



Opportunity and Temptation: A Reformed Christian Legal Perspective on Church Discipline in Canada

In this paper, André Schutten and John Sikkema explore church-state relations in Reformed Christian thought. They describe the high view of both government and local church authority present in the Reformed tradition. They examine recent legal conflicts in Canada between church and state, including Supreme Court cases such as *Wall v. Highwood Congregation* and the two Trinity Western University cases (2018), and human rights tribunal proceedings regarding the institutional autonomy of congregations to enforce church discipline. This paper is the third

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INTRODUCTION

On a cold night in 1561, Guido de Brès crawled up to the castle wall of Tournai, where the governor of the Netherlands resided, and tossed a small package over the wall. He hoped and prayed that the booklet inside would reach the governor and, through him, Phillip II of Spain, who ruled the Netherlands at the time. That booklet, which he wrote, is known as the Belgic Confession,¹ and Reformed churches around the world subscribe to it as a faithful summary of the teaching of Scripture. But we should not forget that this theological document is also a political one. The Belgic Confession was first addressed to a governor and a king. Its purpose was to distinguish the Reformed denominations from the more radical Anabaptist movement, which rejected civil government. The Reformed petitioners hoped for reprieve from violent persecution. Included with the package de Brès tossed over the castle wall was a declaration that the petitioners were ready to obey the government in all lawful things, but they would “offer their backs to stripes, their tongues to knives, their mouths to gags, and their whole bodies to fire,” rather than deny the truths expressed in this confession.

The Belgic Confession sets out a distinct view on church-state relations. It outlines the exclusive authority of the church (articles 27–35) and of the state (in article 36).² An important part of the vision of this document was reflected in the Supreme Court of Canada’s *Wall* ruling earlier this year, namely, that the church alone is responsible for matters of church discipline and membership.³ Of course, this is a principle that was recognized long before the Belgic Confession.

Church and State Relations: Two Institutions, One King

The historian Rémi Brague explains that while the early church had “little need to assert its difference from a civil power that persecuted it,” risk of confusion arose with Constantine and the collaboration of Christianity and the Roman Empire.⁴ Early in this collaborative period, Brague writes,

Something like a transparent membrane was formed to render the church distinct from the civil power and prevent the one from absorbing the other. This first occurred on the juridical level. The privileges accorded to the bishops and the emergence of a canon law prepared the constitution of the church as a society endowed with its own rules; in particular, the church became capable of controlling its conditions of access.⁵

By the Middle Ages, however, the Roman Catholic Church claimed jurisdiction not only over ecclesiastical matters, but over marriage, family relations, wills, and various moral offences.⁶ Ecclesiastical and civil jurisdiction overlapped. Cases could be transferred from a civil court to a church court if the civil procedures were adjudged unfair or unfit.⁷

However, even in the Middle Ages, though borders between church and civil jurisdiction were blurred, Brague writes, “everyone was persuaded that they exist.”⁸ As the medieval jurist Accursius famously declared, “Neither the pope in secular matters nor the emperor in spiritual matters has any authority.”⁹

In the Reformation, the church’s authority was challenged. Martin Luther urged that all legal authority be removed from clergy and consigned to the civil magistrates.¹⁰ The Reformers would not have the church bear the sword.¹¹ But John Calvin and later Reformers were more concerned with ecclesiology and defended the liberty and authority of the new Protestant churches.¹² Calvin defended the Genevan church’s spiritual authority to refuse communion against a challenge by the city council.¹³ Calvin maintained that “[excommunication] requires neither violence nor physical force, but is contented with the might of the word of God.”¹⁴

The Reformed tradition has a high view of civil government.¹⁵ The Belgic Confession outlines a clear, robust vision of the role of the state to bear the sword and to punish wrongdoing. It also requires the state to be a protector of the church, so it can preach the gospel in peace. The implication is that the church depends on the protection of the state from physical threats. Article 36 of the confession states:

We believe that, because of the depravity of mankind, our gracious God has ordained kings, princes, and civil officers. (Proverbs 8:15; Daniel 2:21; John 19:11; Romans 13:1). He wants the world to be governed by laws and statutes, (Exodus 18:20) in order that the lawlessness of men be restrained and that everything be conducted among them in good order. (Deuteronomy 1:16; 16:19; Judges 21:25; Psalm 82; Jeremiah 21:12; 22:3; 1 Peter 2:13, 14.) For that purpose He has placed the sword in the hand of the government to punish wrongdoers and to protect those who do what is good (Rom 13:4). Their task of restraining and sustaining is not limited to the public order but includes the protection of the church and its ministry in order that*... the kingdom of Christ may come, the Word

of the gospel may be preached everywhere, (Psalm 2; Romans 13:4a; 1 Timothy 2:1-4) and God may be honoured and served by everyone, as He requires in His Word.

