty. *Pemsel* is the leading case in charity law precisely because the majority of judges moved beyond this narrow popular view of charity being only eleemosynary.[17] Lord Macnaghten ignored the popular view of the person in the street and held that religion could be a charitable purpose for the rich as well as the poor. While this may not seem revolutionary today, consider that four years after *Pemsel*[18] the Supreme Court of Canada held that Morrin College was not a charity "for it does not appear from the record that that seminary of learning is an eleemosynary institution".[19]

Applying the broad *Pemsel* definition to taxing statutes has tremendous financial implications for religious charities. Donors in Australia do not receive tax benefits

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15 John Pemsel Goes to the Supreme Court of Canada in 2001: International Definitions of Religion ("Pemsel SCC International Definitions").

16 Strasbourg, December 1992 which will take legal effect in England on 1st November, 2000.

17 *The Dictionary of Canadian Law* defines "eleemosyna" simply as "alms" and "eleemosynary corporation" as "a body corporate established to perpetually distribute free alms or its founder's gift". Second Edition, Carswell, 1995.

18 *Pemsel* was not considered in this case.

19 *Ross v Ross,* [1895] 25 SCR 307 at p. 331 (SCC).

for gifts to churches and religious purposes because Australia resisted adopting the *Pemsel* definition for tax purposes.[20] The legal definition of charity in Australia follows *Pemsel* and includes the advancement of religion. However, religion is not an eligible purpose in the definition used for tax deductibility for donors.

While the legal arguments in the *Pemsel* case may seem obscure and technical, this audience will be able to relate to the facts of the case. If this was 1891 and John Frederick Pemsel was in Canada, he might very well be sitting in this room this morning as a member of the Canadian Council of Christian Charities. John Pemsel was the treasurer for the Church of the United Brethren, commonly called the Moravians. In 1813, Elizabeth Mary Bates had established a charitable endowment of land from which one half of the rents were to fund "maintaining, supporting, and advancing the missionary establishments among heathen nations".[21] For 73 years these rents were paid to the Moravian Church and received full tax benefits.

The problem arose in 1886 when John Pemsel applied to the Board of Inland Revenue for a rebate of taxes in the amount of 73 pounds, 8 shillings and three pence. The Board refused the tax benefit on the basis "that the meaning of the legislature was not to be ascertained from the legal definition of the expressions actually found in the [taxing] statute, but to be gathered from the popular use of the word 'charity'.[22] John Pemsel was confronted with the worst nightmare of every church treasurer in this room — the inexplicable reversal of long standing tax policies favourable to religious charities due to the arbitrary decision of some bureaucrat to re-interpret legislation enacted decades earlier. As Church treasurer, John Pemsel's job was to convince the court that the legal meaning of charity extended beyond direct eleemosynary relief and that the endowment provided by Elizabeth Mary Bates should continue to receive tax benefits. The Moravians lost at Queen's Bench with a split decision between two judges. They won in the Court of Appeal and the government appealed to the House of Lords.

It should interest persons attending a Canadian Council of Christian Charities conference that the leading case in broadening the legal definition of charity should be about something as politically incorrect as converting the heathen without any direct social programs. Consequently, we have sought to maintain relevance to this

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20 A more complete discussion of the law of charity in Australia can be found in Blake Bromley's paper, "The Industry Commission Inquiry into Charitable Organisations in Australia: A Legal Walkabout", in the published Conference Papers of the Australian Charity at the Crossroads Conference, in Melbourne, 1994.

21 *Pemsel* at p. 541.

22 *Pemsel* at p. 574.

audience by framing these papers in the context of the issues John Frederick Pemsel would have to address if he were to bring the same case to the Supreme Court of Canada in 2001. The House of Lords was unanimous in holding that the other half of Elizabeth Mary Bates' endowment was charitable because it went to needy children of ministers and occupants of choir houses. Those "good works" can be considered relief of poverty and it is only incidental that the organisation conducting the activities is religious. The greater challenge will be to obtain a ruling in 2001 in Canada that "advancement of religion" in and of itself is charitable.

The law of charity does not make sense divorced from history. Utilizing a pure legal analysis without reference to the historical context produces a less than complete understanding of the cases. Statutes have played a far more significant role in shaping the legal definition of charity than is generally conceded. The widely accepted view that the definition of charity is firmly rooted in the common law ignores the historical role that religious statutes have played in dictating the legitimacy of specific religions in charity law. These papers will attempt to catalogue the extent to which political forces have historically resulted in legislative changes to the definition of religion. For although it will be primarily *Charter* considerations which determine whether John Pemsel succeeds in front of the Supreme Court of Canada in 2001, contemporary political forces will certainly inform the public debate on how religion should be defined in charity law or whether it should be included at all. It will be interesting to see the extent to which the historical and contemporary social contexts also figure in the Court's application of *Charter* principles.

Legal Versus Popular Meaning of Charity

The fundamental problem in understanding charity law is to understand the difference between the "popular" meaning of "charity" and its "legal" meaning. Everyone has an opinion as to what charity means. The question is to determine how the courts define charity. Lawyers traditionally begin their definition by looking back to a statute enacted in 1601, *An Acte to Redress the Misemployment of Landes, Goodes and Stockes of Money heretofore Given to Charitable Uses*[23] also know as the *Statute of Charitable Uses 1601* and commonly (and hereafter) referred to as the *Statute of Elizabeth 1601*. This statute set up commissions to redress abuses of

[23] 43 Elizabeth I, c. 4.

money given to charitable endowments. Its preamble[24] ("*Preamble*") added to charitable uses purposes which the common law or equity had never previously considered charitable. "Uses" is a technical legal term which is most simply, but not entirely accurately, understood as a "trust". The *Preamble* is frequently referred to as the starting point of the law of charity.

The conventional wisdom of the development of charity law traces a direct line between the *Preamble* and the leading case, *Pemsel*. However, it was not Lord Macnaghten, but the dissenting Lord Halsbury, who spent considerable time analysing the *Preamble*. Since the *Preamble,* the development of charity law had occurred within a legal system in which equity was distinct and separate from the common law. In light of this context, Lord Halsbury was not prepared to apply the broad *Preamble* definition of charity which had evolved in the equitable courts of chancery to a taxing statute. On the other hand, Lord Macnaghten's majority judgment broke with conventional wisdom in several ways. The *Preamble* received scant attention. Religion was held to be a charitable purpose for the rich as well as the poor. More importantly, Lord Macnaghten decided that religion was charitable in and of itself. Religion did not require an element of social activism or "good works" to attain the status of being charitable at law.

The significance of Lord Macnaghten's statement of the law with regard to advancement of religion becomes clear when his famous pronouncement on the four classifications of charity is placed in its proper context. It is a seldom mentioned, but noteworthy, fact that the most important statement of law on the definition of charity stemmed from a consideration of Christian missions without social programs aimed substantially at the conversion of the heathen. Lord Macnaghten's words in context are:

> "The Moravians are particularly zealous in missionary work. It is one of their distinguishing tenets. I think they would be surprised to learn that the substantial cause of their missionary zeal was an intention to assist the poverty of heathen tribes. How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity'

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24 The purposes listed in the *Preamble* as charitable are:

> "The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes."

> 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. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."[25]

Applying the broad legal definition to taxing statutes has tremendous financial implications for religious charities. In *Chesterman v FCT*, the High Court of Australia decided that the "sensible meaning of the word 'charitable' is its eleemosynary meaning...'Charitable' must therefore ... be understood in its 'popular' sense."[26] Isaacs, J. stated that:

> "the popular conception of charitable purposes covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief".[27]

Chesterman v FCT was decided in 1923 at a time when legal decisions in Australia could be appealed to the Judicial Committee of the Privy Council in London. On appeal the Privy Council overruled the Australian High Court[28] and re-imposed the technical Elizabethan definition of charity used in *Pemsel*. Consequently, the definition of charity in Australia follows *Pemsel* and includes the advancement of religion in general legal matters. This means that if Mary Elizabeth Bates created a perpetual trust in her will for Christian missions it would be a valid charitable trust in Australia. However, in 1926 Isaacs J. had the opportunity to rule[29] on the meaning of charity under a taxing statute, the *Income Tax Assessment Act*. Isaacs J was disdainful of "quaint Chancery decisions" which affixed "purposes quite outside

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25 *Pemsel* at p. 583.

26 [1923] 32 C.L.R. 362 at pp. 384-385 (hereinafter "*Chesterman (HCA)*").

27 *Chesterman (HCA)*, *supra*, at p. 384.

