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CONFIDENTIAL: SOLICITOR-CLIENT PRIVILEGE

May 28, 2021

The Presbyterian Church in Canada
ATTN: Rev. Stephen Kendall, Principal Clerk
50 Wynford Drive, Toronto
ON M3C 1J7

Dear Rev. Kendall,

RE: LEGAL OPINION ON REMITS B AND C (2019)

Please find enclosed our legal opinion with respect to Remits B and C, 2019 of the Presbyterian Church in Canada.

Privileged Information

This opinion contains privileged information. Sharing this opinion with others may result in loss of privilege. Possession of this opinion, or a copy thereof, does not carry with it the right of publication of all or any part of it. As the client, however, you may at any time choose to waive privilege and share the opinion.

Qualifications

This opinion is subject to the following qualifications:

(a) This opinion is limited to the laws of Ontario and federal laws applicable therein.
(b) The information herein was obtained from sources considered to be reliable; however, no representation is made with regard to the reliability thereof.
(c) This opinion contemplates facts and conditions existing as of May 21, 2021. Events and legislation after that date have not been considered.

Conclusion

We are dedicated to providing advice and legal opinions with a commitment to attention, quality work, consistency in approach, and client service. We trust this legal opinion meets your expectations and we are available to discuss it in greater detail. Please do not hesitate to contact Eugene Meehan, Q.C. at 613-695-8855, or by email at emeehan@supremeadvocacy.ca.

Yours truly,

Eugene Meehan, Q.C.
Supreme Advocacy LLP

SUPREME ADVOCACY LLP S.R.L.

RE: LEGAL OPINION ON REMITS B AND C (2019)

MAY 28, 2021

To

Rev. Stephen Kendall

Principal Clerk

From

Eugene Meehan, Q.C.

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1. EXECUTIVE SUMMARY

OVERVIEW

In January of 2021, the Assembly Council of the Presbyterian Church in Canada ("PCC") recommended that its Executive retain independent counsel to address matters contained in Remits B and C. The Remits purport to establish two parallel definitions of marriage and would provide a basis for the recognition of both same-sex marriages and the ordination of LGBTQI persons (married or single) as Ministers or Ruling Elders in the PCC. Despite this recognition, the Remits also provide "liberty of conscience and action" on marriage and ordinations, which suggests that individual ministers, congregations, and PCC members are free to adhere to the traditional definition of marriage and to decline participation in the ordination of LGBTQI Ministers or Ruling Elders.

Remits B and C were approved by the General Assembly of the PCC in 2019. In your letter dated March 1, 2021, you have indicated that the Remits are currently awaiting a subsequent vote by a second General Assembly. In anticipation of a meeting to be held in May of 2021, you have asked us to address the following questions:

A. If the PCC adopts Remits B & C (2019), are there potential legal risks for ministers who may decline to officiate same-sex marriages? And, if so, what could be done to mitigate any risks?

B. If the PCC adopts Remits B & C (2019), are there potential legal risks for congregations that may decline to host same-sex marriages in their buildings? And, if so, what could be done to mitigate any risks?

C. If the PCC adopts Remits B & C (2019), are there potential legal risks related to the liberty of conscience and action ministers and ruling elders would be granted regarding participating (or not) in the ordinations, inductions and installations of LGBTQI persons. Specifically, could ministers and ruling elders be compelled to participate in the ordination, induction or installation of LGBTQI persons or face legal consequences for refusing to do so?

QUESTION 1: POTENTIAL RISKS FOR MINISTERS & MITIGATION

At the outset, we note that there is no freestanding right in Canada to have a religious official recognize same-sex marriage. To the contrary, there are protections for religious officials who refuse to solemnize same-sex marriages. The Supreme Court of Canada has also held that state compulsion on religious officials to perform same-sex marriages contrary to their religious

beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*, and that such violation could not, absent exceptional circumstances, be justified under s. 1 of the *Charter*.[1] Ultimately, the performance of religious rites, including marriage, has been recognized as a fundamental aspect of religious practice. It is at the core of values protected by s. 2(a).[2]

Accordingly, PCC Ministers enjoy a s. 2(a) *Charter* right to decide who may be married in accordance with the rites, practices and beliefs of their faith as they interpret them. The Supreme Court of Canada and Courts of Appeal in British Columbia, Manitoba, Saskatchewan, Ontario have consistently stated that the equality rights of same-sex couples do not displace the rights of religious groups to refuse to solemnize same-sex marriages which do not accord with their religious beliefs.[3]

Both religious officials and marriage commissioners can perform marriages for civil purposes. Marriage commissioners are considered public officials and cannot refuse to perform same-sex marriages. The performance of a civil marriage by a marriage commissioner is not considered to be a religious rite or practice and therefore does not receive s. 2(a) *Charter* protection.

By way of contrast, a religious official such as a PCC Minister can refuse to perform same-sex marriages based on their religious beliefs. There are important differences between the position of religious officials and public officials on this question, including that:

- a religious official's vocation to his or her church provides *prima facie* evidence of a sincere religious belief;
- a religious official's function in solemnizing marriage is primarily religious in nature; and
- for the religious official, the civil aspects of marriage are incidental to its religious aspect.

However, notwithstanding prior findings that requiring an objecting PCC Minister to perform a same-sex marriage would violate s. 2(a) of the *Charter*, a recent decision of the Court of Appeal for Ontario could potentially be interpreted to suggest (by analogy) that an objecting minister

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[1] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 58.
[2] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at paras. 57-59; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 (CanLII) at para. 120.
[3] *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403 (ON CA) at para. 57; *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at paras. 57-59; *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 (CanLII) at para. 133; *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII) at para. 5; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 (CanLII) at paras. 12, 120.

may be required to assist a same-sex couple in finding a minister who would perform the wedding ceremony.[4] This would be consistent with a concept borrowed from the human rights context – providing reasonable accommodation to the point of undue hardship.[5] Further, the Supreme Court of Canada has expressed the view that "[r]eligious freedom can be limited where an individual's beliefs or practices harm or interfere with the rights of others".[6]

Importantly, in Ontario there is a statutory shield for PCC Ministers to refuse to solemnize a same-sex marriage provided at s. 18.1 of the *Human Rights Code*. Further, we note the Human Rights Tribunal of Ontario has found that where a religious official, such as a priest or PCC minister, is exercising rights at the core of their right to freedom of religion and purely connected with a religious role, that religious official's actions or conduct do not fall within the meaning of 'services' under the *Code*.[7] The Tribunal has also previously noted that it is not an appropriate use of the *Code* to challenge a religion's belief system or teachings.[8] In Ontario, the Divisional Court has also affirmed that Canadians are not required to render services that are "in direct conflict with the core elements of…religious beliefs or creed."[9]

From the foregoing discussion, we have identified a number of potential risks faced by PCC ministers who decline to officiate same-sex marriages. The potential risks for ministers who may decline to officiate same-sex marriage can be divided into two categories:

- the risk of private action (including a discrimination claim made pursuant to human rights legislation); and
- exposure to judicial review and public law remedies (including state compulsion to perform same-sex marriage).

There is a limited risk that a Canadian court could find an individual PCC Minister's decision to decline to provide marriage services to a same-sex couple is a justiciable question, subject to

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[4] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (CanLII).

[5] When referring to the concept of "undue hardship", recall the words of Sopinka J. who observed in *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC) at p. 984, that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test". However, a precise definition of undue hardship depends on the facts and circumstances of each case.

[6] *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 (CanLII at para. 40; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at pp. 346-47; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 26.

[7] *Tesseris v. Greek Orthodox Church of Canada*, 2011 HRTO 775 (CanLII) at paras. 1, 9.

[8] *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII) at para. 35.

[9] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC) at para. 58.

review for procedural fairness or other concerns. However, as recently confirmed by the Supreme Court of Canada in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, even where property or employment is at stake, the intervention of a secular court is less likely in the religious context.[10]

There is a risk that a PCC same-sex couple seeking to be married in the PCC will engage with a congregation that does not exercise its "liberty of conscience and action on marriage" in a way that accepts same-sex couples. In those circumstances, they may ask a court to require that the PCC and/or a PCC Minister provide a referral for a Minister who does accept same-sex couples and who will perform the marriage ceremony.

While this has not been raised by a provincial government to our knowledge, a further risk is that a provincial government may determine that it can no longer permit religious officials to solemnize marriages under its marriage legislation because they engage (or potentially engage) in discriminatory conduct as against members of a protected group under s. 15 of the *Charter* or the applicable human rights legislation. However, this is a risk that exists whether the Remits are fully adopted or not.

There is a range of judicial decisions in Canada which affirm the right of religious officials to solemnize marriages of their choice, in accordance with their sincerely held beliefs in religious teaching. Further, in the Northwest Territories,[11] Prince Edward Island,[12] Québec,[13] and Ontario,[14] there is explicit statutory protection for religious officials and organizations who may decline to perform same-sex marriages. By way of mitigation of these risks, it would be essential to ensure that the PCC's conduct is brought into conformity with the requirements of these decisions and within the protection of any available statutory protection.

It is also important to bear in mind that a decision to refuse equal treatment for same-sex couples may constitute *prima facie* discrimination on the basis of sexual orientation within the meaning of the *Human Rights Code*. Further, if fully adopted, the Remits create the possibility of a clash of religious rights and raise the possibility of same-sex couples within the PCC asserting that they have suffered religious discrimination. For example, assuming that there is not universal agreement to "exercise liberty of conscience and action on marriage" in a way that recognizes the parallel definition of marriage, adherence to either interpretation could

[10] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 49.
[11] *Marriage Act*, SNWT 2017, c 2, s. 28.
[12] *Marriage Act*, RSPEI 1988, c M-3, s. 11.1.
[13] *Civil Code of Québec*, CQLR c CCQ-1991, Article 367.
[14] *Marriage Act*, RSO 1990, c M.3, s. 20.4.

constitute a religious belief entitled to protection under s. 2(a) of the *Charter* or provincial human rights legislation. Accordingly, in the context of a human rights complaint, where same-sex members of the PCC assert that they are entitled to same-sex marriage, they would have an equally valid claim to discrimination on the basis of religious belief in addition to sexual orientation.

In Ontario, s. 18.1 of the *Human Rights Code* provides some protections for religious officials, religious organizations, and "sacred spaces".[15] In the absence of similar statutory protection, a s. 2(a) argument could be developed that freedom of religion includes the right to restrict access to sacred spaces and/or to solemnize marriage in accordance with religious doctrine as interpreted by individual religious officials.

Since the question as to whether a PCC Minister is or is not required to officiate same-sex marriages is essentially doctrinal and religious in nature, the Supreme Court of Canada's decisions in *Highwood* and *Aga* strongly suggest a court must decline to exercise a supervisory role over the issue and that the question is not justiciable.

QUESTION 2: POTENTIAL RISKS FOR CONGREGATIONS & MITIGATION

There is a potential risk that the congregation, as the owner/operator of a "facility" within the meaning of human rights legislation, may be subject to liability under the *Human Rights Code* for declining to host same-sex marriages or for not accommodating same to the point of undue hardship.

In every province except Ontario, there is no explicit protection for "sacred spaces" in the relevant human rights legislation. For those provinces, an objecting PCC Church could assert that the right to exclude same-sex weddings from its "sacred spaces" or facilities is a core religious belief protected under human rights legislation or by s. 2(a) of the *Charter*. The risk, however, is that proving a right of exclusion is not automatic.

The further risk is that the right of any church in Canada to confer a secular benefit (i.e. civil marriage rights) is entirely governed by statute. It is possible that a jurisdiction may exclude religious officials from the list of marriage commissioners on the basis that they engage in a discriminatory practice.

[15] *Human Rights Code*, RSO 1990, c H.19.

As outlined in greater detail below, there are decisions of the Ontario and British Columbia Human Rights Tribunal (e.g. the *Brockie*,[16] *Smith*,[17] *Dallaire*,[18] and *Tesseris*[19] decisions) which provide some potential mitigation of the risk that a discrimination claim will be brought against the PCC or an individual congregation which declines to host a same-sex marriage. For example, these decisions provide limited authority for the proposition that religious rites, such as marriage, are a matter of core religious beliefs attracting enhanced protection. Further, they suggest that a potential discrimination claim as against the PCC or an individual congregation would not necessarily meet threshold requirements – PCC property may not constitute a "facility" and the performance of a marriage ceremony may not constitute a "service" within the meaning of the *Code*.