Moreover, everyone—no matter of what quality, condition, or rank—ought to be subject to the civil officers, pay taxes, hold them in honour and respect, and obey them in all things (Matthew 17:27; 22:21; Romans 13:7; Titus 3:1; 1 Peter 2:17) which do not disagree with the Word of God (Acts 4:19; 5:29). We ought to pray for them, that God may direct them in all their ways and “that we may live peaceful and quiet lives in all godliness and holiness” (1 Timothy 2:1, 2). For that reason we condemn the Anabaptists and other rebellious people, and in general all those who reject the authorities and civil officers, subvert justice, (2 Peter 2:10; Jude 8) introduce a communion of goods, and overturn the decency that God has established among men.

The wording of the Belgic Confession as reproduced above includes an important amendment by the General Synod 1905 of the Reformed Churches in the Netherlands (*Gereformeerde Kerken in Nederland*). Where you see the asterisk in the text above, the 1905 amendment deleted “that all idolatry and false worship may be removed and prevented, that the kingdom of antichrist may be destroyed.” This amendment recognized, based on a thorough study of Scripture and history, that the civil government is neither called, nor well suited, to root out idolatry, particularly by the power of the sword. The church does have that authority to root out idolatry, and also has the means: the preached Word of God. Indeed, as Paul writes, “For the weapons of our warfare are not the flesh but have divine power to destroy strongholds. We destroy arguments and every lofty opinion raised against the knowledge of God and take every thought captive to obey Christ” (2 Corinthians 10:4–5).

Another Reformed confessional document is helpful here too. Question 104 from the Heidelberg Catechism asks what God requires in the fifth commandment (fourth for Roman Catholics and some others). The answer: “That I show honour, love and faithfulness to my father and mother *and to all those in authority over me . . .* since it is God’s will to govern us by their hand.”¹⁶ The Westminster Larger Catechism says something similar in Question and Answer 124. In the fifth commandment, it says, “Father and mother refer not just to our parents but [also] . . . to those whom God has ordained to be over us in positions of authority, whether in our family, the church, or civil government.”¹⁷

How do we determine who has earthly authority in any particular circumstance to direct our actions? A helpful framework to grasp God’s design for social order is called sphere sovereignty. It teaches that God has created and mandated three spheres of sovereignty in society, each with its own authority and responsibilities. The sphere of state is sovereign in

matters properly within its jurisdiction as given and defined by God (criminal justice, civil defense, etc.). Support for this limited role for the civil government is found in Romans 13, 1 Peter 2, Psalm 72, Isaiah 1, among other passages. The civil government bears the sword to punish evildoers and protect the weak and innocent. Another sphere of authority is the church. It is sovereign over areas within its jurisdiction: preaching the gospel, theology and doctrine, the administration of the sacraments, and the exercise of church discipline. This responsibility was given directly to the church when Jesus gave the keys of the kingdom of heaven to Peter in Matthew 16:19. The keys, as explained in Lord's Day 31 of the Heidelberg Catechism, are the preaching of the gospel and the exercise of church discipline. The third sphere is the family. Issues of child rearing, including education and discipline, fall within this sphere. This is clearly seen in passages like Deuteronomy 6, Ephesians 6, and the book of Proverbs.

There is overlap or interdependence between spheres. It's not always easy to determine who has what authority in a given circumstance. Consider who has authority over the drive to church. All three spheres of authority are involved here: Children can obey their parents by getting in the van, the parents obey the church by answering the consistory's call to worship on Sunday morning, and Dad can—and probably should—obey the state's traffic laws. And it all happens at the same time. Whenever a subject can obey all, without disobeying God, he must obey all. But while there is overlap, there are also clear boundaries. The church does not write the traffic laws, for its congregants or others. The state does not, or should not, order or forbid the family to attend church. And so on. These boundaries are critical. History has taught us the consequences of one sphere usurping the authority of another.