28 Chesterman v FCT, [1926] AC 128 (hereinafter "*Chesterman (PC)*").

29 Young Men's Christian Association of Melbourne v FCT [1926] 37 CLR 351 (hereinafter "*YMCA Melbourne [1926]*").

30 *YMCA Melbourne [1926]*, *supra*, at p. 359.

what any ordinary person would understand by charitable".[30] Australia therefore moved away from the rest of the common law world and did not adopt the *Pemsel* definition of charity for purposes of tax deductibility because Isaacs J. embraced the popular notion of "eleemosynary charity". The result is that if Mary Elizabeth Bates donated money in her will to fund her charitable trust, she would not receive tax benefits in Australia for her gift.

Lay persons constantly complain that the definition of charity is too complex and can only be understood by lawyers.[31] However, studying the cases on the "legal" meaning of charity leaves no doubt that the technical legal definition allows a far more generous scope of purposes which are "charitable" than does the popular conception. The courts have routinely held that the popular meaning of charity is restricted to eleemosynary charity. A historical examination of charity law reveals many decisions which suggest it has been a good thing that "the question is whether the trust is charitable in the eyes, not of a layman, but of a lawyer."[32]

Introduction to Historical Context in England

During the Middle Ages, charity functioned primarily as a branch of religion rather than as a branch of law. Charity only began to be recognized as a distinct branch of law in Tudor England.[33] Consequently, it was in the midst of the religious and political battles of this age that the body of law began to take shape. In Tudor England statutes were enacted to dictate the religious doctrines which were lawful for churches. The religious differences of the era were more political than doctrinal. The religious power struggles between Henry VIII and Rome directly affected the law of charity as did the Protestant Reformation. The monarch legislated on religious issues rather than leaving it to the theologians. This historical context suggests that the courts' traditional aversion to ruling on what is a 'good' religion stemmed as much from a desire to stay clear of political strife as from a desire to avoid doctrinal

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31 Lord Macnaghten was inclined to leave the question with lawyers, stating: 'if a gentleman of education, without legal training, were asked what is the meaning of 'a trust for charitable purposes,' I think he would most probably reply, `That sounds like a legal phrase. You had better ask a lawyer.'" *Pemsel*, at p. 584.

32 *In re Hood* [1931] 1 Ch. 245 at 243 (Ch.D.)

33 The reigns of the Tudor dynasty began with King Henry VII in 1485 and continued until the death of Queen Elizabeth I in 1603. Henry VII reigned from 1485 to 1509 followed by Henry VIII from 1509 to 1547. He was succeeded by his children Edward VI (1547-1553), Mary (1553-1558) and Elizabeth I (1558-1603).

disputes. The Supreme Court of Canada has stated that the origins of the freedom of conscience and religion guaranteed by the *Charter* can be traced to the religious struggles of post-Reformation Europe.[34] Consequently, reviewing this history is important to forming *Charter* arguments as well as to understanding charity law.

When organisations such as the Canadian Council of Christian Charities seek to understand "the role of religion in charity law" in the future, they should consult a historian before turning to a lawyer. That historian should be instructed not only to advise on the political temper of the era, but to "follow the money". Treasurers of religious organisations, like John Pemsel, need the academic discussion of political rivalries, theological disputes, economic cycles, societal attitudes and public policy concerns to be translated into pragmatic analyses of their implications to obtaining private sector funding and tax benefits. A myopic focus on technical definitions of charity may result in a surfeit of legal knowledge and a lack of appreciation of the political and fiscal issues which will shape changes in the definition of religion eligible for tax benefits in the real world in the future.

The turbulent relationship between church and state in Tudor England had tremendous financial implications for both parties. Huge amounts of money were involved when Henry VIII dissolved the monasteries and appropriated the "chantry"[35] endowments. However, Tudor England could not offer social welfare, health and educational programs without the church. Consequently, politics dictated that Parliament legislate on theological issues to suppress the Church of Rome and "establish" the Church of England. The church was the primary social unit responsible for delivering the services of the "charitable sector" at both the beginning and the end of Tudor England. The "poor laws" introduced by the last Tudor, Elizabeth I, at the end of her reign made the "Parish" the primary social unit responsible for administering this "third sector" system of social assistance and control.

Henry VIII legislated the Church of Rome out of power and created the Church of England, which functioned as an arm of the state. His daughter, Elizabeth I recognized the need to attract religious money for secular purposes. In a society which did not offer fiscal and tax benefits to donors, religion was an important factor motivating charitable gifts. The citizens with new wealth spurned her state church. Understanding the attitude of the rich Puritan merchants to both the Established

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34 See Dickson J's judgment in *Regina v Big M Drug Mart Ltd.* 1985 18 DLR (4th) 321 ("Big M") at pp. 359-63 where he discusses "*The purpose of protecting freedom of conscience and religion*".

35 Chantries were endowments for saying masses for the dead.

Church and the Crown's history of appropriating religious endowments, Elizabeth I enacted the *Statute of Elizabeth 1601*. Its purpose was to instil donor confidence by providing a regulatory mechanism to protect endowments for charitable uses from corrupt and fraudulent trustees and to keep those endowments from being applied to purposes other than those determined by the donor.

In *Gilmour v Coats,* Lord Simonds said that when determining whether or not an object is charitable "always it is primarily to the Statute of Elizabeth and not behind it that the court has looked for guidance".[36] This paper will challenge that view by looking behind the *Preamble* to examine its historical background. The reason for this is that when John Pemsel faces the Supreme Court in 2001, even the most esteemed statements of common law principles will take a back seat to the *Charter*. Any 'religious' aspect of charity law that is found to offend a fundamental right or freedom of the *Charter* will be void. While some may suggest this makes all pre-1982 case law and history irrelevant, we believe that understanding the historical context of the evolution of charity law has become even more vital since the advent of the *Charter*.

We take the position that religion was intentionally left out of the *Preamble*. The "spirit and intendment" of the *Preamble* refers to secular purposes substantially determined by the state and excludes religious purposes. However, religion is securely positioned in the modern law of charity through the decisions of the Chancery courts and through its inclusion in the classification of charitable purposes articulated by Lord Macnaghten in *Pemsel*. In our opinion, a frequently overlooked piece of legislation called the "*Mortmain Act 1736*"[37] was far more significant in shaping the definition of religion than the *Preamble*.

To ignore history is to ignore the century and a half in English law when the most common way of denying a gift to charity was to have that gift declared charitable. This "mortmain[38] period" ran from 1736 to 1891. The modern assumption that it was always beneficial for the courts to determine a specific trust charitable is at odds with the *Mortmain Act 1736*, which rendered void all testamentary gifts of land given to a charitable purpose. The *Mortmain Act* enacted during this strongly anti-clerical era with the intent of denying gifts to charity, and instead vested the property in the testator's heir-at-law or next-of-kin. Elizabeth Mary Bates obviously had good legal

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36 [1949] AC 426 (hereafter cited as "*Gilmour*"), at p. 443.

37 (1736) 9 Geo. II c. 36.

38 "Mortmain" literally means "dead hand" and refers to the fact that land held in corporations could remain there in perpetuity unlike land held by individuals which necessarily had to change hands at the time of the death of the landholder.

advice and implemented her charitable gift planning in compliance with the strict technical requirements as to witnesses and registration of deeds in the Court of Chancery. Otherwise, her endowment of land would have been void under the *Mortmain Act 1736*.

Because you are administrators of religious organisations rather than lawyers, we will assume your interest lies in the real world impact of court decisions and analyse the cases on religion on the basis of their end result, rather than their internal logic and consistency. Consider *Thornton v Howe,*[39] a case often cited (and frequently criticized) as authority for the most liberal judicial definition of religion. Sir John Romilly, the Master of the Rolls, declared that the propagation of opinions he considered "foolish or even devoid of foundation" was nonetheless a valid religious purpose. What is seldom said is that this reputedly favourable determination allowed him to declare the testamentary devise "void, by reason of the prohibition contained in the Statute of Mortmain (9 Geo. 2, c. 36)".[40] *Thornton v Howe* demonstrates the importance of being sensitive to the periods in history when to be declared charitable by the courts was a sign of stigmatization rather than approval. In this context, it is interesting to note that the Lord who introduced the Bill repealing the mortmain prohibition on testamentary gifts of land to charity into the Parliamentary Debates at the House of Lords was also one of the judges supporting Bates' charitable gift in the *Pemsel* decision.[41]

It is because of the mortmain legislation that it is not possible to understand the historical cases defining charity without looking past the words that analyze the purposes stated in the gift. The result depended on whether the gift was testamentary or *inter vivos* and on whether the subject matter of the gift was realty or personalty. It was critical whether the gift was immediate and outright, or whether the donor intended to fund an endowment in perpetuity. The result also depended on whether the beneficiary was incorporated or unincorporated; if unincorporated, it mattered if the individual(s) took the gift personally or representatively.