Further, there is jurisprudence which insulates doctrinal church decisions from judicial review For example, in *Highwood*, the Supreme Court of Canada clearly stated that matters of church doctrine are not within the competence of courts. For Justice Rowe, the *Charter* does not directly apply to disputes where no state action is being challenged, though the *Charter* may inform the development of the common law or the interpretation of provincial human rights legislation. The *Highwood* decision also stands broadly for the proposition that religious groups are free to determine their own membership and internal rules, and that courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.[20] The Supreme Court of Canada recently affirmed these points in *Aga*.[21]

By way of mitigation of the risks to PCC congregations, it would be important to ensure that the PCC's conduct is:

- brought into conformity with the requirements of the *Highwood* and *Aga* decisions; and
- brought within the ambit of any available statutory protection (e.g. as found in provincial marriage and human rights legislation).

[16] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC).
[17] *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544 (CanLII).
[18] *Dallaire v. Les Chevaliers de Colomb,* 2011 HRTO 639 (CanLII).
[19] *Tesseris v. Greek Orthodox Church of Canada*, 2011 HRTO 775 (CanLII).
[20] *Highwood* at para. 39.
[21] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22.

QUESTION 3: POTENTIAL RISKS FOR MINISTERS & RULING ELDERS NOT PARTICIPATING IN ORDINATION OF LGBTQI PERSONS

Regarding Ministers and Ruling Elders not participating in the ordination of LGBTQI persons, there is a risk that any practical (non-ecclesiastical) effect of non-participation could give rise to an application for judicial review.[22]

In terms of mitigation, we note the *Highwood* decision strongly suggests that the individual decision of a Minister or Ruling Elder who may choose to not attend or participate is not justiciable. Moreover, the Court of Appeal decision in *Aga* (which had put forward an expanded role for judicial review in the religious context) was overturned on appeal to the Supreme Court of Canada.[23]

There is also a potential risk that a discrimination claim, pursuant to human rights legislation, could be brought as between Ministers or Elders of the PCC or as between Ministers of Elders and the PCC. It is not inconceivable that if two categories of Minister and Elder are recognized, then over time one or the other may engage in a course of ostracizing certain Ministers such that there may be grounds for a workplace discrimination claim. If a complaint is made, there may also be an independent obligation on the part of the PCC to conduct an investigation. The failure to do so may result in liability for the PCC.

While, in Ontario, there is limited protection afforded to religious organizations on the issue of workplace discrimination, we suggest that relying on a provision such as s. 24(1) of the *Human Rights Code* does not guarantee the PCC will escape liability. Rather, by way of mitigation, the decision in *Ontario Human Rights Commission v. Christian Horizons* suggests that a pro-active approach to ensuring a non-discriminatory workplace (i.e. through anti-discrimination workshops and education) is preferable.[24]

2. ANALYSIS

PROPOSED AMENDMENTS

Remits B and C provide as follows:

[22] *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10 (CanLII).
[23] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22.
[24] *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII) at para. 121.

I. REMIT B, 2019 RE DEFINITION OF MARRIAGE

That the following be approved and remitted to presbyteries under the *Barrier Act*. (Special Committee on Implications of Pathway B, Recommendation No 2, as amended, p. 51):

> The Presbyterian Church in Canada holds two parallel definitions of marriage and recognizes that faithful, Holy Spirit filled, Christ centred, God honouring people can understand marriage as a covenant relationship between a man and a woman or as a covenant relationship between two adult persons.
>
> That congregations, sessions, ruling and teaching elders be granted liberty of conscience and action on marriage.

II. REMIT C, 2019 RE ORDINATION OF LGBTQI PERSONS (MARRIED OR SINGLE)

That the following be approved and remitted to presbyteries under the *Barrier Act*. (Special Committee on Implications of Pathway B, Recommendation No 1, p. 52):

> That congregations and presbyteries may call and ordain as ministers and elect and ordain as ruling elders LGBTQI persons (married or single) with the provision that liberty of conscience and action regarding participation in ordinations, inductions and installations be granted to ministers and ruling elders.

III. INTERPRETATION OF REMITS B AND C

In *Presbyterian Connection*, Rev. Stephen Kendall, Principal Clerk, and the Rev. Don Muir, General Assembly Office offered an interpretation of the Remits.[25] For Rev. Kendall and Rev. Muir, language granting "liberty of conscience and action" is designed to "create space for respecting differences in theological views and how they are lived out."

On the question of what "liberty of conscience and action on marriage" means, they say "[w]ith respect to marriage, this means it is acceptable for our conscience to dictate that our understanding, or belief, of marriage is that it can be faithful as either (a) only between a man and a woman, or (b) between two adult persons."[26]

Specifically regarding marriage ceremonies, they say that "liberty of action means that no minister would be required to conduct a same-sex marriage" and that "no congregation would be required to host a same-sex marriage". Significantly, they have also indicated that, on their interpretation of the Remits, there is a "pastoral responsibility" to accommodate same-sex couples such that, "[i]f a same-sex couple comes to a church to request a wedding, the minister

[25] *Presbyterian Connection*, Issue 11, Fall 2019 at pp. 37-38.
[26] *Presbyterian Connection*, Issue 11, Fall 2019 at pp. 37-38.

who is in a church that chooses not to host such weddings, may exercise pastoral concern by, for example, helping the couple find a nearby church that will offer the wedding." [27]

With respect to Remit C and the ordination of LGBTQI people to the office of teaching or ruling elder, they say that while a minister "would not be free to believe that the ordination of an LGBTQI colleague is invalid based on orientation, identity or relationship status", it would be acceptable for a member of the PCC "to not participate in the ordination, installation or induction." However, and significantly, they add that the liberty of action is "restricted to the participation in these events". This means that objecting persons "might still wish to extend the right hand of fellowship as a sign…they will support their colleague in this ministry". The apparent source of this requirement is a principle of the PCC, set out in Section 4 of the Book of Forms, that all are equal in ministry.[28]

GOVERNING STATUTES

I. MARRIAGE LEGISLATION IN CANADA

In the early 2000s, an array of decisions from across Canada addressed the question of same-sex marriage and the common law definition of marriage.[29] These decisions recognized same-sex marriage and modified the common law definition of marriage to include same-sex couples. The federal government responded by enacting the *Civil Marriage Act*.[30] The *Act* recognizes and affirms same-sex marriage in Canada, while providing that religious officials and religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.[31] Section s. 3.1 of the *Act* provides protections for those exercising their freedom of conscience and religion in respect of marriage:

> [N]o person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the

[27] *Presbyterian Connection*, Issue 11, Fall 2019 at pp. 37-38.
[28] *Presbyterian Connection*, Issue 11, Fall 2019 at pp. 37-38.
[29] *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403 (ON CA); *Barbeau v British Columbia*, 2003 BCCA 406, 15 BCLR (4th) 226 (CA); *Catholic Civil Rights League v Hendricks*, [2004] RJQ 851, 238 DLR (4th) 577 (CA); *Dunbar v Yukon*, 2004 YKSC 54, 122 CRR (2d) 149; *Vogel v Canada (AG)* (2004), [2005] 5 WWR 154, [2005] WDFL 630 (Man QB); *Boutilier v Nova Scotia (AG)*, [2004] NSJ No 357 (QL) (SC); *NW v Canada (AG)*, 2004 SKQB 434, 246 DLR (4th) 345; *Pottle v Canada (AG)*, [2004] NJ No 470 (QL) (SC(TD)); *Harrison v Canada (AG)*, 2005 NBQB 232, 290 NBR (2d) 70; *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698.
[30] *Civil Marriage Act*, SC 2005, c 33.
[31] *Civil Marriage Act*, SC 2005, c 33, s. 3.

> freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.[32]

Four additional jurisdictions (the Northwest Territories,[33] Prince Edward Island,[34] Québec,[35] and Ontario[36]) have included similar protections for religious officials and religious organizations in their marriage legislation.

Eight jurisdictions (Yukon Territories, [37] Nunavut, [38] British Columbia, [39] Alberta, [40] Saskatchewan, [41] Manitoba, [42] New Brunswick, [43] Nova Scotia, [44] and Newfoundland and Labrador[45]) have not. In New Brunswick, the Legislature attempted to add a provision which

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[32] *Civil Marriage Act*, SC 2005, c 33, s. 3.1.

[33] *Marriage Act*, SNWT 2017, c 2, s. 28:

Rights of registered cleric

A registered cleric is not required to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if doing so would be contrary to

(a) the cleric's religious beliefs; or

(b) the doctrines, rites, usages or customs of the religious body to which the cleric belongs.

[34] *Marriage Act*, RSPEI 1988, c M-3, s. 11.1:

Refusal to solemnize

For greater certainty, a person who is authorized to solemnize a marriage under this Act may refuse to solemnize a marriage that is not in accordance with that person's religious beliefs.

[35] *Civil Code of Québec*, CQLR c CCQ-1991, Article 367:

No minister of religion may be compelled to solemnize a marriage to which there is any impediment according to his religion and to the discipline of the religious society to which he belongs.

[36] *Marriage Act*, RSO 1990, c M.3, s. 20.4:

Rights of person registered

20.4 (1) A person registered under section 20.1, 20.2 or 20.3 is not required to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of marriage, or to otherwise assist in the solemnization of a marriage, if to do so would be contrary to,

(a) the person's religious or spiritual beliefs; or

(b) the doctrines, rites, usages, customs or traditions of the religious body, band, First Nation, Métis or Inuit organization or community or Indigenous entity to which the person belongs.

[37] *Marriage Act*, RSY 2002, c 146.

[38] *Marriage Act*, RSNWT (Nu) 1988, c M-4.

[39] *Marriage Act*, RSBC 1996, c 282.

[40] *Marriage Act*, RSA 2000, c M-5.

[41] *The Marriage Act, 1995*, SS 1995, c M-4.1.

[42] *The Marriage Act*, CCSM c M50.

[43] *Marriage Act*, RSNB 2011, c 188.

[44] *Marriage Act*, RSNS 1989, c 436.

[45] *Marriage Act*, SNL 2009, c M-1.02.

included similar protections to those found in Ontario, Québec, Prince Edward Island, and the Northwest Territories,[46] but the Bill did not pass second reading.[47]

As outlined in greater detail below, this does not mean that, for those jurisdictions which have not enacted similar provisions, there are no protections for religious officials who refuse to solemnize same-sex marriages. For example, Courts of Appeal in British Columbia, Manitoba, Saskatchewan, Ontario, and the Supreme Court of Canada have consistently stated that the equality rights of same-sex couples do not displace the rights of religious groups to refuse to solemnize same-sex marriages which do not accord with their religious beliefs.[48] Indeed, even if the federal government, Ontario, Québec, Prince Edward Island, and the Northwest Territories all removed the explicit statutory protections outlined above, religious officials and organizations[49] enjoy a recognized s. 2(a) *Charter* right to decide who may be married in accordance to the rites, practices and beliefs of the religion in question.[50]

More concretely, the Supreme Court of Canada has held that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*, and that such violation could not, absent exceptional circumstances, be justified under s. 1 of the *Charter*.[51] Ultimately, the performance of religious rites, including marriage, has been recognized as a fundamental aspect of religious practice. It is at the core of values protected by s. 2(a).[52]

II. HUMAN RIGHTS LEGISLATION IN CANADA

In 1995, the Supreme Court of Canada held that sexual orientation is a personal characteristic analogous to grounds enumerated in s. 15(1) of the *Charter* and deserving of protection.[53] The Supreme Court later held that *omitting* sexual orientation as a prohibited ground of

[46] Bill 76, *An Act to Amend the Marriage Act*, 2005.
[47] Legislative Assembly of New Brunswick: Status of Legislation, Bill 76.
[48] *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403 (ON CA) at para. 57; *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at paras. 57-59; *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 (CanLII) at para. 133; *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII) at para. 5; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 (CanLII) at paras. 12, 120.
[49] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), McLachlin C.J. and Moldaver J. joint reasons concurring partially in result at para. 99; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII) at para. 61.
[50] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII)).
[51] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 58.
[52] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at paras. 57-59; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 (CanLII) at para. 120.
[53] *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 5.

discrimination in human rights legislation was discriminatory and not justifiable under s. 1 of the *Charter*.[54]

Following the Supreme Court's decision in *Vriend v Alberta*, discrimination based on sexual orientation is not only a prohibited ground of discrimination under s. 15(1) of the *Charter* but also under provincial human rights legislation, either expressly or by reading in.[55]

Notwithstanding these developments, s. 18.1 of Ontario's *Human Rights Code* provides explicit protections for persons authorized to solemnize marriage under the *Marriage Act*, and who may refuse to solemnize (or otherwise assist in solemnizing) a same-sex marriage, as follows:

> **Solemnization of marriage by religious officials**
> **18.1** (1) The rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20.1 or section 20.3 of the *Marriage Act* refuses to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to solemnize the marriage, allow the sacred place to be used or otherwise assist would be contrary to,
>
> (a) the person's religious beliefs; or
>
> (b) the doctrines, rites, usages or customs of the religious body to which the person belongs.
>
> **Same**
> (2) Nothing in subsection (1) limits the application of section 18.
> **Definition**
> (3) In this section,
> "sacred place" includes a place of worship and any ancillary or accessory facilities.[56]

According to the Ontario Human Rights Commission's "Policy on preventing discrimination based on creed", s. 18.1 of the *Code* "allows religious officials to refuse to preside over (or assist in the solemnization of) a marriage in a 'sacred place' or refuse to allow a 'sacred place' to be used for a marriage event, if this goes against their religious beliefs or 'the doctrines, rites, usages or customs of the religious body to which the person belongs.'"[57]

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[54] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 179.
[55] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 179.
[56] *Human Rights Code*, RSO 1990, c H.19.
[57] Ontario Human Rights Commission's "Policy on preventing discrimination based on creed", s. 8.4.