Abraham Kuyper, the Dutch Reformed theologian, developed this concept to help Christians and others understand the distinct areas of God-given authority and responsibility within society. The key to understanding sphere sovereignty is this: over each sphere, and over every individual in each sphere, Christ is sovereign. As Kuyper famously said, "There is not one square inch in the whole domain of our human existence over which Christ, who is Sovereign over all, does not cry, 'Mine!'"¹⁸ So the church and the state are different institutions with distinct responsibilities, both under King Jesus.

Now, consider the concept of sphere sovereignty through the eyes of Canada's previous chief justice the Right Honourable Beverley McLachlin. In a speech delivered in October 2002, Her Honour stated,

The rule of law exerts an authoritative claim upon all aspects of selfhood and experience in a liberal democratic state . . . influenc[ing] local, community, and familial structures. The authority claimed by law touches upon all aspects of human life and citizenship. . . . It makes total

claims upon the self and leaves little of human experience unaffected by its claim to authority.¹⁹

You might paraphrase it this way: “There is not a square inch in the whole domain of our human existence over which the law, which is sovereign over all, does not cry, ‘Mine!’” Nine judges are the final authority of the meaning and scope of this law.²⁰ If judges see themselves as the final arbiters of all human law (including ecclesiastical, for example), they will violate the sovereignty of other spheres.

A basic emphasis of Reformed political thought—namely, that all authority belongs to God, and thus the state’s authority is from God, not the church or the people—pushes back against McLachlin’s grand vision. The state’s authority does not stretch so far as people might desire, nor is it limited to what the church at a given time might be willing to afford it. Its authority, like that of parents or church elders, is subject to God’s authority. In a way, this basic principle is affirmed in the preambles to the Canadian Bill of Rights (1960) and the Charter (1982), both of which assert the *supremacy of God*. Is this an empty phrase, added merely to placate Christians? Or does it reflect a principle more deeply embedded in our legal tradition? Let us consider this question with respect to church independence.

Although, in Professor M. Ogilvie’s view, Christian assertions of “independence of spiritual authority” have not been constitutionally recognized in Canada, she observes that “they have enjoyed tacit acceptance in practice.”²¹ After noting the “accelerating religious pluralism” of the twentieth century, Ogilvie writes, “Although Canadian courts have . . . been required to come to grips with the implications of these changes, especially in *Charter* litigation, the fundamental assumptions on which the law relating to religious institutions has, for reasons of history, been based, remain Christian understandings of the relationship of civil and spiritual authority.”

²²

Perhaps the Charter reference to God’s supremacy is best understood in this light. As Bruce Ryder says, the Charter preamble signals “a kind of secular humility, a recognition that there are other truths, other sources of competing worldviews, of normative and authoritative communities that are profound sources of meaning in people’s lives that ought to be nurtured as a counter-balance to state authority.”²³

Some have argued that the supremacy of God clause is incompatible with a free and democratic society. David Brown explains that “courts and academics have treated the Preamble, especially in its reference to the ‘supremacy of God,’ as an embarrassment to be ignored.”²⁴ The last Supreme Court case to wrestle with the preamble read the supremacy clause as merely articulating “the ‘political theory’ on which the *Charter’s* protections are based.”²⁵ Iain Benson, however, flips this critique

onto a McLachlin-type view of the law, saying, “Conceiving of law as ‘total,’ ‘comprehensive,’ or as an ‘empire’ is not particularly helpful and there are strong reasons to suspect such approaches as hubristic and even . . . *theocratic*.”²⁶ Rather, Benson asserts, “Law has practical and theoretical limits to its proper role and function in a society, and these limits determine its jurisdiction or proper scope.”²⁷

The Bible has something important to say about “these limits.” Our understanding of them is aided not only by what the Bible says directly about civil authorities, but also what it says about other spheres, as the issue of church discipline illustrates.

A Key to the Kingdom: Church Discipline

Article 29 of the Belgic Confession teaches, “The true church is to be recognized by the following marks: it practices the pure preaching of the gospel. It maintains the pure administration of the sacraments as Christ instituted them. It exercises church discipline for correcting and punishing sins. In short, it governs itself according to the pure Word of God, rejecting all things contrary to it and regarding Jesus Christ as the only Head.”²⁸

These *marks of the true church*—preaching, sacraments, and discipline—are the exclusive domain of the church, meaning the state has no authority here. Another important Reformed doctrine is that the “keys of the kingdom” are “the preaching of the holy gospel and church discipline,” as the Heidelberg Catechism teaches. “By these two the kingdom of heaven is opened to believers and closed to unbelievers.”²⁹ Matthew 16:18–19 is a key text: “And I tell you that you are Peter, and on this rock I will build my church, and the gates of Hades will not overcome it. I will give you the keys of the kingdom of heaven; whatever you bind on earth will be bound in heaven, and whatever you loose on earth will be loosed in heaven” (NIV). Jesus said this to Peter, not Caesar.