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39 (1862) 31 Beav. 14, 1042.

40 (1862) 31 Beav. 14, 1042 at p. 1044.

41 Parliamentary Debates, Ser. 3, Vol. 353, 1891.

The History of Religion in Charity Law prior to the *Preamble*

It is the generally accepted view that the law of charity originates with the *Preamble* to the *Statute of Elizabeth 1601*. While that may be correct with regard to secular charitable purposes, the role of religion in charity law much predates the *Preamble*. Since early in the reign of Edward I (1272 –1307) the clergy had a representative convocation which acted as a legislative council in ecclesiastical matters and enacted laws to bind the laity.[42] In political and legal theory, (but no longer in fact today) the clergy continues to be one of the three estates of the realm in England alongside the lords and the commons.[43] At the end of the Middle Ages, "bishops and abbots constitute(d) a good half of the House of Lords".[44] In the Middle Ages the very concept of charity was described as "*ad pias causas*". As Professor Gareth Jones writes:

> "Pious causes were causes which honoured God and his Church...But the canonical conception of piety also embraced gifts for the relief of distress and suffering on earth; ...".[45]

Because the interests of the church and state were so closely intertwined in the Middle Ages, religious activities had political implications. In 1360 John Wycliffe, a great forerunner of the Reformation, translated the Bible into the vernacular English and his followers distributed it among the people. Given the threat this posed to the Church in Rome, his followers, the Lollards, were seen to have "become political revolutionists as well as religious reformers".[46] During this era the Church in Rome was effectively superior to temporal law.

It was King Henry VIII who overthrew papal supremacy and subjected the church to the state. He enshrined this change through two statutes. In the first, clergy were

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42 *English Constitutional History*, by Thomas Pitt Taswell-Langmead, 8th Edition London Sweet & Maxwell Limited, 1919 at p. 232 ("Pitt").

43 Pitt at p. 233.

44 *The Constitutional History of England*, by FW Maitland, Cambridge University Press, 1926 at p. 507 ("Maitland").

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

46 Pitt at p. 393.

forbidden to make any new canons without royal assent.[47] In 1534 the *Act of Supremacy*[48] made the king the only supreme head on earth of the Church of England. Henry VIII continued his battle with the church in Rome in 1536 by dissolving 376 smaller monasteries by an Act of Parliament.[49] All of the property, both real and personal, was given to the king. In 1539 Henry VIII added insult to injury by reciting in the statute which dissolved the remaining large monasteries that the religious leaders holding this property had surrendered it "of their own free and voluntary minds, goodwills, and assents, without constraint, co-action, or compulsion"[50] to the king.

Henry VIII was not content to appropriate for his own use only the real estate assets of the church with the dissolution of the monasteries. Henry VIII went on to enact legislation[51] to appropriate the existing chantry endowments in 1545. Back in 1532 Henry VIII had a statute[52] enacted which said that subsequent endowments for "Obites perpetual, or a continual Service of a Priest for ever" (chantry endowments) "shall be utterly void, and of no Strength, Virtue, nor Effect in the law".[53] As this statute applied equally to any uses for churches and chapels, the inclusion of the repair of churches in the *Preamble* may have been intended as a reversal of this statutory provision for a very restricted purpose rather than as an inclusion of general religious purposes. Politics and economics seem to have been the driving

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47 (1533) 25 Hen. VIII, c. 19. "*An Acte for the Submission of the Clergie to the Kynges Majestie*".

48 (1534) 26 Hen. VIII, c. 1. "*An Acte concynge the Kynges Highnes to be supreme heed of the Church of Englande & to have auctoryte to refourme & redress all errours & abuses in the same*".

49 (1535) 27 Hen. VIII, c. 28. "*An Acte wherby all Relygous Monasteries given to the King, which have not Lands above two hundred Pounds by the Year*".

50 (1539) 31 Hen. VIII, c. 8 "*An Act for Dissolution of Monasteries and Abbies*".

51 (1545) 37 Hen. VIII, c. 4. "*A Bill for Colleges, Chantries Etc.*"

52 (1531-32) 23 Hen. VIII, c. 10. "*An Acte for Feoffement & assurances of Landes and Tenements made to the use of any parishe Churche Chapell or suche like*".

53 When one reads the House of Lords decision regarding Henry VIII's own will, one learns that he left a chantry endowment of land to provide priests to say masses at his tomb at specific times and to keep certain obits. As this litigation is more than three centuries after his death, this chantry endowment obviously survived these laws. *Attorney-General v The Dean and Canons of Windsor*, [1860] 8 HL Cas 369; RR Vol. 125, p. 206.

force behind Henry VIII's legislation as there is no expression of theological disapproval.

This paper will not attempt to deal with the profound charitable, educational and religious consequences of dissolving the monasteries and expropriating their assets and the chantry endowments. These statutes took away both the infrastructure and resources used to deliver social services and education by the church. When one considers this history in the light of Lord Macnaghten's four classifications of charity in *Pemsel*, one sees that Parliament used economic legislation to effectively remove the Church of Rome from the key role it had played in the advancement of education and the relief of poverty. It used doctrinal legislation to render illegal its work in the advancement of religion. There is little doubt how political charity had become; not through the advocacy of charities but through the ambitions of the politicians.

The Crown's power to appropriate chantry endowments lapsed with Henry VIII's death. His son, Edward VI, introduced the theological need to suppress "*superstition and errors in Christian Religion*" when he revived the right to expropriate chantry endowments in the *Statute of Superstitious Uses*.[54] This statute forfeited to the Crown only prior existing chantries of real estate rather than personalty. Superstitious uses are frequently referred to as being void because they are unlawful. The statute does not declare them to be unlawful but only void. However, even when the court expressly held this interpretation of the statute, it went on to say "but that statute has been considered as establishing the illegality of certain gifts".[55] The introduction of the theological concept of the superstitious use was the first instance of the law introducing a distinction between pious causes and charitable purposes. It is significant that it came from Parliament rather than the courts. Having appropriated the economic resources of the charitable sector, Parliament now sought to appropriate and secularise the philosophic tenets of charity.

While it is useful to track the various statutes which Henry VIII enacted which are relevant to defining religion and charity law, it is also important to stand back and recognise what Henry VIII was doing in constitutional law terms. The supremacy of "God's law" was being replaced by the supremacy of Parliament. In declaring himself the "Head of the Church", Henry VIII instituted a far more fundamental change than simply replacing the role of the Pope in England. The ultimate authority for law had moved to man's creation, being Parliament, and was no longer God as interpreted and expressed by his representative on earth, the Pope.

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54 (1547) 1 Edw. VI c. 14. "An Act for chantries collegiate".

55 *West v Shuttleworth*, [1835] 2 My & K. 684 at 697.

Henry VIII was followed by his son Edward VI (1547–1553) who added theological zeal to his father's essential political agenda of curbing the temporal power of the Pope in England. His sister, Mary (1553–1558) who completely re-established the power of the Church in Rome, followed his short reign. The statute of Philip and Mary[56] restored the powers taken away from the Catholics by statutes passed by Henry VIII and Edward VI. This period saw widespread persecution of Protestants. While statutes could restore legal powers, they could not restore the wealth of the monasteries and chantry endowments which had been dispersed.

The very first order of business of Elizabeth I's first parliament was to pass the *Act of Supremacy*[57] which took back from the Roman Catholic Church all the lands and powers restored by Philip and Mary. The second statute in her reign dealt with theology as she legislated the requirement of uniformly using the Book of Common Prayer in worship.[58] This audience will be able to explain to the lawyers the financial significance of her fourth statute which was "*An Act for the Restitution of the First-fruits to the Crown*".[59] Terms in that statute such as "first-fruits" and "tenths" are better understood by reading a Bible than a legal dictionary. Elizabeth I gave up the title "Head of the Church" but otherwise took legal control over the "established" Church of England. Taswell-Langmead writes:

> "Throughout her reign it was the constant policy of Elizabeth to maintain her ecclesiastical supremacy, and to enforce outward conformity with the religion established by law. (Elizabeth's own words were: 'She would suppress the papistical religion, that it should not grow; but would root out puritanism, and the favourers thereof.')...The church and the throne mutually supported each other against the advocates of civil and religious freedom, and to the heat of political contests were added the bitterness of theological hatred."[60]

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56 (1554-55) 1 & 2 Phil and Mary, c. 8. "An Acte repealing all Statutes Articles and Provisions made against the See Apostolick of Rome since the XXth yere of King Henry theight, and also for the establishment of all Spyrytuall and Ecclesiasticall Possessions and Hereditaments conveyed to the Layete".