The Ontario Human Rights Commission also notes that, to date, there have been no decisions under the Ontario *Code* dealing with this provision.[58]

Ontario is the only Canadian jurisdiction which has included a provision of this kind in its *Human Rights Code*. There is no similar provision in any other Canadian jurisdiction, but other statutes do prohibit discrimination on the basis of religion generally.[59] In jurisdictions other than Ontario, protection for religious officials who refuse to solemnize same-sex marriages is based primarily on s. 2(a) of the *Charter.* For example, following the Supreme Court of Canada's decision in *Reference re Same-Sex Marriage*, the Saskatchewan Court of Appeal recognized that clergy can refuse to perform marriages that are not in accordance with their religious beliefs.[60]

Engaging Ontario's *Human Rights Code*

While it is beyond the scope of this opinion to address the potential risks posed by human rights legislation in every Canadian jurisdiction, this section examines Ontario's *Human Rights Code*. Since Ontario is the sole jurisdiction which has included explicit protection for religious officials who decline to perform same-sex marriages, the potential risks which s. 18.1 mitigate in this province, *may* be present in every other jurisdiction.

Section 1 of Ontario's *Human Rights Code* provides as follows:

> **Services**
> **1** Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.[61]

There is a potential risk that, following the full adoption of Remit B, a discrimination claim may be brought as against the PCC or an individual congregation on the basis that the performance of same-sex marriage is a "service" within the meaning of the *Human Rights Code*. In this scenario, the claimant would allege discrimination on the basis of sexual orientation arising from a refusal to perform same-sex marriage. Since Remit B provides that the PCC holds parallel

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[58] Ontario Human Rights Commission's "Policy on preventing discrimination based on creed", s. 8.4.
[59] *Canadian Human Rights Act*, RSC 1985, c H-6; *Human Rights Code*, RSBC 1996, c 210; *Alberta Human Rights Act*, RSA 2000, c A-25.5; *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2; *The Human Rights Code*, CCSM c H175; *Human Rights Code*, RSO 1990, c H.19; *Charter of Human Rights and Freedoms*, CQLR c C-12; *Human Rights Act*, RSNB 2011, c 171; *Human Rights Act*, RSNS 1989, c 214; *Human Rights Act*, RSPEI 1988, c H-12; *Human Rights Act*, 2010, SNL 2010, c H-13.1; *Human Rights Act*, RSY 2002, c 116; *Human Rights Act*, SNWT 2002, c 18; *Human Rights Act*, SNu 2003, c 12.
[60] *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3.
[61] *Human Rights Code*, RSO 1990, c H.19, s. 1.

definitions of marriage, a discrimination claim may also seek accommodation such that a minister who supports same-sex marriage exercises their "liberty of conscience and action on marriage" to preside over a same-sex wedding.

Similarly, in circumstances where the Presbyterian Church in Canada rents its facilities and such facilities are not made available to same-sex couples, a claim for discrimination on the basis of sexual orientation or religion (e.g. that the religious rights of a same-sex PCC couple under Remit B are engaged) may be brought.

These claims would likely fail in Ontario based on s. 18.1 of the *Human Rights Code*, which explicitly states that the s. 1 rights with respect to services and facilities are not infringed where a person registered under the *Marriage Act* refuses to solemnize a marriage, or to allow a sacred place to be used for solemnizing a marriage where doing so would be contrary to the person's religious beliefs or the doctrines, rites, usages or customs of the religious body to which the person belongs.

Even though Remit B indicates that marriage may be understood as a "covenant relationship between a man and a woman or as a covenant relationship between two adult persons", a reasonable interpretation of s. 18.1(1)(a) and (b) would provide a shield to a s. 1 discrimination claim.

For those congregations in Ontario who decline to host same-sex marriages, the same protection arguably applies. However, significantly, the protection applies to "a person registered under section 20.1 or section 20.3 of the *Marriage Act*". As such, it is possible that a discrimination claim could be brought as against individual members of a congregation who are not squarely within the protective sphere offered by s. 18.1 of the *Human Rights Code* or against the PCC itself.

For those individuals, it is important to note that Ontario's Human Rights Tribunal has found that conduct is not discriminatory in the legal sense *unless* there is proof that one or more of the protected personal characteristics listed in the *Code* was a factor in the treatment experienced.[62]

[62] *Linton v. Slofac*, 2018 HRTO 1314 (CanLII) at para. 15.

The Human Rights Tribunal does not have a general power to deal with allegations of "unfairness".[63] The fact a person identified by a prohibited ground of discrimination (e.g. sex, colour, race, creed, and disability) experiences disagreeable or unfair treatment is generally insufficient to support an inference of discrimination.[64] Where a prospective applicant is unable to point to circumstances beyond their own assumptions or belief that discrimination has occurred, the application may be found to have no reasonable prospect of success.[65]

Establishing Discrimination

In *Moore v. British Columbia (Education)*, Abella J., writing for the Supreme Court of Canada, observed:

> …to demonstrate *prima facie* discrimination, applicants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.[66]

While Abella J. was writing about British Columbia's *Human Rights Code*,[67] the Court of Appeal for Ontario has affirmed the content of the test as described in *Moore*, including that establishing *prima facie* discrimination requires demonstrating three things:

1. that the prospective applicant is a member of group protected under the *Code*,
2. that she was subject to adverse treatment, and
3. that a *Code* ground was a factor in the adverse treatment.[68]

Adverse treatment or discrimination is prohibited under Ontario's *Human Rights Code* where the discrimination is because of "race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability."

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[63] *Linton v. Slofac*, 2018 HRTO 1314 (CanLII) at para. 15; see also *Forde v. Elementary Teachers' Federation of Ontario*, 2011 HRTO 1389; *Szabo v. Office of a Member of Parliament of Canada*, 2011 HRTO 2201; and *Badvi v. Voyageur Transportation*, 2011 HRTO 1319.
[64] *Linton v. Slofac*, 2018 HRTO 1314 (CanLII) at para. 16.
[65] *Linton v. Slofac*, 2018 HRTO 1314 (CanLII) at para. 16.
[66] *Moore v. British Columbia (Education)*, 2012 SCC 61 (CanLII), [2012] 3 SCR 360 at para. 33.
[67] *Human Rights Code*, RSBC 1996, c 210.
[68] *Peel Law Association v. Pieters*, 2013 ONCA 396 at para. 126; see also *Shaw v. Phipps*, 2012 ONCA 155 (CanLII) at para. 14.

Principles governing an award of compensation for injury to dignity, feelings and self-respect were set out by the Human Rights Tribunal in *Arunachalam v. Best Buy Canada*:

> The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination.
>
> The first criterion recognizes that injury to dignity, feelings, and self-respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-38.[69]

In *AB v. 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai,* the Human Rights Tribunal referred to the following non-exhaustive factors frequently used in assessing the appropriate quantum of general compensation for the violation of the right to be free from discrimination:

- humiliation experienced by the complainant;
- hurt feelings experienced by the complainant;
- a complainant's loss of self-respect;
- a complainant's loss of dignity;
- a complainant's loss of self-esteem;
- a complainant's loss of confidence;
- the experience of victimization;
- vulnerability of the complainant; and

[69] *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 at paras. 52-54.

- the seriousness, frequency, and duration of the offensive treatment.[70]

Vicarious Liability

Under s. 46.3 of the Ontario *Human Rights Code*, a corporation, trade union or occupational association, unincorporated association or employers' organization may be held responsible for discrimination, including acts or omissions, committed by employees or agents in the course of their employment.

Importantly, while s. 46.3 of the *Human Rights Code* may apply in the context of a claim made against the PCC, there is less risk of a discrimination claim or vicarious liability for the PCC in the civil litigation context. For example, in *King v Ryerson University*, the Court of Appeal for Ontario recently stated that "where…a person alleges conduct that offends the Ontario *Human Rights Code*, a remedy must be sought within the statutory scheme of the *Code* itself."[71]

Importantly, there is no independent tort of "discrimination" recognized in Canada; no cause of action in tort at common law for discrimination, nor an "independently actionable wrong" in respect of discriminatory conduct for the purpose of awarding punitive damages.[72] This strongly indicates that the PCC would not be found vicariously liable for discrimination in the civil litigation context.

A recent application of vicarious liability in the tort context can be found in *John Doe (G.E.B. #25) v The Roman Catholic Episcopal Corporation of St. John's*.[73] In that case, the Court of Appeal for Newfoundland and Labrador affirmed the notion that vicarious liability is not a distinct tort. Rather, it is a theory that holds one person responsible for the misconduct of another because of the relationship between them. Without an underlying tort of discrimination, vicarious liability does not apply.

Application to Questions 1 & 2

In *Tesseris v. Greek Orthodox Church of Canada*,[74] the Human Rights Tribunal of Ontario determined "[t]he actions of a clergyperson performing purely religious functions are not

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[70] *AB v. 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai*, 2020 HRTO 499 (CanLII) at para. 174; see also *Qiu v. 2076831 Ontario Ltd.*, 2017 HRTO 1432 (CanLII) at para. 99; *Sanford v. Koop*, 2005 HRTO 53.
[71] *King v Ryerson University*, 2015 ONCA 648 at para. 5.
[72] *Seneca College of Applied Arts and Technology v. Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 SCR 181; *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 65-67; *Jaffer v York University*, 2010 ONCA 654 at para. 37-38.
[73] *John Doe (G.E.B. #25) v The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27 (CanLII). Leave to SCC dismissed.
[74] *Tesseris v. Greek Orthodox Church of Canada*, 2011 HRTO 775 (CanLII).

covered by the social area of 'services' in the *Code*".[75] Mr. Tesseris approached a priest who was in the course of performing a religious rite at his parents' house, to seek assistance in dealing with his parents' views toward homosexuality (and as a member of the Greek Orthodox Church). When he disclosed his sexual orientation, Mr. Tesseris claimed the priest made statements expressing his views on homosexuality that violate the *Code*.

The Tribunal found that, in giving a response in accordance with his faith, "the priest was exercising rights at the core of his right to freedom of religion and that were purely connected with his religious role. Accordingly, this Application does not fall within the social area of 'services' under the *Code*".[76] Although a decision of the Human Rights Tribunal is not binding in future cases (the Tribunal is not subject to the principle of *stare decisis*), this decision may have persuasive effect. Of relevance here, the Tribunal found that the exercise of rights at the core of a religious official's right to freedom of religion do not constitute services, or engage the *Code*. This suggests that a PCC Minister is equally not performing a 'service' within the meaning of the *Code* when engaged in the decision to perform a same-sex marriage.