Churches and their leaders are accountable to God—not the state—for how they exercise (or fail to exercise) church discipline. As the apostle Paul writes, “As for those who persist in sin, rebuke them in the presence of all, so that the rest may stand in fear. In the presence of God and of Christ Jesus and of the elect angels I charge you to keep these rules without prejudging, doing nothing from partiality” (1 Timothy 5:20–21 ESV). The procedural and substantive requirements of church discipline are dictated by Scripture (Matthew 18:15–20; 1 Corinthians 5; 2 Corinthians 2:6–11; 2 Thessalonians 3:14–15). And the Holy Spirit enables true church leaders to understand and to carry out their calling, including with respect to exercising discipline (John 20:21–23). If a person is excommunicated, it is very serious. As the Heidelberg Catechism says in answer 85, “they are excluded by the elders

from the Christian congregation *and by God himself from the kingdom of Christ.*”

Wall v. Highwood Congregation

In April 2014, Randy Wall was disfellowshipped from the Highwood Congregation in Calgary, Alberta, a Jehovah’s Witnesses congregation. He was excommunicated for being, in the opinion of their elders, insufficiently repentant for two instances of drunkenness and verbal abuse of his wife and children. Mr. Wall was a real estate agent. Around half of his clients were Jehovah’s Witnesses. And after Mr. Wall was disfellowshipped they refused to do business with him. Unhappy at the loss of so many customers, Mr. Wall brought the congregation to court. He wanted a judge to quash the elders’ decision and to declare that it was made in error or unfairly. A preliminary question was whether the court even had jurisdiction to decide this case. The judge decided that the court had jurisdiction for two reasons. First, the congregation’s decision had an economic impact on Mr. Wall. Second, Wall alleged that the congregation’s procedure for disfellowshipping him did not satisfy the requirements of natural justice. As for the related question of a civil judge’s *competence* to address the issues in this case, the judge decided this could be done by obtaining expert religious opinion on both scriptural sins (in this case, drunkenness and reviling) and the biblical criteria used by elders to determine a sinner’s repentance.

The congregation appealed. Two of three judges at the Alberta Court of Appeal agreed with the lower judge and affirmed that a civil court can overrule a church discipline decision. The congregation appealed to the Supreme Court of Canada. The case, then, is about the state’s authority to review internal church governance matters, even in the absence of a civil rights claim.

CHURCH DISCIPLINE AT THE SUPREME COURT

As an intervener in the Supreme Court hearing in *Wall*, ARPA Canada argued that fundamental principles of Canadian government long preceding and affirmed by the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms, namely, the supremacy of God and the rule of law, should be understood as limiting the judiciary’s jurisdiction in such matters.³⁰ The former principle—the supremacy of God—signifies that the state is neither the highest authority nor the ultimate source of rights. The latter—the rule of law—means the state, including the judiciary, must have intelligible sources for and limits on its authority. The rule of law and church autonomy are not opposed here, but in agreement.

When it comes to church membership decisions, ARPA explained to the court, the jurisprudence favours judicial restraint, reflecting respect for

ecclesiastical authority.³¹ Church membership is not merely contractual, such that the (former) status of membership alone can form the basis for judicial review. Rather, the party applying for judicial review must have a recognized legal right at stake. In written argument, Mr. Wall pointed to “economic interests,” “livelihood,” and “psychological welfare,”³² but not to any recognized property or civil right. Mr. Wall’s lawyers had not proposed an intelligible standard to govern judicial intervention in church discipline decisions where no property or civil right is at stake.

Thankfully, the Supreme Court of Canada upheld this jurisprudence and clearly articulated the limits of state action as it relates to church membership. In an opening summary, Justice Rowe, writing for a unanimous court, gives three reasons why Mr. Wall’s argument for judicial review must be rejected.