57 (1558-59) 1 Eliz. c. 1. "An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all foreign Powers repugnant to the same".

58 (1558-59) 1 Eliz. c. 2. "An Act for the Uniformity of Common Prayer and Service in the Church, and Administration of the Sacraments".

59 (1558-59) 1 Eliz. c. 4.

60 Pitt at p. 430.

The extent to which religion became intertwined with politics[61] in Tudor England is described by Professor Crowther:

> "The Reformation brought religion into the arena of politics, and the power of persecution changed hands. Roman Catholics were now persecuted because of their allegiance to the Pope, while Puritans suffered for their opposition to the monarchy, and so the Anglican church became the sole recipient of legal favour during this political stage to the exclusion of all non-conformity."[62]

Elizabeth I's interest in religious issues was not theological but political. A. L. Rowse states that "she was essentially secular".[63] She wanted to control the religious elements which might disrupt her reign. In Rowse's words, "the Queen did not want a preaching ministry: in her experience preachers only stirred up trouble for government".[64] Elizabeth I passed three separate statutes indexed under the heading "Religion" but all having the title "*An Act to retain the Queen's Majesty's subjects in their due obedience*".[65] In truth, the "preachers" attracted their crowds because of their political message as well as their theology. The political issues were compounded by economic realities. The pragmatic problem was that while political control was vested in the established Church of England, the new wealth of the Elizabethan age was not in the hands of the established aristocracy. Increasingly, economic power was in the hands of the emerging gentry and the "principally Puritan urban aristocracy — the merchants".[66] Politicians are always much more interested in religious issues when money is involved.

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61 This is the period of history referred to by Dickson J when he discusses "*The purpose of protecting freedom of conscience and religion*" in *Regina v Big M Drug Mart Ltd.* 1985 18 DLR (4th) 321 ("Big M") at pp. 359-63.

62 *Religious Trusts - Their Development Scope and Meaning*, C E Crowther, published by George Ronald, Oxford, 1954 at p. 13 ("Crowther").

63 *The England of Elizabeth*, A L Rowse, London, MacMillan & Co. Ltd, 1951 at p. 14 ("Rowse").

64 Rowse at p. 468.

65 (1581) 23 Eliz. c. 1; (1587) 29 Eliz. c. 6; and (1592) 35 Eliz. c. 1.

66 *Philanthropy in England 1480 -1660*, W K Jordan, George Allen and Unwin Ltd., 1959 at p. 15 ("Jordan").

One of the most fascinating insights into the impact of religion on secular philanthropy for state purposes is Professor W. K. Jordan's monumental historical study *Philanthropy in England 1480 -1660* which in his words "documents, though imperfectly, one of the few great cultural revolutions in western history: the momentous shift from men's primarily religious pre-occupations to the secular concerns that have moulded the thought and institutions of the past three centuries".[67] Jordan writes:

> "The Middle Ages were acutely sensitive to the spiritual needs of mankind while displaying only scant, or ineffectual, concern with the alleviation or cure of the ills that beset the bodies of so large a mass of humanity. The mediaeval system of alms, administered principally by the monastic foundations, was at once casual and ineffective in its incidence, never seeking to do more than relieve conspicuous and abject suffering... Poverty was first systematically attacked in the sixteenth century with gifts for the outright relief of the poor and then later in our period with really massive endowments designed to eradicate its causes by a great variety of undertakings, among which the extension of educational opportunities was not the least. These efforts, so important in the development of the ethic as well as the institution of the liberal society, were implemented by Elizabethan and Jacobean legislation planned to make each parish responsible for its poor and to separate the employable from the unemployable poor. But it is clear that the constructive effort, as well as most of the funds, flowed from private endowments rather than from the mechanism contemplated by legislation... The gentry, raised up to political and economic strength by Henry VIII and Elizabeth, assumed new and heavy public burdens with grace and considerable skill. At the same time, Calvinism was in England sublimated into a sensitive social conscience that was secular in its aspirations and fruits even when the animating impulse may have been religious."[68]

Elizabeth I wanted to convert this religious money to secular purposes. Her financial needs greatly increased in the last decade of the sixteenth century due to a series of disastrous harvests and the need to continue funding the war with Spain. This resulted in the both the "Elizabethan Poor Laws" (Poor Relief Act[69]) and the first statute of

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67 Jordan at p. 16.

68 Jordan at pp. 17-18.

69 39 Eliz. I, c. 3.

charitable uses[70] being enacted in 1597. Elizabeth I recognized the potential for private charitable funds to assist in meeting the state's financial needs.

The *Statute of Elizabeth 1601*

In Elizabethan England, the charitable organisation designated as responsible to deliver social services was the parish. The parish was given the right to involuntary taxation[71] of householders to fund these services. If Elizabeth I was to attract more voluntary funds to her secular objectives, she realized the state must address the realities of the abuses and maladministration of the past, and hold out the hope of preventing such abuses in the future. Although the Elizabethan legislators knew that the donors who they must attract to the State's social objectives were primarily religious, the *Statute of Elizabet 1601* only offered to non-religious purposes the protection and remedies authorized to the commissioners it created. By the end of her reign, the economic potential of the religious sector was more important to Elizabeth I than its politics.

Elizabeth I was very astute in finding the optimum balance in juggling religion, politics and economics. The Puritans were not interested in becoming too closely associated with the temporal power of the Crown and controls which would inevitably follow for their religious activities. Within thirty years of the *Preamble* the Pilgrim Fathers would leave for America to be free from the "established church".[72] The *Statute of Elizabeth 1601* must be understood as being shaped by all the legislative initiatives, religious reformation, social upheaval and economic dislocation of the previous century. Medieval charity reflected the church's practice of charity as an expression of "pious causes". The *Preamble* marks a watershed change to try convert religious charity to predominantly the State's secular agenda for public purposes. The "advancement of religion" is neither explicitly included, nor in "the spirit and intendment" of the *Preamble*.

The *Statute of Elizabeth 1601* should be celebrated not as the classic starting point and quintessential statement of the law of charity; but as the beginning of the legal secularisation of charity. Elizabeth I set the course for the evolution of philanthropy as a voluntary partnership between the citizen and the state to fund and achieve social objectives. The *Preamble* lists the Queen as the first benefactor before referring to

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70 39 Eliz. I, c. 6.

71 It is the church's subsequent shift to "voluntary" donations in New England which gave the name "Voluntary" to the sector.

72 In the United States of America the constitutional separation of church and state would mean that churches in this new country were free from supervision and interference from the state.

"sondrie other well disposed persons". The citizen provided the motivation, methods and means and the state provided enabling legal (and later fiscal) privileges and protection from and remedies for abuses and maladministration. The secular social objectives of the state were given definition in the *Preamble* and protection in the body of the statute.

Professor Jordan finds roots for the *Preamble* which may have been more religious than secular. He points out the similarity between the wording of the fourteenth century poem, *Vision of Piers Plowman*, and the *Preamble*. In this poem troubled (and rich) merchants were counselled by Truth to gain full remission of sins and a happy death by the fruitful use of their fortunes:

> "And therewith repair hospitals, help sick people, mend bad roads, build up bridges that had been broken down, help maidens to marry or to make them nuns, find food for prisoners and poor people, put scholars to school or to some other craft, help religious orders, and ameliorate rents or taxes."[73]

The 1597 statute was replaced by the *Statute of Charitable Uses* in 1601 which adopted and improved the original procedure. The 1597 statute focused on institutions whereas the 1601 statute focused on money.[74] The *Preamble* set out the uses over which the commissioners had jurisdiction. However, the statute itself excluded some institutions included in the *Preamble*. "Schooles of Learninge, Free Schooles and Schollers in Universities" are included in the *Preamble* but "any Colledge Hall or Howse of Learning within the Universities of Oxforde or Cambridge" and "the Colledges of Westminster Eaton or Winchester" are explicitly excluded in the statute itself. The statute also explicitly excludes "any Cathedrall or Collegiate Churche within this Realme" from the jurisdiction of the Commissioners even though religion is not mentioned in the *Preamble*. It is more reasonable to assume that these bodies did not want to be covered by the statute than that they are not charitable. Churches and universities are "exempt charities" under the *Charities Act 1993*[75] and are exempt from the jurisdiction of the Charity Commissioners for England and Wales even today. The repair of churches is included in the 1601

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73 Jordan, at p. 112.

74 The 1597 Preamble begins "Whereas divers Colledges Hospitalles Almes Houses and other Places..." while the 1601 *Preamble* begins "Whereas Landes Tenementes Rentes Annuities Profittes Hereditamentes, Goodes Chattels Money and Stockes of Money...".

75 5 Statutes, 866, Schedule 2.