In *Dallaire v. Les Chevaliers de Colomb*,[77] the Tribunal held, referring to s. 2(a) of the *Charter*, that the manifestation of religious belief in an inscription displayed on church property is not a "service" or "facility" within the meaning of s. 1 of the *Code*. The Tribunal also noted that it is not an appropriate use of the *Code* to challenge a religion's belief system or teachings and that the meaning of "service" or "facility" is subject to the right of others to exercise their freedom of religion.[78]

In *Dallaire*, the Tribunal stated in *obiter* that, where a religious organization engages in the practice of renting church halls or buildings that religious organization may be providing a "facility" within the meaning of s. 1 of the *Code*:

> It may be that a religious organization that rents a hall or building is providing a facility for the purposes of section 1 of the *Code*. Similarly, religious "facilities" that are not accessible to a person with a disability might be found to fall within the purview of the *Code*. However, these are not issues I need decide in the matter before me.[79]

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[75] *Tesseris v. Greek Orthodox Church of Canada*, 2011 HRTO 775 (CanLII) at para. 2.
[76] *Tesseris v. Greek Orthodox Church of Canada*, 2011 HRTO 775 (CanLII) at paras. 1, 9.
[77] *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII).
[78] *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII) at para. 35.
[79] *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII) at para. 39.

The Tribunal in *Dallaire* left unanswered the question as to whether a religious organization can be subject to s. 1 of the *Code*. However, of relevance here, the Tribunal found that it would not be appropriate to use the *Code* as a means to challenge specific religious beliefs. This *may* provide some mitigating effect in the context of a discrimination claim brought against the PCC or an individual congregation that may decline to host same-sex marriages.

By way of comparison, in *Smith and Chymyshyn v. Knights of Columbus and others*, the British Columbia Human Rights Tribunal held that the respondents had breached the *British Columbia Human Rights Code*[80] by failing to accommodate to the point of undue hardship when they refused to rent "facilities" (i.e. a hall used by the Knights of Columbus) to a gay couple who wanted to celebrate their wedding. The Knights argued that they did not breach the *Code* and that, in light of their belief system and their own right to freedom of religion under s. 2(b) of the *Charter*, they could refuse to rent the facility for the celebration of a gay marriage. The Tribunal determined that, "[a]lthough…the Knights could refuse access to the Hall…because of their core religious beliefs...in the Panel's view, in making this decision they had to consider the effect their actions would have on the complainants."[81]

In the circumstances, the Knights were not permitted to "act in a manner that adversely affected the rights of the complainants to be free from discrimination without considering the effect that would have on the complainants' right to access a public service". This was particularly so because the Knights had already agreed to rent the Hall to the complainants.[82]

Although from the perspective of a PCC congregation the language in the decision (i.e. that a religious group could refuse access) may appear helpful, it is important to bear in mind that the Tribunal *still* imposed an obligation to accommodate to the point of undue hardship. In the context of the PCC and Remits B and C, it is not difficult to envision a similar scenario arising in which a same-sex couple within the PCC applies to use a particular Church facility for their wedding only to be rejected after the Church realizes the couple is not heterosexual. In those circumstances, what constitutes accommodation to the point of undue hardship? Would all members of the PCC consent to provide an 'internal referral' such that the same-sex couple has an opportunity to be married within the PCC? Does such accommodation itself result in adverse treatment and discrimination? Unfortunately, there are no definitive answers to these questions, leaving open the possibility that the PCC and individual congregations could run afoul of human rights legislation.

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[80] *British Columbia Human Rights Code*, R.S.B.C. 1996 ch. 210.
[81] *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544 (CanLII) at para. 120.
[82] *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544 (CanLII) at para. 120.

Another relevant decision is the case of *Brockie v. Brillinger (No. 2)*.[83] In *Brockie*, a Christian who owned a printing shop declined to print certain materials on the basis of his religious belief that he could not assist in the distribution of information intended to spread the acceptance of a homosexual "lifestyle". Mr. Brockie contended that his constitutional right to freedom of religion and conscience should protect him from being required to provide a service that conflicted with this belief.

The Tribunal found that Mr. Brockie and his business breached the *Code* by refusing to print certain materials containing gay and lesbian information. The Tribunal also held that freedom of religion does not extend to the practice of religious beliefs in the public marketplace. On review, the Divisional Court upheld the Board's decision, in part. The Court said:

> The right to freedom of religion includes the right to believe, the right to declare the belief openly by word or in writing and the right to manifest that belief by worship, practice and teaching without coercion or constraint. However, the right is not unlimited. It is subject to such limitations as are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others…
>
> The freedom to hold beliefs is broader than the freedom to act on them. The freedom to exercise genuine religious belief does not include the right to interfere with the rights of others…[84]

In finding Mr. Brockie to be in violation of the *Human Rights Code*,[85] the Divisional Court relied upon the Supreme Court of Canada's reasoning in *Trinity Western University v. British Columbia College of Teachers* (i.e. "[t]he freedom to hold beliefs is broader than the freedom to act on them"; that religious people are "free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others")[86] and upheld the "right to be free from discrimination based on sexual orientation in obtaining commercial services".[87]

The Court, in considering whether the Tribunal's remedial order infringed Mr. Brockie's freedom of religion, said that the further the activity is from the "core elements" of the religious belief, the more likely it is that the activity will impact on others and the activity is

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[83] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC).
[84] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC) at paras. 40-41.
[85] *Human Rights Code*, R.S.O. 1990, c. H.19.
[86] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 (CanLII) at paras. 35, 36.
[87] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC) at para. 55.

therefore less deserving of constitutional protection.[88] The Court found that the exercise of Mr. Brockie's religious freedom did adversely impact the rights of homosexuals in private commercial transactions. However, importantly, in balancing the rights of Mr. Brockie and Mr. Brillinger, the Divisional Court held that Mr. Brockie was not required to print materials that would be considered in "direct conflict with the core elements of his religious beliefs", but could not deny the service sought in that case.[89]

So, whereas the Tribunal ordered Mr. Brockie to: "provide the printing services that they provide to others, to lesbians and gays and to organizations in existence for their benefit"; "pay damages in the amount of $5,000 to Mr. Brillinger and Archives", the Divisional Court added "Provided that this order shall not require Mr. Brockie or Imaging Excellence to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed."[90]

In defining "direct conflict" the Divisional Court observed "[i]f any particular printing project…contained material that conveyed a message proselytizing and promoting the gay and lesbian lifestyle or ridiculed his religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of Mr. Brockie's religious beliefs."[91]

This decision suggests there *may* be a risk that a human rights complaint will be brought against those PCC congregations who engage in a practice of renting their facilities and who decline to rent to same-sex couples. That being said, the *Brockie,*[92] *Smith,*[93] *Dallaire,*[94] *and Tesseris*[95] decisions each provide some potential mitigation of that risk. For example, they suggest that religious rites, such as marriage, are a matter of core religious beliefs attracting enhanced protection. Further, they suggest that a potential discrimination claim may not meet the threshold requirements of a valid claim since PCC property may not constitute a "facility" and the performance of a marriage ceremony may not constitute a "service" within the meaning of the *Code*.

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[88] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC) at para. 51.
[89] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC) at para. 58.
[90] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC) at para. 58.
[91] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC) at para. 56.
[92] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC).
[93] *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544 (CanLII).
[94] *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII).
[95] *Tesseris v. Greek Orthodox Church of Canada*, 2011 HRTO 775 (CanLII).

Question 3 and Workplace Discrimination

With respect to Question 3, there is a potential risk that a discrimination claim could be brought:

- between individual ministers or elders of the PCC; or
- between a minister or elder and the PCC itself.

There is a further possibility that, upon full adoption of the Remits, current ministers or elders of the PCC come out as members of the LGBTQI community.

On the assumption that PCC ministers may be considered employees of individual Presbyteries or the PCC, Remit C creates the possibility that LGBTQI Ministers will be hired as workplace colleagues of non-LGBTQI Ministers. If some ministers or elders do not extend "gestures of kindness" as advocated by Rev. Stephen Kendall, Principal Clerk and Rev. Don Muir, General Assembly Office, in the Fall 2019 edition of *Presbyterian Connection*,[96] but rather engage in a course of ostracizing LGBTQI ministers, there may be grounds for a workplace discrimination claim.

In Ontario, s. 5 of the *Human Rights Code* provides as follows:

> **Employment**
> 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

In Ontario, there is also an obligation to conduct an investigation into the right to equal treatment in employment under s. 5(1) of Ontario's *Human Rights Code*.[97] In *AB v. 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai*, the Human Rights Tribunal set out three questions which may be relevant for determining whether reasonable steps have been taken to respond to an applicant's concerns:

a. once an internal complaint was made, did the employer treat it seriously?
b. did it deal with the matter promptly and sensitively?

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[96] *Presbyterian Connection*, Issue 11, Fall 2019 at pp. 37-38.
[97] *AB v. 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai*, 2020 HRTO 499 (CanLII) at para. 93; *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII); *AB v. 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai*, 2020 HRTO 499 (CanLII) at para. 93.

c. did it reasonably investigate and act?[98]

Where the Human Rights Tribunal finds evidence demonstrating a *prima facie* case of discrimination flowing from an unreasonable and inadequate investigation of a complaint, the failure to properly address the complaint is contrary to s. 5(1) of the *Code*.[99] Accordingly, the failure of the PCC to investigate an internal complaint made by an LGBTQI minister may result in liability.

Importantly, it remains to be determined whether a PCC minister is an "employee" or engaged in "employment" within the meaning of the *Code*. There is very limited jurisprudence on the subject of whether a priest or minister should be considered an "employee". [100] We note that the Court of Appeal for Ontario did not disturb the finding in *McCaw v. United Church of Canada* that a minister of the United Church of Canada was an employee of the church and that he was wrongfully dismissed.[101] On the other hand, a specialized tribunal in Québec recently decided in *Dubois v. Diocèse de Trois-Rivières*[102] that a parish priest was neither in the employment of the diocese that appointed him nor the parish corporation for which he was selected to perform his services. The Commission des Lésions Professionnelles concluded that no employment relationship existed under the relevant Québec statute,[103] and found the relationship was a spiritual one. For the Commission, priests act on behalf of the Catholic Church to the benefit and enlightenment of their parishes and parishioners. They do not perform "work" within the meaning of the Québec statute.

Providing a clear answer as to whether PCC ministers are or are not engaged in "employment" within the meaning of the *Code* would depend on a detailed interpretation of the PCC's internal documents that is beyond the scope of this opinion.

However, if PCC Ministers are considered to be "employed" within the meaning of the *Code*, a further potential mitigating factor is s. 24(1)(a) of the *Code*. Section 24(1) provides that the right to equal treatment with respect to employment is not infringed where a religious organization gives preference in employment to persons who are "similarly identified" with the interests of

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[98] *AB v. 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai*, 2020 HRTO 499 (CanLII) at para. 104.
[99] *AB v. 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai*, 2020 HRTO 499 (CanLII) at para. 92.
[100] *Corp. du petit séminaire de St-Georges de Beauce c. Cliche*, 1984 CanLII 3417 (QC CS); *Lewery v. Governing Council of Salvation Army in Canada*, 1993 CanLII 5290 (NB CA); *McCaw v. United Church of Canada* (C.A.), 1991 CanLII 7048 (ON CA).
[101] *McCaw v. United Church of Canada* (C.A.), 1991 CanLII 7048 (ON CA).
[102] *Dubois and Diocese of Trois-Rivières*, 2015 QCCLP 542 (CanLII).
[103] *Act respecting occupational health and safety*, CQLR c S-2.1.

people served by the religious organization and where being "similarly identified" is a *bona fide* qualification.

Section 24(1)(a) states that a religious, philanthropic, educational, fraternal or social institution or organization that mostly serves the interests of people identified by certain *Code* grounds including creed can give hiring preference to people from that group or impose a creed-based qualification, as long as the qualification is reasonable and legitimate (*bona fide*), given the nature of the job.

Of practical significance here, if Remit C is fully adopted by the PCC, it may be less likely that an individual PCC congregation could rely on s. 24(1) of the *Code* to insist that being non-LGBTQI is a *bona fide* creed-based qualification of service.