Preamble[76] not because religion is charitable but because the financial burden for repairing churches was imposed by law on the parish.

The exclusion of religion from the *Preamble* does not mean that religion was not charitable at law. Uses which were not in the statute could still be charitable at law. It is our opinion that donors and religious activists did not want religious uses to be subject to the statute any more than did Elizabeth I and Parliament. Having witnessed the Tudor years in which statutes were regularly enacted changing matters of religious doctrine, they did not want a future which would repeat the pattern of the legislative favours granted by Edward VI being repealed by Mary and then restored by Elizabeth I. They did not want some future Henry VIII dissolving monasteries and appropriating their assets. They worried that some legitimate religious purpose could be voided as a superstitious use. Given that any religious purpose other than the "established Church" was illegal, there was little reason for the government to include religion within the uses protected by the *Statute of Elizabeth 1601*. Modern courts stay away from determining which religious doctrines are correct. It is doubtful that Commissioners in the charged sectarian environment of 1601 would have wanted such a responsibility. Elizabeth I legislated on matters of religious doctrine, such as masses, and she would not want to give jurisdiction in such matters to the commissioners.

While religion was not within the jurisdiction of the Commissioners, two out of the five Commissioners in a particular county had to be the Bishop of the diocese and his Chancellor. A person could not be a commissioner if he was "an excommunicate, an outlaw or a felon". However, an outlaw or felon whose conviction was reversed before taking the commission could serve; whereas an excommunicate was always disabled, even if afterwards absolved.[77] The efficient and effective operation of the Commission was dependent upon the co-operation of the churchwardens and officers of the parish. Consequently, while religion was not listed in the *Preamble*, the church was integral to the operation of the statute.

Toleration Statutes and the Mortmain Period (1736-1891)

It is very difficult to track the evolution of the law of charity for the two centuries after the *Preamble*. For nearly two centuries the courts of equity aggressively protected trusts for charitable purposes. However, with the passage of a statute, the

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76 The 1597 Preamble does not include churches but includes the repair of highways, bridges and seabanks.

77 Jones at p. 40.

Mortmain Act 1736,[78] the historic generosity of the courts of equity to charity was reversed. This statute declared void any devise of land to charity and instead vested the land in the testator's heir-at-law or next-of-kin. This statute only applied to land so it is necessary to carefully read the cases to determine whether the property being litigated was realty or personalty. In our opinion it is important to read all of the cases between 1736 and 1891 looking at the results as well as the legal principles if one is to try to understand the evolution of the law of charity.

In order to understand the definition of religion as a particular branch of the law of charity, it is necessary to consider the toleration statutes. Among religious institutions, full legal rights were accorded only to the Church of England and its members. Christians who did not hold to the uniform beliefs of the Church of England were considered "Dissenters" and were subject to various degrees of discrimination. Elizabeth I was so opposed to citizens holding contrary religious beliefs that she legislated penal sanctions for offenders.[79] Her attitude towards Roman Catholics[80] can be ascertained by the Preamble to "*An Act for restraining Popish Recusants to some certain places of abode*"[81] which reads as follows:

> "For the better discovering and avoiding of such traiterous and most dangerous conspiracies and attempts as are daily devised and practised against our most gracious Sovereign lade the Queen's majesty and the happy estate of this common weal, by sundry wicked and seditious persons, who terming themselves catholicks, and being indeed spies and intelligencers, not only for her Majesty's foreign enemies, but also for rebellious and traiterous subjects born within her Highness realms and dominions, and hiding their most detestable and devilish purposes under a false pretext of religion and conscience, do secretly wander and shift from place to place within this realm, to corrupt and seduce her Majesty's subjects, and to stir them to sedition and rebellion".

Religious intolerance legislated into law could only be undone by legislation which legalised toleration. The law of charity on religion was dictated by and changed in accordance with this tolerance legislation.

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78 1736 (9 Geo. II), c. 36.

79 See statutes such as (1581) 23 Eliz. c. 1; (1587) 29 Eliz. c. 6; and (1592) 35 Eliz. c. 1.

80 Elizabeth I had a separate statute directed specifically against Jesuits called "*An Act against Jesuits, seminary priests, and other such like disobedient persons*" (1585) 27 Eliz. c. 2.

81 (1592) 35 Eliz. c. 2.

While there was a growing toleration for a diversity of religions, the eighteenth century was a period in England when there was a virulent backlash against the philanthropic forces unleashed in the Elizabethan era. Jordan's historical study was based upon the testamentary bequests of wills "made in the full contemplation of death, and they were ordinarily drawn in the immediate presence of death".[82] By protecting the testamentary charitable trust, Elizabeth I succeeded in her objective of unleashing private wealth for public purposes. The seventeenth century saw an unprecedented outpouring of testamentary gifts to charitable causes. These charitable gifts, however, came at the economic expense of the heirs-at-law. The children sought to protect their inheritance of the family wealth so they could maintain the comforts of life enjoyed by the previous generation. The pendulum swung against charity and the eighteenth century witnessed the passage of family wealth preservation legislation under the guise of the *Mortmain Act 1736.*

The flavour of this statute is understood by reading its preamble, which says:

> "Whereas gifts or alienations of lands, tenements or hereditements, in Mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this publick mischeif has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called Charitable uses, to take place after their deaths, to the disherision of their lawful heirs."

Although referred to as the *Mortmain Act 1736,* this title[83] is somewhat deceptive as this legislation was not a true successor to the earlier mortmain legislation. From as early as the *Magna Carta*[84] in 1215, statutes had sought to prevent the "dead hand" of corporations holding land in perpetuity. The *De Viris Religiosis* statute[85] forbade gifts or sales of land to religious houses without royal licence. The earlier mortmain legislation was aimed solely at religious houses. It was intended to stop their increasing acquisition of land because religious houses did not pay normal taxes and dues to the king and feudal lords. Mortmain legislation applied to corporations

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82 Jordan at p. 16.

83 The statute is headed "An Act to restrain the disposition of lands, whereby the same become unalienable". The heading of the statute which repealed and substantially re-enacted it is more accurate: "An Act to consolidate and amend the Law relating to Mortmain and to disposition of Land for Charitable Uses" 1888 (51 & 52 Vict.), c. 42.

84 (1215), 17 John 39 and 43.

85 (1279) 7 Edw. I, stat. 2. "*Who shall take the forfeiture of lands given in mortmain*".

because religious houses were considered corporations. This is the reason why in reading charity cases it is important to distinguish between whether the recipient was a corporation or not. It was not until 1391[86] that mortmain legislation extended to secular corporations. The 1391 legislation caught land held in trust for corporations as well as legal conveyances. Henry VIII cited mortmain as one of the reasons for his legislation[87] forbidding the funding of chantry endowments. While the *Mortmain Act 1736* used the same name as the earlier legislation, it was substantially different in that it applied to gifts for all charitable uses irrespective of whether the recipient was incorporated or not. It is important to remember that until very modern times almost all charities were trusts so were not incorporated. The 1736 legislation applied to secular charitable purposes also.

This legislation was necessarily binding on the courts. However, the historical evidence indicates this legislation was enthusiastically enforced by the courts. Professor Gareth Jones said that the "legal evidence, at least, suggests that an influential segment of the community, the judiciary and legal profession, remained suspicious of the worth of charity and resentful of the death-bed gift which disinherited the testator's heir-at-law and next-of-kin".[88] Lord Hardwicke assessed his role as a judge in charity cases was "to do justice to all and not to oppress any man for the sake of charity".[89]

The *Mortmain Act 1736* interacted with the tolerance legislation to shape the evolution of the law of charity. The first tolerance statute was the *Toleration Act* of 1688[90] which gave Protestant Dissenters some relief from the criminalization of their religious beliefs. After the *Toleration Act*, nonconformist Protestant religions which believed in the Trinity were charitable; but it excluded Roman Catholics and Jews. It is important to note that the legislation was tied to very specific theological doctrines and not just religion generally.

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86 (1391) 15 Ric. II, c. 5. "*Assurance of lands to certain places, persons, and uses, shall be adjudged Mortmain*".

87 (1531-32) 23 Hen. VIII c.10. "An Acte for Feoffement & assurances of Landes and Tenements made to the use of any parishe Churche Chapell or suche like".

88 Jones at p. 107.

89 *Attorney General v Lord Gower* [1736] 2 Eq. Cas Abr. 195.

90 1688 (1 Will & Mary), c. 18. "An Act for exempting their Majesties protestant subjects, dissenting from the church of England, from the penalties of certain laws".