In order for s. 24(1)(a) to be available to the PCC, it must be determined that,

1. PCC is a "religious organization";
2. PCC is "primarily engaged in serving the interests of persons identified by" their creed and employs only people who are similarly identified; and
3. religious adherence is a reasonable and *bona fide* qualification because of the nature of the employment.[104]

In *Ontario Human Rights Commission v. Christian Horizons*, the main issue before the Tribunal was whether Christian Horizons could benefit from the protection given by s. 24(1)(a) of the *Code* in imposing a requirement in its "Lifestyle and Morality Statement" that support workers not engage in same sex relationships. A secondary and discrete issue was whether Christian Horizons permitted a "poisoned work" environment that fostered discrimination against an employee because of her sexual orientation.[105]

The decision affirms an important principle that religious organizations, whether they provide services directly to their own members or to the public, are eligible for the statutory exemption in s. 24(1)(a) of the *Code* that allows them to hire a co-religionist.

However, in the circumstances of the case, the Tribunal found that Christian Horizons was not entitled to the special exemption provision in s. 24(1)(a) of the *Code* and found an employee had been discriminated against on the basis of sexual orientation. A Court subsequently

[104] *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII) at para. 25; see also *Caldwell v. Stuart*, 1984 CanLII 128 (SCC); *Brossard v. Quebec*, 1988 CanLII 7 (SCC).
[105] *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII) at para. 14.

directed an anti-discrimination and anti-harassment policy and training program to address "discrimination on the basis of sexual orientation" and required that Christian Horizons cease to impose a requirement in its "Lifestyle and Morality Statement" that support workers not engage in same sex relationships.[106]

These principles are as yet untested in the scenario contemplated by Question 3. However, it is significant that the Court in *Christian Horizons* did not alter the Tribunal's findings with respect to whether, regardless of whether s. 24(1) of the *Code* was engaged, a "poisoned" work environment resulted from the Lifestyle and Morality Statement. For the Court, the evidence supported the finding that the Christian Horizons permitted the existence of a poisoned workplace. It did not have in place an effective process or training program to educate and combat any tendencies of employees to discriminate against members of the LGBTQI community.

Accordingly, to mitigate the potential risk of a s. 5 claim which is not barred by s. 24(1) of the *Code*, a reasonable response may include proactive training or education to combat discrimination within the PCC.

FREEDOM OF RELIGION IN CANADA

I. DIVISION OF POWERS

In Canada, couples wishing to be recognized by the state as married must meet both federal and provincial marriage requirements because neither the federal government nor any provincial government has exclusive jurisdiction over marriage. Section 91(26) of the *Constitution Act, 1867*[107] assigns the federal government jurisdiction over capacity questions (i.e. who can be married and to whom). Section 92(12) gives each province jurisdiction with respect to "The Solemnization of Marriage in the Province", which conditions of marriage and how a marriage is made valid.

Provincial legislatures can prescribe how a marriage licence is issued, who may perform a marriage ceremony, whether witnesses are required and how many, and how a marriage is registered with the state after the fact.[108] Religions may have requirements for marriage that

[106] *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII) at para. 121.
[107] *The Constitution Act, 1867*, 30 & 31 Vict, c 3.
[108] *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 (CanLII) at para. 5; see, for example, *Marriage Act*, RSY 2002, c 146; *Marriage Act*, RSBC 1996, c 282; *Marriage Act*, RSA 2000, c M-5; *The*

differ from or add to federal and provincial requirements. That being said, a religious marriage is valid for civil purposes only if the marriage meets federal and provincial requirements.

Provincial legislatures can, and do, permit religious officials to perform civil marriages. A civil marriage is often (but not necessarily) performed simultaneously with a religious marriage, with the ceremony thereby having a civil effect and a religious effect at the same time. The distinction between a civil marriage and a religious marriage can be "nearly invisible" since in some provinces and territories where the wedding ceremony is performed by a religious official a marriage licence is not required and the religious official will often take care of registering the marriage.[109]

It has been long settled that, by virtue of these provisions, the federal government has exclusive legislative competence in relation to the question of the capacity to marry, whereas the provinces have authority in respect of the performance of marriage formalities.[110] Accordingly, in every province there is a statute which identifies the persons who are empowered to solemnize marriages.[111] In addition to conferring this authority on various individuals with specified religious connections, the provinces also typically provide that a "marriage commissioner" may solemnize marriages.

II. *CHARTER*

Section 2(a) of the *Charter* provides as follows:

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

Marriage Act, 1995, SS 1995, c M-4.1; *The Marriage Act*, CCSM c M50; *Marriage Act*, RSNB 2011, c 188; *Marriage Act*, RSNS 1989, c 436; *Marriage Act*, SNL 2009, c M-1.02.

[109] Lorraine P Lafferty, *Religion, Sexual Orientation and the State: can Public Officials Refuse to Perform Same-Sex Marriage?*, 2007 CanLIIDocs 112.

[110] *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 at para. 18; *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 (CanLII) at paras. 40-41.

[111] *Marriage Act*, SNWT 2017, c 2; *Marriage Act*, RSPEI 1988, c M-3; Marriage *Act*, RSO 1990, c M.3; *Marriage Act*, RSY 2002, c 146; *Marriage Act*, RSNWT (Nu) 1988, c M-4; *Marriage Act*, RSBC 1996, c 282; *Marriage Act*, RSA 2000, c M-5.*The Marriage Act, 1995*, SS 1995, c M-4.1; *The Marriage Act*, CCSM c M50; *Marriage Act*, RSNB 2011, c 188; *Marriage Act*, RSNS 1989, c 436; *Marriage Act*, SNL 2009, c M-1.02; *Civil Code of Québec*, CQLR c CCQ-1991.

As explained in *R. v. Edwards Books and Art Ltd.*, "[t]he purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.[112]

Freedom of religion has been defined as "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practise or by teaching and dissemination".[113]

There is a concept of "state neutrality" in respect of religion and religious belief in Canada. For example, in *S.L. v. Commission scolaire des Chênes*, the Supreme Court stated:

> …following a realistic and non-absolutist approach, state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.[114]

Of relevance here, this suggests that the state may not prefer one or the other religious beliefs recognized in the Remits. It may not, for example, favour those Ministers and Presbyteries who believe that marriage is between two consenting adults over those who adhere to a traditional definition of marriage. Simply put, as established in *R v. Big M Drug Mart Ltd.*, government may <u>not</u> coerce individuals into affirming a specific religious belief or to manifest a specific religious practice for a sectarian purpose.[115]

The Supreme Court has adopted the following test for determining whether there has been an infringement of s. 2(a):

> An infringement of section 2(a) of the *Charter* will be made out where:

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[112] *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at p. 759; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 346; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 41; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 32.

[113] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 336; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 72; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 40; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 57; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at para. 32; *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 at para. 71; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para. 63.

[114] *S.L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235 at para. 32.

[115] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at pp. 347, 350.

1. the claimant sincerely believes in a belief or practice that has a nexus with religion; and
2. the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.[116]

Because s. 2(a) protects beliefs which are sincerely held by a rights claimant, courts must "ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice".[117] We suggest that, whether the Remits are fully adopted or not, a PCC Minister or individual PCC member who does not choose to exercise "liberty of conscience and action on marriage" in a way that supports same-sex marriage would be able to demonstrate that this is connected to a sincerely held belief. This is because the Remits propose to create parallel definitions of marriage within the PCC.

As a matter of PCC doctrine, the provision of "liberty of conscience and action on marriage" may be connected with other core PCC teachings, including a general call for PCC members to be active participants in the direction of their faith which is present in the Book of Forms. For example, the Book of Forms provides that, "To take away all occasion of tyranny," our Lord wills that office-bearers in his Church "should rule with mutual consent of brethren, and equality of power, every one according to his function."[118] Recent decisions of the Supreme Court of Canada confirm that, so long as the belief is *bona fide* and sincerely held, the Court will not look beyond or assess what is or is not a matter of faith.[119]

The Supreme Court of Canada has determined that state compulsion on religious officials to perform same-sex marriages (where contrary to their religious beliefs) violates the guarantee of freedom of religion under s. 2(a) of the *Charter*. In *Reference re Same-Sex Marriage*, the Supreme Court also stated that, "absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*".[120] Arguably, there may be circumstances in which a violation *could* be justified. Recent jurisprudence from the

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[116] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 32; *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 56-57; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 34, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 63.

[117] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 70; see also *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 35.

[118] Book of Forms, General Rules for Church Courts, Item 4. (2 Bk. of Dis. II, 4).

[119] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 70; see also *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 35.

[120] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 58.

Court of Appeal for Ontario[121] and Supreme Court of Canada[122] suggests that freedom of religion may yield to competing *Charter* values in the context of a s. 1 analysis.

The Supreme Court in *Highwood* noted that religious matters are not justiciable, partly because freedom of religion is protected by s. 2(a) of the *Charter*. We note that Justice Rowe cited *RWDSU v. Dolphin Delivery Ltd.*[123] as authority for the proposition that, by virtue of s. 32 of the *Charter* (which specifies that the *Charter* applies to the legislative, executive, and administrative branches of government), the *Charter* does not apply to private litigation.[124]

For Justice Rowe, the *Charter* does not directly apply to disputes where no state action is being challenged, though the *Charter* may inform the development of the common law or the interpretation of provincial human rights legislation. This means that religious groups are free to determine their own membership and rules, and that courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.[125]

In *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, individual physicians and organizations representing physicians in Ontario brought two separate applications in Divisional Court. They challenged the College of Physicians and Surgeons of Ontario's effective referral policies on the grounds that a requirement to provide effective referrals for services such as abortion and medical assistance in dying infringes freedom of conscience and religion under s. 2(a) of the *Charter*. The Divisional Court dismissed the applications, finding that while the policies infringed s. 2(a), the infringement is justified under s. 1 of the *Charter* because the Policies are reasonable limits, demonstrably justified in a free and democratic society. The Court of Appeal affirmed this decision, finding patients should not bear the burden of managing the consequences of physicians' religious objections,[126] and that "[o]rdinarily, where a conflict arises between a physician's interest and a patient's interest, the interest of the patient prevails".[127]

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[121] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (CanLII) at para. 187.
[122] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772.
[123] *RWDSU v. Dolphin Delivery Ltd.* 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573.
[124] *Highwood*; see also *A.B. v. C.D*. 2020 BCCA 11.
[125] *Highwood* at para. 39.
[126] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (CanLII) at para. 185.
[127] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (CanLII) at para. 187.

While the circumstances are clearly different in the context of a PCC Minister declining to officiate a same-sex wedding, the decision in *Christian Medical and Dental Society of Canada* indicates that, even where a s. 2(a) *Charter* right is breached, the state may impose reasonable limits on the expression of that right where it affects others.

In *Law Society of British Columbia v. Trinity Western University*, the Supreme Court of Canada noted administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority. More specifically, the Court noted that administrative bodies may "look to instruments such as the *Charter* or human rights legislation as sources of these values, even when not directly applying these instruments".[128] A potential risk associated with these findings is that those members of the PCC who wish to exercise "liberty of conscience and action on marriage" by recognizing and affirming same-sex marriages may seek to interpret key PCC governing documents (including the Book of Forms) in a manner consistent with *Charter* values such as equality. Further, they may wish to give effect to their own, parallel s. 2(a) right to practise their faith as same-sex members of the PCC.

In *McKitty v. Hayani*, the Court of Appeal for Ontario recently expressed caution about importing *Charter* values in the common law setting and indicated the question regarding the relationship between *Charter* values and *Charter* rights is unsettled in the administrative law context.[129] On the other hand, recent Supreme Court authority has held that, where *Charter* guarantees are infringed on by administrative decisions, decision-makers have a duty to balance the objective of a statutory scheme under which they operate with the *Charter* value or protection being infringed.[130]

This jurisprudence was recently applied by the Court of Appeal for Ontario in *Taylor-Baptiste v. Ontario Public Service Employees Union*.[131] *Taylor-Baptiste* involved the review of a HRTO decision relating to s. 5(2) of *Human Rights Code*. The complainant alleged she had been discriminated against with respect to employment. It was the position of the HRTO that *Doré* allowed them to consider relevant *Charter* values—which in this case were the freedoms of expression and association. The Court of Appeal agreed. The Court rejected the argument that an administrative tribunal can only consider *Charter* values in its decision-making if an

[128] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 46; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 at paras. 12-14, 26-28.
[129] *McKitty v. Hayani*, 2019 ONCA 805 (CanLII) at paras. 87-99.
[130] See *Doré v. Barreau du Quebec*, 2012 SCC 12 at paras. 24 and 55; *R v. Clarke*, 2014 SCC 28 at para. 16; and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 35.
[131] *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495.

ambiguity exists in the provision of its home or enabling statute.[132] The Court also found that *Doré*, read as a whole, requires administrative tribunals to "always…consider fundamental values".[133]

We note that there is a fundamental difference between the scenarios in *Taylor-Baptiste*, *Trinity Western*, and *Christian Medical and Dental Society of Canada* and the scenario before the PCC in this context. In *Taylor-Baptiste*, there was no religious freedom issue to consider. In both *Trinity Western* and *Christian Medical and Dental Society of Canada*, the question concerned the extent to which the provision of a secular service and/or secular institution had to accommodate privately held religious beliefs. By way of contrast, in the context of the questions raised by the PCC herein, the central issues are matters of internal PCC doctrine. As noted by the Supreme Court of Canada in *Amselem*, "[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."[134]

III. JURISPRUDENCE AFFECTING SAME-SEX MARRIAGE RIGHTS

In 2004, the Supreme Court of Canada rendered a landmark decision confirming the legal validity of same-sex marriage.[135] Parliament then enacted legislation redefining marriage to include such unions.[136]

In *Reference re Same-Sex Marriage*, the Supreme Court of Canada was tasked with answering the following question: Does the freedom of religion guaranteed by s. 2(a) of the *Charter* protect religious officials from being compelled to perform same-sex marriages contrary to their religious beliefs?

In answering this question, the Supreme Court of Canada observed that, since s. 2(a) of the *Charter* only relates to state action, "the protection of freedom of religion against private actions is not within the ambit of this question".[137] This leaves a fundamental gap in the jurisprudence with respect to private compulsion on religious officials.

However, significantly, the Supreme Court found that the Provinces, in their power over the solemnization of marriage, may legislate in a way that "protects the rights of religious officials

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[132] *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495 at para. 55.
[133] *Doré v. Barreau du Quebec*, 2012 SCC 12 at para. 35.
[134] *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50.
[135] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII), [2004] 3 SCR 698.
[136] *Civil Marriage Act*, SC 2005, c 33.
[137] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 55.

while providing for solemnization of same-sex marriage", and that Canada's human rights legislation "must be interpreted and applied in a manner that respects the broad protection granted to religious freedom under the *Charter*".[138]

For the Supreme Court of Canada, the right to freedom of religion enshrined in s. 2(a) of the *Charter* encompasses "the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice".[139]

Regarding state compulsion of religious officials and organizations, the Supreme Court has specifically found:

- that the performance of religious rites is a fundamental aspect of religious practice;[140]
- that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate s. 2(a) of the *Charter*;[141]
- that state compulsion to assist in the celebration of same-sex marriages is contrary to s. 2(a) of the *Charter*;[142] and
- that the *Charter* protects against the compulsory use of "sacred spaces" for the celebration of same-sex marriages.[143]

In *Halpern v. Canada (Attorney general)*, the Court of Appeal for Ontario was explicit in recognizing the right of religious groups to opt out of same-sex marriage: "[f]reedom of religion under s. 2(a) of the *Charter* ensures that religious groups have the option of refusing to solemnize same-sex marriages."[144]

It is important to be clear about what marriage is for the purpose of this analysis. As noted by the Court of Appeal in *Halpern*, marriage is:

- a legal institution, and

[138] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 55.
[139] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 57; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at pp. 336-337.
[140] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 57.
[141] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 58.
[142] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 59.
[143] *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 59.
[144] *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403 (ON CA) at para. 138.

- a religious and a social institution.

In *Halpern*, the Court of Appeal was careful to note that, with respect to its decision to extend civil marriage rights to same-sex couples, "[t]his case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage".[145]

This passage is significant because it demonstrates a fundamental distinction between secular and religious marriage. Whereas secular marriage is a justiciable matter for the courts, the parameters of religious marriage, as a religious rite and matter of church doctrine, are not.

It is also important to note the Court of Appeal's understanding in *Halpern* that the law does not determine what marriage ceremonies will or will not conform to religious doctrine:

> In sharp contrast to the situation in *Big M Drug Mart*, the common law definition of marriage does not oblige MCCT [*Metropolitan Community Church of Toronto*] to abstain from doing anything. Nor does it prevent the manifestation of any religious beliefs or practices. There is nothing in the common law definition of marriage that obliges MCCT, directly or indirectly, to stop performing marriage ceremonies that conform with its own religious teachings, including same-sex marriages. Similarly, there is nothing in the common law definition of marriage that obliges MCCT to perform only heterosexual marriages.[146]

In *Barbeau v. British Columbia (Attorney General)*, the British Columbia Court of Appeal said, when considering if religious groups would be required to participate in same-sex marriages, that the equality of same-sex marriages does not displace the rights of religious groups to refuse to solemnize same-sex marriages. The Court of Appeal noted that Article 367 of the *Civil Code of Québec*[147] explicitly provides that no minister of religion may be forced to celebrate same-sex marriages. A concern was raised that, absent a provision like Article 367, religions whose beliefs preclude the recognition of same-sex marriage "could find themselves required to participate in such marriages, or be discriminated against because of their beliefs".[148] In response to this concern, the Court of Appeal stated as follows:

> As noted by Lemelin J. in *Hendricks*, there is no hierarchical list of rights in the *Charter*, and freedom of religion and conscience must live together with s. 15

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[145] *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403 (ON CA) at para. 53.
[146] *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403 (ON CA) at para. 57.
[147] *Civil Code of Québec*, CQLR c CCQ-1991.
[148] *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 (CanLII) at para. 133.

> equality rights. One cannot trump the other. In her view, shared by the court in *Halpern*, the equality rights of same-sex couples do not displace the rights of religious groups to refuse to solemnize same-sex marriages which do not accord with their religious beliefs. Similarly, the rights of religious groups to freely practise their religion cannot oust the rights of same-sex couples seeking equality, by insisting on maintaining the barriers in the way of that equality. While it is always possible for an individual to attempt to challenge the practices of a religious group as being contrary to *Charter* values, the possibility of such a challenge cannot justify the maintenance of the common law barrier to same-sex marriage.[149]

Similar decisions have arisen in many Canadian provinces. For example, as noted by the Saskatchewan Court of Appeal in *Marriage Commissioners Appointed Under The Marriage Act (Re)*, "gay and lesbian couples will not have access to the institution of marriage unless they are able to call on a marriage commissioner to perform the required ceremony".[150] This finding affirms the notion that religious officials and organizations are not required to perform or accommodate the performance of same-sex marriages, since the right to be married outside the context of a church is open to same-sex couples.

Most recently, in *Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)*,[151] the Khaladkar J. determined that a decision of the Board of Inquiry under the *Human Rights Act, 2010* requiring a marriage commissioner to solemnize same-sex marriages was correct. In Newfoundland and Labrador, following the decision in *Pottle v. Canada (Attorney General)*,[152] the Province amended its *Solemnization of Marriage Act* (now the *Marriage Act*)[153] to require that marriage commissioners appointed under s. 10 of the former *Act*, resign their appointments if they were unable to provide services to same-sex couples.[154]

Khaladkar J. noted that the Province took this action as "an accommodation for same-sex couples who, theretofore, had been denied the right to legitimize their unions in the eyes of the law", adding that "[a]lthough the *Charter* had been brought into force in 1982, it took 22 years

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[149] *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 (CanLII) at para. 133. [Emphasis added].
[150] *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 (CanLII) at para. 10. [Emphasis added].
[151] *Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)*, 2021 NLSC 9 (CanLII).
[152] *Pottle v. Canada (Attorney General)*, [2004] NJ No 470.
[153] *Marriage Act*, SNL 2009, c M-1.02.
[154] *Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)*, 2021 NLSC 9 (CanLII) at para. 30.

before same-sex couples could legally enter the state of civil matrimony in the Province. In some religions and religious creeds it is still not possible to do so."[155]

Khaladkar J. went on to identify the practical challenge associated with accommodating a public official's sincerely held religious belief to refuse service to same-sex couples:

> [i]f approached for services as a marriage commissioner by a same-sex couple, Ms. Dichmont would not have the luxury of refusing the couple her services because of her strongly held religious belief. If she did so, she would be shedding her mantle of neutrality and discriminating against the same-sex couple on a prohibited ground under the Province's human rights legislation. She, in her official capacity, is not allowed to discriminate.[156]

Critically, Khaladkar J. found that a marriage commissioner may not discriminate in their "official capacity". However, from a purely religious and doctrinal perspective, the members of a church are (and remain) free from any state compulsion to perform same-sex marriages.

This is because, as Khaladkar J., stated,

> We have, in Canada, a clear separation between religion and state. The state is required to be neutral in its dealings with its citizens. However, religious organizations are allowed considerable latitude in keeping with the rights that are recognized as belonging to them under the *Charter*. Within the umbrella of the protected right to religious freedom, Ms. Dichmont and her religious organization, have the right to consider same-sex marriage as sinful and to make the choice not to celebrate any same-sex marriages.[157]

Khaladkar J. went on to describe the "dual role" that clergy perform when celebrating marriages:

> They, firstly, legitimize the union of two individuals in accordance with the dictates of their faith. Secondly, they are recognized by the state as being persons who, *ex officio*, are allowed to record the fact that a marriage has taken place because the state has a legitimate interest in recording that fact for a variety of reasons. In no way does the fact that clergy record marriage particulars result in the loss of any religious freedom. They remain free to follow the dictates of their religion subject

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[155] *Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)*, 2021 NLSC 9 (CanLII) at para. 30.
[156] *Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)*, 2021 NLSC 9 (CanLII) at para. 37.
[157] *Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)*, 2021 NLSC 9 (CanLII) at para. 45. [Emphasis added].

> only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[158]

Finally, it is important to note that the Court distinguished between the rights of religious officials and civil, secular officials to refrain from conducting same sex marriages. For Khaladkar J., *Reference re Same-Sex Marriage* protects the rights of religious officials only.[159]

In *Kisilowsky v Manitoba*,[160] Mr. Kisilowsky had made a complaint after the Province of Manitoba had declared that the common law definition of marriage included same-sex partners.[161] The Province of Manitoba, like Newfoundland and Labrador, requested marriage commissioners to resign their licence if they were unable to perform same-sex marriage ceremonies. Mr. Kisilowsky, who was a marriage commissioner, refused to marry same-sex couples on the basis it was contrary to his religious beliefs.

In its decision, the Manitoba Court of Appeal made the following observations about the authority of religious officials to solemnize marriages in Manitoba:

> In Manitoba, legislation provides for two ways in which a person may be authorized to solemnize marriages. First, a person may be registered as a religious official pursuant to section 2 of *The Marriage Act*, CCSM c M50, (the *Act*) (religious official) to perform religious ceremonies. Specifically, religious denominations may ordain, appoint, or commission members of their faith and apply to register them as religious officials to solemnize marriages. A religious official may solemnize marriages of his or her choice and is not required to solemnize same-sex marriages.[162]

By way of contrast, the "second way" to be authorized in Manitoba is to be – as Mr. Kisilowsky was – a registered marriage commissioner pursuant to s. 7(1) of the *Act*. However, following *Vogel v Canada (Attorney General)* recognizing that "[t]he common law definition of marriage in Manitoba is reformulated to be the voluntary union for life of two persons to the exclusion of all others",[163] Manitoba took the position that civil marriage commissioners must be able to provide civil marriage solemnization services to same-sex couples. Such marriage

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[158] *Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)*, 2021 NLSC 9 (CanLII) at para. 48.
[159] *Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)*, 2021 NLSC 9 (CanLII) at paras. 68-69.
[160] *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII).
[161] *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII) at paras. 11-17.
[162] *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII) at para. 5.
[163] *Vogel v Canada (Attorney General)*, [2004] MJ No 418.

commissioners are providing services on behalf of Manitoba and so cannot engage in discriminatory behaviour against same-sex couples.[164]

The Court of Appeal noted that, for Mr. Kisilowsky, he may marry who he wishes by applying for a temporary marriage commissioner's appointment or "based on the evidence given by the applicant regarding the nature of his religious activities, he could be eligible to be registered as a religious official."[165] Once again, implicit in this finding is an understanding that religious officials are permitted the latitude to marry who they wish, in accordance with religious doctrine.