The practical impact of this legislation can be discerned by looking at the case of *Attorney-General v Baxter.*[91] By a will in 1676 the testator had left 600 pounds (personalty) to be divided among 60 pious ministers ejected from their established churches because of their theological non-conformity. Decided in 1684, the court held the charitable use void and decreed that the money be paid into court to be used to maintain an established chaplain. The money was still in court after the passing of the *Toleration Act 1688* and so the 600 pounds was paid out to 60 non-conforming ministers pursuant to the terms of the will.

The *Unitarian Relief Act, 1813*[92] removed the theological commitment to the Trinity. The first *Roman Catholic Relief Act* was in 1791.[93] It may be significant that this statute immediately followed the Imperial statute[94] which divided Quebec into Upper Canada and Lower Canada and accorded the Roman Catholic church in Canada substantial rights and economic resources. George III had given His Majesty's subjects in Quebec the right to "the free exercise of the religion of the church of Rome"[95] back in 1774. The second *Roman Catholic Relief Act* was in 1829[96] but only the final statute in 1832[97] enabled Roman Catholics to claim charitable status as a lawful religion. Jews had to wait until 1846 and the enactment of the *Religious Disabilities Act*[98] before achieving legal recognition in charity law. This was only

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91 (1684), 1 Vern. 248.

92 1813 (53 Geo. III), c. 160. "An Act to relieve Persons who impugn the Doctrine of the Holy Trinity from certain Penalties".

93 (1791) 31 Geo. III, c. 32. "An Act to relieve, upon Conditions, and under Restrictions, the Persons therein described, from certain Penalties and Disabilities to which Papists, or Persons professing the Popish Religion, are by Law subject".

94 (1791) 31 Geo. III, c.31.

95 (1774) 14 Geo. III, c. 83, s. 5. "An Act for making more effectual provision for the government of the province of Quebec in North America"

96 (1829) 10 Geo. IV, c. 7. "An Act for the Relief of His Majesty's Roman Catholic Subjects"

97 (1832) 2 & 3 Will. IV, c. 115. "An Act for the better securing the Charitable Donations and Bequests of His Majesty's Subjects in Great Britain professing the Roman Catholic Religion".

98 (1846) 9 & 10 Vict. C. 59. "An Act to relieve Her Majesty's Subjects from certain Penalties and Disabilities in regard to Religious Opinions".

two years after the Protestant Dissenters who had to wait until the *Nonconformist Chapels Act 1844*.[99]

Professor Gareth Jones writes that the *Mortmain Act 1736* "was inspired by a fear and hatred of the Church and ecclesiastical charities, by a contempt for the 'vainglorious' ambitions of charitably minded testators and by a desire to ensure that the heir-at-law should enjoy some sort of natural right to succeed after his [ancestor's] death".[100] Byles, J. in the House of Lords described the purpose of the legislation as follows:

> "The object of the Act 9 Geo. 2, c. 236, s.2 was to check alienations of land to charitable uses, by enacting that the gift shall be at the personal expense of the donor himself, and not merely of those who are to come after him; for men are not so prone to generosity at their own expense as at the expense of others."[101]

The Lord Chancellor, Lord Campbell, added his view that "the statute does indicate a great anxiety to guard 'languishing and dying persons' from the attempts of those around them to induce them to make 'improvident alienations and dispositions to the disherison of their lawful heirs'."[102] Consequently, the statute did not include *inter-vivos* gifts. If a gift of land to charity was made by deed executed in the presence of two or more witnesses at least twelve months before the death of the transferor and enrolled in the High Court of Chancery within six months of execution, it was a valid gift.

If one is to fully appreciate some of the ironies of legal history, it is necessary not only to pay attention to the mortmain legislation but also to track the development of the tolerance legislation. Consider the case of *West v Shuttleworth*[103] in which the testatrix gave a total of 90 pounds and 5 shillings in cash to several Roman Catholic priests to offer prayers and masses after her death. The residue went "to promote the knowledge of the Catholic Christian religion among the poor and ignorant

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99 1844 (7 & 8 Vict.), c. 45. "An Act for the Regulation of Suits relating to Meeting Houses and other Property held for religious Purposes by Persons dissenting from the United Church of England and Ireland".

100 Jones at p. 107.

101 *Jeffries v Alexander* [1860] VIII HL Cas 594 at 628.

102 *Jeffries v Alexander* [1860] VIII HL Cas 594 at 646.

103 *West v Shuttleworth,* [1835] 2 My & K. 684 at 697.

inhabitants" of York. The court considered the residue first and found it a valid gift in law because of the 1832 statute[104] granting legal recognition to Roman Catholics. The judge then made it clear what his personal views were by, in what has become a leading decision on the issue, declaring the bequests for masses void as being illegal under the equity of Edward VI's *Statute of Superstitious Uses*.[105] Invoking this statute meant that the gift of 90 pounds was void. Invoking William IV's statute meant that the residue gift was charitable. However, because of the operation of the *Mortmain Act 1736*, this charitable gift was void to the extent it came from realty. Since 2479 pounds of the estate came from realty and only 434 pounds from pure personalty, the result was that the heirs-at-law received 2569 pounds and religion received only 344 pounds. There are no church treasurers in this room who would like that result.

It is important to recognise the extent to which the result of denying the testator's intention to make a charitable gift depended upon the court's willingness to expand the definition of religion. Clearly, religion was a charitable use or it would not be caught by the statute. In the overwhelming majority of cases, the courts' efforts to expand the definition of charity served to defeat the testamentary gift of land. The land was usually far more valuable than the personalty. Until statutory amendments in 1891, mortmain applied to "any estate or interest in land". This was interpreted to include all gifts connected with land or in which the funds were derived from the sale of land. Consequently we find gifts of "impure personalty" or "personalty savouring of realty" being caught by "mortmain" legislation even though the land was expressly delivered from the "dead hand" by the conversion to personalty. Relatives tried to extend mortmain coverage to life assurance policies because the company invested in real estate, but the Master of the Rolls said that was going too far as the consequence would catch any debt owing by any person who has real estate as the payment might come out of the disposition of the land.[106] Since this legislation was rooted in the passionate anti-clericalism of Walpole's England, no aspect of charity law was more profoundly impacted than the definition of religion.

During this century and a half period of mortmain legislation, it is necessary to have a degree of intellectual dyslexia to understand charity law. In *Thornton v Howe*[107] Sir

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104 (1832) 2 & 3 Will. IV, c. 115. "An Act for the better securing the Charitable Donations and Bequests of His Majesty's Subjects in Great Britain professing the Roman Catholic Religion".

105 (1547) 1 Edw. VI c. 14. "*An Act for chantries collegiate*".

106 *March v Attorney-General* [1842] Beaven's Reports Vol. 5 433.

107 (1862) 31 Beav. 14, 1042.

John Romilly found a testamentary trust "to propagate the sacred writings of Joanna Southcote" to be charitable in an estate which had no personalty but only realty. In *Browne v Yeall*[108] the bequest was entirely personalty so was not subject to mortmain legislation. Consequently, the gift for disseminating such books as might promote the interests of virtue, religion and the happiness of mankind was defeated not by holding it charitable, but by saying it failed for uncertainty. One wonders if the bequest in *Gwynn v Cardon*[109] for "a legacy to the African Society, for acquiring information in the interior of Africa to contribute to raise the degraded state of society in that part of the world" would have been found "charitable" if the gift had been realty rather than a sum of money. Instead, the gift was defeated by declaring it void for being expressed in a vague way.

The mortmain cases were almost always decided to the detriment of the religious beneficiary. There is one notable exception which needs to be examined as it is almost always cited in cases deciding the need for "public benefit" in religious purposes. In the leading case of *Cocks v. Manners* the court was faced with the claim by Mr Manners that the testamentary gifts of his deceased wife to religious charities were void under the mortmain legislation and he was entitled to all of the residue resulting from land sales for his own personal use and benefit. Half of the residue went to two Catholic Chapels and he clearly was entitled to half the realty residue given to them. One quarter went to the Sisters of Saint Paul at Selley Oak and Sir John Wickens, VC found this to be a good charitable gift without any reference to the *Preamble*. He did, however, discuss the *Preamble* in finding that the Dominican convent at Carisbrook was "not only not within the words of the statute, but probably, and without reference to the faith professed, one of the last gifts which the Legislature which passed the Act would have thought of including in it".[110] He said that religious purposes are only charitable when there is a direct or indirect public benefit. The Dominican convent was not charitable because the devotees were only sanctifying their own souls by prayer and pious contemplation. The result of holding that the Dominican convent was not charitable was that it received one quarter of the realty and impure realty worth 26,237 pounds. The other charities each only received one quarter of the pure personalty worth 405 pounds.

Applying an anti-clerical mortmain analysis to the cases during this time period helps one to understand some of the more bizarre decisions on the definition of

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108 (1791) 7 Ves. 50 n.