JUSTICIABILITY OF RELIGIOUS DOCTRINE ON SAME-SEX MARRIAGE IN CANADA

I. JUDICIAL REVIEW OF VOLUNTARY ASSOCIATIONS

The Court of Appeal for Ontario and Federal Court of Appeal have recently confirmed that, unless the decisions of an association (whether they be incorporated or unincorporated voluntary associations) are sufficiently infused with a public element, they are governed by private not public law.[166] In *Arriola v. Ryerson Students' Union*, *Naggar v. The Student Association at Durham College and UOIT*, and *Zettel v. University of Toronto Mississauga Students' Union*, the Superior Court of Justice provided a detailed list of associations which could be presumptively exempt from the application of public law and public law remedies:

- charities,
- social clubs,
- fraternities,
- sororities,
- yacht, golf, tennis, curling clubs, etc.,
- athletic organizations,
- schools,
- religious societies,
- trade unions,

[164] *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII) at para. 13.
[165] *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII) at paras. 88-90.
[166] *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at paras. 26-30; *Setia v. Appleby College*, 2013 ONCA 753 at paras. 32-42.

- professional guilds,
- political parties,
- or NGOs (non-governmental organizations).[167]

The *Charter of Rights and Freedoms* applies to an association's activities if the association is government or if the association's activity is governmental action.[168] Where the affairs of an association are governed by private law, a court has only a limited jurisdiction to review the conduct and decisions of associations. There is ample jurisprudence to support the proposition that a court will (and should) only do so if a significant private law right or interest is involved.[169]

Further, if a significant private law right or interest is involved (e.g. "where a member of an association has been expelled or lost his or her membership status, been deprived of his or her membership privileges, or his or her ability to pursue vocations and avocations associated with the association"[170]) the court does not review the merits of the association's conduct or decision. Rather, the limited role of the courts is to review whether the purported expulsion or loss of membership or of membership privileges is carried out according to the applicable rules of the association and with the principles of natural justice, and without *mala fides*.[171]

In terms of mitigation of the risk that a court will exercise its jurisdiction to weigh in on the private decisions of the PCC as a voluntary organization, we note there is jurisprudence demonstrating that a court may decline its jurisdiction and treat the court proceeding as premature where it is shown that internal procedures and remedies of the association have not

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[167] *Arriola v. Ryerson Students' Union*, 2018 ONSC 1246 (CanLII) at para. 49; see also *Naggar v. The Student Association at Durham College and UOIT*, 2018 ONSC 1247 (CanLII) at para. 47; *Zettel v. University of Toronto Mississauga Students' Union*, 2018 ONSC 1240 (CanLII) at para. 49.

[168] *Mckinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229; *Arriola v. Ryerson Students' Union*, 2018 ONSC 1246 (CanLII) at para. 52 *Naggar v. The Student Association at Durham College and UOIT*, 2018 ONSC 1247 (CanLII) at para. 50.

[169] See, for example, *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (CanLII), [2018] 1 SCR 750; *Street v. B.C. School Sports*, 2005 BCSC 958; *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329 (C.A.).

[170] *Arriola v. Ryerson Students' Union*, 2018 ONSC 1246 (CanLII) at para. 53.

[171] *Lakeside Colony of Hutterian Brethren v. Hofer*, 1992 CanLII 37 (SCC) at paras. 10-11; see also *Berry v. Pulley*, 2002 SCC 40; *Pal v. Chatterjee*, 2013 ONSC 1329; *Farren v. Pacific Coast Amateur Hockey Association* 2013 BCSC 498; *Lee v. Yeung*, 2012 ABQB 40; *University of Victoria Students' Society v. Canadian Federation of Students*, 2011 BCSC 122; *Garcia v. Kelowna Minor Hockey Association*, 2009 BCSC 200; *Association of Part-Time Undergraduate Students of the University of Toronto v University of Toronto Mississauga Students Union*, [2008] O.J. No. 3344 (S.C.J.); *Barrie v. Royal Colwood Golf Club*, 2001 BCSC 1181; *Falk v. Calgary Real Estate Board Co-operative Ltd.*, 2000 ABQB 297.

been exhausted.[172] The most significant risk presented by the Remits in this context is that a claim could be made that, for same-sex couples within the PCC who are unable to be married by the Minister of their choice or at the Church facility of their choice, they been deprived of membership privileges, or the ability to pursue vocations and avocations associated with the PCC.[173]

II. JUDICIAL REVIEW OF RELIGIOUS ORANIZATIONS

To illustrate this idea in the context of a religious organization, consider the decision of the Court of Appeal for Ontario in *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*.[174] In that case, the Archdiocese became concerned about Father Hart's business relationships and irregularities in parish finances. The Archdiocese decided to remove Father Hart from office, pursuant to ecclesiastical rules. The Court of Appeal determined that Father Hart was required to seek redress, not through the courts, but through the internal review process provided by canon law.

Father Hart asserted that his relationship with the Archdiocese was "multi-faceted" – meaning that while some aspects may have been ecclesiastical, "other aspects concerned property and civil rights". Father Hart noted that he contributed to unemployment insurance and Canada pension, paid income tax, and most important to him, lost the lodging that accompanied his position when he was removed as pastor.[175] The Court of Appeal rejected the argument that the "multi-faceted" nature of his relationship to the Church brought the dispute within the jurisdiction of the Court.

For the Court of Appeal, courts will interfere in the internal affairs of a self-governing organization in only two situations:

- where the organization's internal processes are unfair (or do not meet the requirements of natural justice); or

[172] *Ukrainian Greek Orthodox of Canada v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, 1940 CanLII 59 (SCC); *Lakeside Colony of Hutterian Brethren v. Hofer*, 1992 CanLII 37 (SCC); *Lee v. Yeung*, 2012 ABQB 40; *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728.
[173] *Arriola v. Ryerson Students' Union*, 2018 ONSC 1246 (CanLII) at para. 53.
[174] *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728 (CanLII).
[175] *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728 (CanLII) at para. 15.

- where the aggrieved party has exhausted the organization's internal processes.[176]

As noted above, the Court of Appeal affirmed that, subject to any enabling statutory provision, the reviewing court will not consider the merits of the internal decision, but will determine only whether the decision was carried out in accordance with the organization's rules and the requirements of natural justice.[177] We note that the Supreme Court of Canada has recently affirmed this proposition in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall* (citing, with approval, *Lakeside Colony of Hutterian Brethren v. Hofer*).[178]

Significantly, in *Hart*, the Court of Appeal described the nature of the Roman Catholic Church in arriving at the conclusion that canon law provides the proper review process for ecclesiastical disputes of the kind raised by Father Hart:

> The Roman Catholic Church is a self-governing organization. Its canon law provides an internal review process for ecclesiastical disputes. The expert evidence before the motion judge showed that where an administrative decree may affect the rights of a party, canon law requires that the party be given notice, an opportunity to respond and an unbiased tribunal. Canon law also provides a broad range of remedies, including the substitution of a different decree, monetary compensation and even a trial.[179]

This suggests that where a religious organization has an internal review process, this decreases the likelihood that questions affecting that internal process will be subject to the supervisory jurisdiction of a court.

More recently, in *Pankerichan v. Djokic*,[180] the Court of Appeal described the reasons for "judicial diffidence" in face of requests to intervene in the internal affairs of a religious organization:

> There are good reasons for judicial diffidence. Freedom of religion, a fundamental right protected by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.

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[176] *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728 (CanLII) at para. 19.
[177] *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728 (CanLII) at para. 19.
[178] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (CanLII), [2018] 1 SCR 750 at para. 37; *Lakeside Colony of Hutterian Brethren v. Hofer*, 1992 CanLII 37 (SCC) at p. 175.
[179] *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728 (CanLII) at para. 20.
[180] *Pankerichan v. Djokic*, 2014 ONCA 709 (CanLII).

> 11, can be implicated in such disputes and must be respected. Courts also recognize the real risk of misunderstanding the relevant religious tradition and culture, and that a mistaken decision could saddle the organization with difficult if not unworkable consequences: *Lakeside Colony of Hutterian Brethren v. Hofer*, 1992 CanLII 37 (SCC), [1992] 3 S.C.R. 165, at paras. 63-64.[181]

The most recent decision of the Supreme Court of Canada which touches on these principles is *Highwood*.[182] In that case, the central question was whether, if ever, s. 96 courts have jurisdiction to review the decisions of religious organizations on procedural fairness grounds.[183] By way of context, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses in Alberta disfellowshipped Mr. Wall, after he admitted that he had engaged in sinful behaviour and he was considered to be insufficiently repentant.

The Supreme Court stated that judicial review at common law is limited to public decision-makers. The Judicial Committee of the Congregation was not a public decision maker and so the question was not "justiciable". Justice Rowe noted the following for the unanimous Supreme Court:

- The purpose of judicial review is to ensure the legality of state decision making.[184]
- Judicial review is a public law concept that allows s. 96 courts to "engage surveillance of lower tribunals" in order to ensure that these tribunals respect the rule of law".[185]
- Private parties cannot seek judicial review to solve disputes that may arise between them; rather, their claims must be founded on a valid cause of action, for example, contract, tort or restitution.[186]
- [T]here is no free-standing right to procedural fairness with respect to decisions taken by voluntary associations.[187]
- Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes.[188]

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[181] *Pankerichan v. Djokic*, 2014 ONCA 709 (CanLII) at para. 55.
[182] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (CanLII), [2018] 1 SCR 750 at para. 25.
[183] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (CanLII), [2018] 1 SCR 750.
[184] *Highwood* at para. 13.
[185] *Highwood* at para. 13.
[186] *Highwood* at para. 13.
[187] *Highwood* at para. 24.
[188] *Highwood* at para. 24.

- Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.[189]

Justice Rowe, writing for a unanimous Supreme Court of Canada, noted that there is an alternative line of jurisprudence which suggests that judicial review is available with respect to decisions by churches and other voluntary associations. However, in *Highwood*, the Supreme Court of Canada clearly rejected this line of jurisprudence. For the Court, these decisions should not be taken "as authority for the broad proposition that private bodies are subject to judicial review. Both lines of cases fail to recognize that judicial review is about the legality of state decision-making".[190]

The Supreme Court of Canada has previously considered the relevance of religion to the question of justiciability. For example, in *Bruker v. Marcovitz*, Justice Abella stated: "The fact that a dispute has a religious aspect does not by itself make it non-justiciable."[191] In *Bruker*, Justice Abella quoted with approval the following passage from M.H. Ogilvie, *Religious Institutions and the Law in Canada* (2nd ed., 2003):

> Subject to any protections accorded to individuals and religious groups pursuant to the *Canadian Charter of Rights and Freedoms*, which have yet to be worked out in detail by the courts, religious institutions and persons in Canada are subject to the sovereignty of Parliament and the sanctioning powers of the state invoked by the courts when disputes concerning religion are brought for resolution.
>
> Nevertheless, the courts have expressed reluctance to consider issues relating to religious institutions, evidencing some embarrassment that internal church disputes should be determined by secular courts and doubting the appropriateness of judicial intervention. The courts have stated that they will not consider matters that are strictly spiritual or narrowly doctrinal in nature, but will intervene where civil rights or property rights have been invaded.[192]

In *Highwood*, the most recent word on this subject from the Supreme Court of Canada, Justice Rowe affirmed that courts should not be deciding "matters of religious dogma".[193] As authority

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[189] *Highwood* at para. 24.
[190] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (CanLII), [2018] 1 SCR 750 at paras. 13-17. [Emphasis added].
[191] *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 41.
[192] *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 42. [Emphasis in original].
[193] *Highwood* at para. 35.

for this proposition, Justice Rowe referred to *Syndicat Northcrest v. Amselem*. In that decision, the Supreme Court of Canada unequivocally stated that "[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."[194]

Citing *Amselem* and *Demiris v. Hellenic Community of Vancouver*, Justice Rowe added that "[t]he courts have neither legitimacy nor institutional capacity to deal with such issues, and have repeatedly declined to consider them".[195]

A general principle emerges from the *Highwood* decision: religious or doctrinal aspects of a dispute are considered 'off-limits'. That being said, a court *may* consider the purely procedural aspects of a decision made by a religious organization.