109 Unreported but cited in Romilly's argument in *Morice v Bishop of Durham* (1805) 10 Ves. 522 at 533.

110 (1871) LR 12 Eq. 574 at p.585.

religion. What is far more difficult is to determine the subtle impact on the "public benefit" component of the definition of charity. It is easy to discern the anti-clerical impact of mortmain legislation when the court finds a public benefit and consequent charitable use in *Grieves v Case*[111] because "of the benefit the congregations were meant to derive from the preaching of their teachers". While not anti-clerical, one wonders if Lord Camden's motivation was any less anti-charity when in 1767 he defined a charitable gift in *Jones v Williams* as:

> "a gift to a general public use, which extends to the poor as well as the rich [of which there are] many instances in the statute of 43 Eliz. carrying this idea, as for building bridges".[112]

The irony is that the legal heritage of a century and a half of using a broad definition of charity to defeat testamentary gifts of land under mortmain legislation meant that when that legislation was avoided, as Elizabeth Mary Bates succeeded in doing, the definition had much expanded from the *Preamble*. Consequently, Lord Halsbury, LC in *Pemsel* states: "In *Jones v Williams* 'charity' is defined to be 'a general public use'."[113] Lord Halsbury does not dispute the broad definition of charity in the Court of Chancery. Rather, his argument is that charity should be defined differently for purposes of a taxing statute than it was in the *Statute of Elizabeth 1601* which was a statute to prevent abuses involving fraud, breach of trust and negligence.

Given that the courts had been enforcing the mortmain legislation primarily to the detriment of religious charities, it cannot be argued that religion was not an integral component of the legal definition of charity at the time *Pemsel* was decided. There can be no doubt that religious purposes were charitable at law or the *Mortmain Act 1736* would not have applied. Nor can it be argued that religion was caught by the mortmain legislation by any other legal term than "charitable". The *Statute of Elizabeth 1601* in its body used the term "charitable and godlie uses" and the 1597 statute used the terms "godly and charitable purposes" and "good godly and charitable uses". The *Mortmain Act 1736*,[114] however, only used the term "charitable uses".

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111 [1792] 4 Bro. CC 67, at p. 70.

112 *Jones v Williams* [1767] Ambl. 651, at p. 652.

113 *Pemsel* at pp. 544-545.

114 1736 (9 Geo. II), c. 36.

The Mortmain Act 1736 was repealed and substantially re-enacted in the *Mortmain and Charitable Uses Act 1888*.[115] John Pemsel appeared in the Court of Appeal in 1888. In his judgment in favour of *Pemsel*, Fry L.J. refers to the fact that the *Mortmain Act 1736*, had been partly repealed that year.[116] However, it was not until the *Mortmain and Charitable Uses Act 1891*,[117] was passed that the mortmain legislation was amended to allow the disposition of land to or for the benefit of any charitable use by will. Until the passage of that statute this body of legislation effectively functioned as anti-charity legislation rather than as mortmain legislation. This legislation is not mentioned in the House of Lords decision in *Pemsel*. However, it was Lord Herschell, one of the majority judges in *Pemsel,* who introduced the Bill into the House of Lords on May 29, 1891.[118] He not only carried much of the debate[119] but introduced the amendment[120] to, for the first time, give the power to order the sale of charity lands to the Charity Commissioners rather than the Court of Chancery. Lord Macnaghten did not participate in Hansard debates but Lord Halsbury did. Many charities would silently applaud the contribution of Lord Colchester who said:

> "My noble and learned Friend [Lord Herschell] will, I trust, allow me to remark that having, as I believe, carefully followed him in his remarks in introducing the Bill on that occasion, I do not understand that he has himself been able to find any principle which underlies the legislation dealing with these bequests in recent times. He said himself, I think, that it was very difficult to say what the principle was, and, for my own part, I will venture to say that it is impossible to find in it one single ray of common sense. If you refer back to remote times, I can quite understand that in periods now past there was a reasonable suspicion of vast accumulations of land from death-bed donations obtained by the clergy; but the period of those

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115 1888 (51 & 52 Vict.), c. 42. "*An Act to consolidate and amend the Law relating to Mortmain and to disposition of Land for Charitable Uses*".

116 *The Queen on the Prosecution of J.F. Pemsel v the Commissioners of Income Tax* [1888] 22 QBD 296 (CA) footnote on p. 312.

117 Mortmain and Charitable Uses Act 1891, 54 & 55 Vict., c. 73, section 5.

118 Parliamentary Debates, Ser. 3, Vol. 353, 1891.

119 One of the great lines of Lord Herschell was "Except to afford food for lawyers, it was difficult to see what advantage there is in retaining distinctions such as these." Parliamentary Debates, Ser. 3, Vol. 355, 18th June, 1891.

120 Parliamentary Debates, Ser. 3, Vol. 355 at 321, 3rd July, 1891.

> donations may be described as a dead past, and there is not the slightest reason why that suspicion should have anything to do with the legislation of the present day."[121]

The legislation passed in the House of Lords on July 14, 1891. *Pemsel* was decided in the House of Lords on July 20. It is interesting to speculate what influence the debate of this legislation had on the *Pemsel* decision in the House of Lords. We consider it significant that the end of the mortmain era came within days of the start of the *Pemsel* era.

The mortmain period can generally be considered to end in 1891. However, *In re Delaney*,[122] is an example of a case decided as late as 1902 which invoked mortmain legislation to declare void testamentary charitable gifts. This was because the testator died in 1886 and his wife enjoyed a life interest until her death in 1901.

Reading the mortmain cases and reflecting upon the policy behind the legislation may even help one understand the anomalous law of charity with regard to the "poor relations" cases. Charity law has allowed trusts for poor relations to be charitable even though they do not benefit a broad section of the community and therefore fail the public benefit test. In the House of Lords, Lord Cross of Chelsea, said:

> "The status of some of the 'poor relations' trusts as valid charitable trusts was recognised more than 200 years ago and a few of those then recognised are still being administered as charities today. In *In re Compton* Lord Greene MR said, at p. 139, that it was 'quite impossible' for the Court of Appeal to overrule such old decisions and in *Oppenheim* [1951] AC 297 [Lord Simonds] in speaking of them remarked, at p. 309, on the unwisdom of casting doubt on 'decisions of respectable antiquity in order to introduce a greater harmony into the law of charity as a whole'."[123]

In our opinion, the mortmain cases should be understood as defeating charity in order to preserve the family wealth of rich landowners into the next generation. If some personalty does end up in a charitable trust, it seems quite consistent for the courts to allow crumbs to fall to poor relations. While this may be an anomaly from a public benefit analysis, it is an analogy from the perspective of the policy of the

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121 Parliamentary Debates, Ser. 3, Vol. 355 at 316, 3rd July, 1891.

122 [1902] 2 Ch 642 (Ch.D.).

123 *Dingle v Turner* [1972] AC 601 (HL) at p. 622 ("*Dingle v Turner*").

mortmain legislation. It also may explain why the courts have not extended the poor relations anomaly to "poor employees".[124]

Conclusion

It is somewhat ironic that when John Pemsel appears before the Supreme Court of Canada in 2001, his greatest fear will be that the Court might act as Lord Macnaghten did in 1891 by foregoing the principle of making modest incremental changes to the common law and substantially redefining charity. Most likely, the litigation will yield a split court decision. There will be considerable pressure to find that something as politically incorrect as "maintaining, supporting, and advancing the missionary establishments among heathen nations" is not charitable. Although missionary work is clearly the "advancement" of religion, proselytising without actively engaging in "good works" will seem out of step with the age. To date, the *Charter* has been invoked as a means of protecting the rights of minority religions rather than expanding the privileges of the religious majority. Minority religions are an important component of multi-culturalism in Canada. The issue which people will find threatening is a religion's commitment to converting others.

While some of the judges may want to protect the "legal" privileges historically extended to religion, the Court will be troubled by the extent to which tax benefits implicate the state in matters of religion. As Lord Bramwell stated in his dissenting decision in *Pemsel*:

> "the State will be a subscriber of 17 pounds a year to supporting, maintaining, and subsidising 'the missionary establishment among heathen nations of the Protestant Episcopal Church known by the name of the Unitas Fratrum, or United Brethren'."[125]

This paper has not articulated John Pemsel's legal arguments related to tax benefits.[126] However, there is no doubt that tax benefits are the only substantial advantage gained by a church being designated as a registered charity. Historically, charity cases dealt almost exclusively with testamentary gifts of perpetual endowments, and so were governed by trust law. In Canada today, however, almost all charities are created as corporations rather than trusts. Thus the other benefits

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124 See the Supreme Court of Canada decision *In re Cox* [1953] 1 DL. 577 which was appealed to the Privy Council [1955] 2 All ER 550 (PC).