In *UAlberta Pro-Life v Governors of the University of Alberta*, the Court of Appeal for Alberta recently affirmed the statement made in *Highwood* that "judicial review is not a broad appellate remedy against decisions of institutional decision-makers. It is subject to the rules of justiciability and of state involvement".[196]

III. COMPETING JURISPRUDENCE?

In *Aga*, the Court of Appeal determined that a court's jurisdiction to address a voluntary association's adherence to its own procedures (including the "fairness" of those procedures) depends on the presence of an underlying legal right to be adjudicated, such as a property or a civil right in contract or tort. Of interest here, the Court of Appeal also determined that membership in a voluntary religious association, by itself, could constitute an underlying legal right grounding jurisdiction and that the presence of a written constitution and by-laws create reviewable contractual relations.[197]

The practical concern for the PCC is whether an individual member could use the mere existence of the PCC's written rules to apply to a court to enforce a particular interpretation of Remits B and C. The reason for this concern arises from the interpretation of the law presented by the Court of Appeal in *Aga* (and independently arrived at in other jurisdictions[198]) that where

[194] *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50.
[195] *Highwood* at para. 36. See *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733, at para. 33; *Amselem*, at paras. 49-51.
[196] *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 (CanLII) at para. 28.
[197] *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10 (CanLII).
[198] See *Farrish v. Delta Hospice Society*, 2020 BCCA 312 (CanLII) at para. 47.

an association has a written constitution or bylaws, members may properly resort to the courts (although not for judicial review *per Highwood*) in order to have such "contracts" enforced.

A good illustration of these concepts is found in *Bains v. Khalsa Diwan Society of Abbotsford*.[199] In that case, members of a religious society – a Sikh group called the Khalsa Diwan Society of Abbotsford – were suspended or expelled following an incident at the society's annual general meeting. Six of the expelled members were subsequently banned from the society's premises after a separate incident.

The expelled members sought a remedy in court. They applied for an order setting aside the decision to expel the members, and directing the religious society reinstate them. Alternatively, they sought an injunction preventing the religious society from barring from access to facilities to receive religious services and declaratory relief (pursuant to British Columbia's *Societies Act*[200]) that the society was oppressive or unfairly prejudicial. This case is significant because, despite the religious nature of the organization, the question of justiciability was <u>not</u> raised before the Chambers Judge or on appeal to the Court of Appeal.[201]

The Chambers Judge observed:

> Khalsa is a religious society, and membership in a religious organization may be a significant aspect of a person's wellbeing. I find that the interests at stake are of sufficient importance to attract a level of procedural fairness above that of a purely social club, but not as high as an organization that could affect property rights or employment. The [respondents] were entitled to notice of the allegations made against them, an opportunity to be heard, and an unbiased decision maker. These are tenets of procedural fairness. The first two aspects are adopted in Bylaw 14, in which Khalsa recognizes the right to notice and an opportunity to be heard. An unbiased tribunal is fundamental to a meaningful opportunity to be heard.[202]

The Chambers Judge found that the religious society had failed to provide the members adequate notice of the particulars of the allegations, and that there was a reasonable apprehension of bias. Further, the Chambers Judge allowed the members' petition under the *Societies Act*, ordered that their expulsions, suspensions, or bans be set aside, and that they be reinstated as members.[203] The Court of Appeal allowed the appeal in part, but only on the basis

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[199] *Bains v. Khalsa Diwan Society of Abbotsford*, 2021 BCCA 159 (CanLII).
[200] *Societies Act*, SBC 2015, c 18.
[201] *Bains v Khalsa Diwan Society of Abbotsford*, 2020 BCSC 181 (CanLII); *Bains v. Khalsa Diwan Society of Abbotsford*, 2021 BCCA 159 (CanLII).
[202] *Bains v Khalsa Diwan Society of Abbotsford*, 2020 BCSC 181 (CanLII) at para. 42.
[203] *Bains v. Khalsa Diwan Society of Abbotsford*, 2021 BCCA 159 (CanLII) at para. 21.

that the Chambers Judge had failed to assess the necessary degree of procedural fairness. Ultimately, the Court did not interfere with para. 3 of the Chambers Judge's order, which set aside the Society's July 1, 2018 decision to ban six of the respondents from the Society's premises.[204]

This outcome was possible, in part, because the religious society was incorporated under the *Societies Act*, and also because the religious society's by-laws provided a vehicle for the court to engage in an analysis of procedural fairness and provide juridical remedies. The Court of Appeal in this case affirmed that "the relationship between a society and its members is essentially contractual in nature".[205]

Significantly, on May 21, 2021, the Supreme Court of Canada released its decision on appeal from the Court of Appeal decision in *Aga*. The Supreme Court confirmed that becoming a member of a religious organization, without more, does not create legally enforceable rights.[206] Contrary to the Court of Appeal decision in *Aga*, the Supreme Court of Canada also confirmed membership in a voluntary association is not automatically contractual, even where there is a written constitution.[207] Instead, a voluntary association should only be seen as "a web of contracts among the members" where the conditions for contract formation are met, including an objective intention to form contractual relations. Regarding the impact of a written constitution and by-laws, the Court determined:

> The finding of a contract between members of a voluntary association does not automatically follow from the existence of a written constitution and bylaws. Voluntary associations with constitutions and bylaws may be constituted by contract, but this is a determination that must be made on the basis of general contract principles, and objective intention to enter into legal relations is required.[208]

The Supreme Court also drew an important distinction between the enforceability of spiritual and secular obligations. For the Supreme Court, while underlying legal rights (e.g. a contract of employment between a minister and their church) *may* be enforceable by a secular court, the

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[204] *Bains v. Khalsa Diwan Society of Abbotsford*, 2021 BCCA 159 (CanLII) at para. 123.
[205] *Bains v. Khalsa Diwan Society of Abbotsford*, 2021 BCCA 159 (CanLII) at para. 112; see also *Farrish v. Delta Hospice Society*, 2020 BCCA 312 at paras. 46–48; *Bhandal v. Khalsa Diwan Society of Victoria*, 2014 BCCA 291 at paras. 26–27; *Kwantlen University College Student Association v. Canadian Federation of Students – British Columbia Component*, 2011 BCCA 133 at para. 30.
[206] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 51.
[207] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 49.
[208] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 3.

religious/doctrinal aspects of the employment relationship are significantly less likely to be enforced by judges.[209] The Supreme Court of Canada summarized this point as follows:

> The upshot is this. Courts must have jurisdiction to give effect to legal rights – including legal rights held by members of religious associations and impermissibly affected in the operation of such associations…However, courts should not be too quick to characterize religious commitments as legally binding in the first place...[210]

For the Supreme Court of Canada, even where property or employment is at stake, the intervention of a secular court will be less likely in the religious context,[211] where "individuals may intend for their mutual obligations to be spiritually but not legally binding."[212]

3. CONCLUSION

In January of 2021, the Assembly Council recommended that the Executive of the Presbyterian Church in Canada ("PCC") retain independent counsel to address matters contained in Remits B and C. The Remits purport to establish two parallel definitions of marriage and would provide a basis for the recognition of both same-sex marriages and the ordination of LGBTQI persons (married or single) as Ministers or Ruling Elders in the PCC. The Remits also provide "liberty of conscience and action" on marriage and ordinations, which suggests that individual ministers, congregations, and PCC members are free to adhere to the traditional definition of marriage and to decline participation in the ordination of LGBTQI Ministers or Ruling Elders.

The full adoption of Remits B and C would present a range of practical risks and potential challenges for the PCC. At the same time, there are also a range of important mitigating factors which may be sourced in legislation, jurisprudence from across Canada, and the *Charter*.

The federal *Civil Marriage Act* recognizes and affirms the right of religious officials and religious groups to refuse to perform marriages that are not in accordance with their religious beliefs. As noted, four additional jurisdictions have included similar legislative protections.

Courts of Appeal in British Columbia, Manitoba, Saskatchewan, Ontario, and the Supreme Court of Canada have consistently stated that the equality rights of same-sex couples do not displace the rights of religious groups to refuse to solemnize same-sex marriages which do not accord

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[209] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 41.
[210] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 42.
[211] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 49.
[212] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 49.

with their religious beliefs.[213] Indeed, even if the federal government, Ontario, Québec, Prince Edward Island, and the Northwest Territories all removed the explicit statutory protections outlined above, religious officials and organizations enjoy a recognized s. 2(a) *Charter* right to decide who may be married in accordance to the rites, practices and beliefs of the religion in question.

Following the *Vriend* decision, all contemporary human rights legislation in Canada ensures that sexual orientation is a protected ground of discrimination. However, the freedom of religion is a competing value to consider in the human rights context. For example, in Ontario, s. 18.1 of the *Human Rights Code* expressly permits religious officials to refuse to preside over (or assist in the solemnization of) a marriage in a "sacred place" or refuse to allow a "sacred place" to be used for a marriage event, if this goes against their religious beliefs or "the doctrines, rites, usages or customs of the religious body to which the person belongs."

As noted above, there are a number of risks and mitigating factors to consider when assessing the likelihood that the PCC will be subject to liability under human rights legislation. However, we note that the Human Rights Tribunal of Ontario found that where a religious official, such as a priest or PCC minister is exercising rights at the core of their right to freedom of religion and purely connected with his religious role, that religious official's actions or conduct do <u>not</u> fall within the meaning of 'services' under the *Code*.[214] The Tribunal has also previously noted that it is not an appropriate use of the *Code* to challenge a religion's belief system or teachings.[215] In Ontario, the Divisional Court has also affirmed that Canadians are not required to render services that are "in direct conflict with the core elements of…religious beliefs or creed."[216] Further, there is guidance to suggest that a potential discrimination claim as against the PCC or an individual congregation would not necessarily meet threshold requirements – PCC property may <u>not</u> constitute a "facility", and the performance of a marriage ceremony may <u>not</u> constitute a "service" within the meaning of the *Code*.

The justiciability of religious doctrine is an important factor to consider in weighing the potential risks posed by Remits B and C. Canadian courts have consistently held that questions of doctrine are not justiciable. Most recently, on May 21, 2021, the Supreme Court of Canada

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[213] *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403 (ON CA) at para. 57; *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at paras. 57-59; *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 (CanLII) at para. 133; *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII) at para. 5; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 (CanLII) at paras. 12, 120.
[214] *Tesseris v. Greek Orthodox Church of Canada*, 2011 HRTO 775 (CanLII) at paras. 1, 9.
[215] *Dallaire v. Les Chevaliers de Colomb,* 2011 HRTO 639 (CanLII) at para. 35.
[216] *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC) at para. 58.

released a decision[217] confirming that membership in a religious organization, without more, does not create legally enforceable rights.[218] The Supreme Court also indicated that while a contract of employment between a minister and their church *may* be enforceable by a secular court, there is a difference between religious or spiritual obligations and those which can be enforced by judges.[219] For the Supreme Court of Canada, even where property or employment is at stake, the intervention of a secular court is less likely in the religious context.[220]

Accordingly, there is a limited role for courts to review the conduct and decisions of voluntary associations, which is only engaged where a significant private right or interest is in question.[221] Even if a court exercises jurisdiction to review a voluntary organization's decisions, it does not review the underlying merits of that decision. Instead, the limited role of the court is to ensure that the applicable rules of the association conform to principles of natural justice.

To summarize, while the elimination of all potential risks to individual Ministers, congregations, and PCC would be impossible, there is a range of mitigating factors which may be sourced in legislation, in jurisprudence from across Canada, and in the Canadian constitution. Indeed, these mitigating factors greatly minimize the potential risks posed by the full adoption of Remits B and C.

Yours truly,

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[217] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22.
[218] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 51.
[219] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 41.
[220] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 49.
[221] See, for example, *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (CanLII); *Street v. B.C. School Sports*, 2005 BCSC 958; *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329 (C.A.).

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