125 *Pemsel* at p. 568.

126 Tax issues will be dealt with in Pemsel SCC Common Law.

historically associated with charity status, such as the ability of a trust to exist in perpetuity, have become substantially irrelevant. Corporations enjoy the benefits of perpetual existence whether or not they are charitable at law. This means that the issues causing organisations to seek registered charity status from Revenue Canada Charities Division have changed. Today, applicants are seeking to raise funds in the future from the public with the assistance of tax benefits which flow from donations to registered charities. At a pragmatic level, this is very different from applicants seeking tax protection on income earned from an endowment already funded by a deceased donor such as Mary Elizabeth Bates.

It is important to remember that at a broad policy level the conferral of tax benefits is a political question. If the issue is framed in the words of Lord Bramwell, John Pemsel will be in very real trouble. His challenge will be to appeal to the secular Elizabethan instincts of politicians who see how much money the religious community contributes to the social and educational needs of Canadian society. If our understanding of the economic and political environment in which Parliament enacted the *Statute of Elizabeth 1601* is correct, it suggests that politicians will turn a blind eye to narrow sectarian concerns if that is the price of achieving economic support for secular social programs. Politicians face the reality of needing broad public support in order to be re-elected. Judges of the Supreme Court, however, face no such pressures in interpreting the *Charter*. The questions are the extent to which they will consider the significant social advantages of preserving religion as a charitable purpose, and whether they will frame the issues in a way which will enable John Pemsel to succeed.

John Pemsel should not confine his fight to the court battle. History demonstrates that religious issues are vitally important to politicians. This is not because of theology or doctrines but because of financial and political power. Henry VIII moved against the Roman Catholic Church because of the political problems caused by his citizens' allegiance to the Pope. He appropriated the chantry endowments and monasteries because of the financial benefit they offered him. The chantry endowment set up in accordance with Henry VIII's own will was funded by Edward VI with lands, in the words of Lord Carnworth, "chiefly, if not entirely, [out of] the possessions of suppressed ecclesiastical bodies".[127] Elizabeth I coveted the wealth of the religious community as much as her father did. However, she accessed it by crafting favourable legislation so that it was given voluntarily rather than taken through taxation or expropriation. The secular social objectives of the state were given definition in the *Preamble* and protection in the body of the statute. The results as documented by Jordan were spectacular:

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127 *Attorney-General v The Dean and Canons of Windsor* [1860] 8 L. Cas 369 at 412; RR Vol.125 p. 206 at p. 223.

> "... in the span of two generations Protestantism had in fact created in England a new social order that in terms of effective charitable giving had outstripped by far the whole of the charitable accumulation of the medieval past."[128]

Economic power was also a consideration in the various toleration statutes. The statute which gave Roman Catholics the legal right to claim charitable status as a lawful religion was called "*An Act for the better securing the Charitable Donations and Bequests of His Majesty's Subjects in Great Britain professing the Roman Catholic Religion*".[129] Even the *Mortmain Act 1736* acknowledged the economic significance of primarily religious donors as Parliament sought to curtail the testamentary gifts of land.

In the Middle Ages, the concept of "pious causes" integrated both the spiritual and temporal aspects of charity. In the popular view of charity, the church was identified with all of the first three *Pemsel* heads. Tudor Parliaments enacted statutes dealing with religious doctrines, such as the "*Statute of Superstitious Uses*", which introduced a legal distinction between pious causes and charitable purposes. The *Preamble* gave definition to the secularisation of the legal concept of charity. Its agenda was set by the state. *Preamble* charity was not religious and was no longer exclusively concerned with provision for the poor. Unlike the church, the state is as concerned with finding private funds for repairing bridges and highways as providing for impotent and poor people. The *Preamble* implicitly introduced the concept of public benefit into the law of charity as a primarily secular concept which sought to align charitable purposes with state purposes. Religious purposes were left out of the *Preamble* and it effectively introduced a legal distinction between charitable purposes and religious purposes. Religious purposes were on their way to being confined to spiritual issues because temporal good works were now charitable rather than religious. The *Preamble* also marked the beginning of the distinction between the legal and popular meaning of charity.

During the mortmain period, the courts generally followed the anti-charity policy implicit in the *Mortmain Act 1736*.[130] In an anti-clerical age, the court in *West v Shuttleworth*[131] invoked the "equity" of the *Statute of Superstitious Uses* to declare bequests for masses void as being illegal even though the statute did not go that far.

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128 Jordan at p. 230.

129 (1832) 2 & 3 Will. IV, c. 115.

130 1736 (9 Geo. II), c. 36.

131 [1835] 2 My & K. 684 at 697.

It was during the same period that the court in *Cocks v Manners*[132] applied the secular concept of public benefit to religious purposes and held that they were only charitable at law when there is a direct or indirect public benefit. By holding that a trust to convert the heathen without any good works was charitable, the House of Lords in *Pemsel* implicitly took the view that religion in and of itself was inherently beneficial. Some might argue that it also restricted the "public benefit" test for religion to a requirement that the activity be "public".

Since *Pemsel,* the primary growth in the legal definition of charity has been under the fourth head. This head of "other purposes beneficial to the community" clearly implies a requirement of public benefit. The Pemsel SCC Common Law paper will discuss the extent to which this resulted in charitable purposes expanding to reflect the cultural and social agendas of the individual rather than the state. While entirely secular, it is not antagonistic to religion. It has expanded charitable purposes phenomenally and liberated them from the restricted agendas of both the church and the state. The question which Canadians must debate is the extent to which the current efforts by intermediary organisations and governments to create a modern definition of charity will result in giving predominance to the public benefit agenda of the state and curbing the creative agenda of the individual and civil associations.

Elizabeth I would admire the Report of the Joint Tables released to the public ten days ago as "A Government of Canada / Voluntary Sector Joint Initiative".[133] It discusses "the new alliance between the federal government and the voluntary sector".[134] Like the *Preamble*, it wants to introduce into the law of charity "purposes, some of which are not charitable according to any ordinary definition of the word".[135] Lord Bramwell said that the *Preamble* included more than charitable uses "benevolent uses, and uses for the public or general good". The Regulatory Framework Table talks about "other public benefit organisations" and "the broader not-for-profit voluntary sector".[136] Elizabeth I intentionally excluded religion; but mentioned the "repair of churches" in the one paragraph *Preamble*. The 69 page *Working Together* also mentions churches once. It even demonstrates an interest in history by mentioning churches in a reference to the era predating Confederation in

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132 (1871) LR 12 Eq. 574.

133 *Working Together*, Report of the Joint Tables, August, 1999, ("*Working Together*"), it can be found on the web at www.nvo-on.ca/vstf-e.html

134 *Working Together*, p. 21.

135 The words of Lord Bramwell describing the *Preamble* in *Pemsel*, p. 566.

136 *Working Together*, p. 47.

1867.[137] Diane Francis may feel some optimism in her quest to have religion denied tax exemption because the Report raises the question of whether organisations that are no longer charitable should be removed from the register of charitable organisations.[138]

Religion merits consideration in any debate on the role of the voluntary sector in Canada today because of the important role religion continues to play in the lives of many Canadians. This debate must recognise the impact of the *Charter* on the legal definition. Many of the participants in this debate are hostile to the privileged place which religion has in charity law. Centuries after the church was the principal deliverer of charitable services in society, they want to restrict the activities within the church's purposes which the law recognises as charitable to those activities which would be charitable if carried out by secular organisations. They object to even using the term "charitable" to describe the sector because of the links which the word charity has to the religious origins of the sector. They would be delighted if the Supreme Court of Canada would apply the *Charter* like a modern day *Statute of Superstitious Uses* to declare the advancement of religion unlawful. They seem quite prepared to sacrifice the independence of the agenda of the sector if adopting a substantially state defined concept of public benefit means more tax benefits for charitable organisations. They would be pleased if the removal of religion from the definition of charity provided the fiscal resources to make it easier for the state to provide more tax benefits for secular charities.

If John Frederick Pemsel was attending this conference this morning, his interest would move beyond the learned legal arguments which his counsel will make before the Supreme Court of Canada. He would be wondering what organisations such as the Canadian Council of Christian Charities are doing to help support the political and policy issues which underlie his court application to protect Elizabeth Mary Bates' endowment. Retaining religion as a separate charitable purpose is important to society as a whole and not just to religious organisations. The Canadian Council of Christian Charities and organisations representing other faiths should develop the policy arguments as to why supporting religion through tax benefits is important to all Canadians rather than simply being a benefit to the particular registered charity receiving donations.

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137 *Working Together*, p. 19.

138 *Working Together*, p. 48.