First, judicial review is limited to public decision makers, which the Judicial Committee is not. Second, there is no free-standing right to have such decisions reviewed on the basis of procedural fairness. In light of the foregoing, Mr. Wall has no cause of action, and, accordingly, the Court of Queen’s Bench has no jurisdiction to set aside the Judicial Committee’s membership decision. Finally, the ecclesiastical issues raised by Mr. Wall are not justiciable.³³

In fact, the Supreme Court rebuked the lower courts for failing to make this distinction:

Although the public law remedy of judicial review is aimed at government decision makers, some Canadian courts, including the courts below, have continued to find that judicial review is available with respect to decisions by churches and other voluntary associations. These . . . lines of cases fail to recognize that judicial review is about the legality of state decision making.³⁴

Wall claimed the court should review the decision of his elders to disfellowship him because it “profoundly affected his life” and caused him “significant economic harm,” “loss of familial and social ties,” “severe distress,” and “harm.”³⁵ ARPA Canada submitted that Mr. Wall’s list of factors supposedly supporting the claim of justiciability did not form a coherent and predictable standard. The threshold would be some degree of social, psychological, or economic harm to a person from a church’s decision, which could not be known in advance and would therefore undermine the rule of law. Thankfully, the court ruled that “Mr. Wall had no property right in maintaining his client base [and] does not have a right to the business of the members of the Congregation.”³⁶

Alleged procedural unfairness is also insufficient to invoke judicial intervention. Professor Ogilvie rightly notes “the impracticality of

separating procedural and substantive matters”³⁷ and points out that “all religious organizations would assert that to a greater or lesser extent, their procedural rules are theologically grounded.”³⁸ Ogilvie supports judicial scrutiny of both. The Court, in *Wall*, did not:

Sometimes even the procedural rules of a particular religious group may involve the interpretation of religious doctrine. . . . The courts lack the legitimacy and institutional capacity to determine whether the steps outlined in [the gospel of] Matthew have been followed. These types of procedural issues are also not justiciable.³⁹

Questions of fairness, detached from a legal right, should not be decided by a civil judge simply because she is considered an expert in fairness, just as a moral issue decided by Parliament or a court cannot be appealed to an ethics panel or church council. The important question is: What is the matter that ought to be fairly decided and who ought to decide it? Since churches function as legal entities, owning property and entering contracts, they must be subject to civil courts in some respects. As for discipline of members, however, the courts ought to view this foremost as a spiritual matter.⁴⁰

CHURCH INTERACTIONS WITH CIVIL LAW

In every case *Wall* cited to support the claim that review of church membership decisions for procedural fairness is available in Canada, the courts either found that there was a property interest at stake or that it had no jurisdiction to enforce the claim.⁴¹ However, Mr. *Wall* also suggested that jurisdiction in this case can be based on contract.⁴² But what would the mutual consideration of such a contract be? To repent of one’s sins and follow Christ in exchange for the sacraments and the fellowship of the saints? Thankfully, the court did not endorse this line of reasoning, although a prominent scholar on the law of religious institutions in Canada, M.H. Ogilvie, does.

In a passage relied on by Mr. *Wall*, Ogilvie claims there is an assumption in early jurisprudence that church discipline of lay members is based on contract.⁴³ For this, Ogilvie cites *Dunnet v. Forneri*.⁴⁴ Lay discipline is based on contract, she argues, because the common law regards churches as “voluntary associations,” with relationships among members governed by “multilateral contract.” She continues, “Thus, it is arguable that the ‘civil right’ which provides the allegedly necessary legal nexus for the intervention of civil courts is this contract.” But neither *Dunnet* nor the other cases cited by Ogilvie (or Mr. *Wall*) support reducing church membership to a civil contract in this way.

In fact, Ogilvie’s argument contradicts the court’s statement in *Dunnet*: “All religious bodies are here considered as voluntary associations; the law recognizes their existence, and protects them in their enjoyment of property, but unless civil rights are in question it does not interfere with their organization or with questions of religious faith.”⁴⁵ If simply being a “voluntary association” brings “civil rights” into play when membership or discipline decisions are made, the court’s statement would be a tautology. Rather, the court in *Dunnet* concluded it had no jurisdiction to enforce the claim of the excommunicated member because no civil rights were engaged. The court confirmed the same in *Wall*: “In the end, religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.”⁴⁶

The court was emphatic on this point. Mr. Wall’s “mere membership in a religious organization—where no civil or property right is granted by virtue of such membership—should remain free from court intervention. Indeed, there is no free standing right to procedural fairness with respect to decisions taken by voluntary associations.”⁴⁷

Church member “status is not a civil but an ecclesiastical one,” *Dunnet* states. “The position of member of the Church and the right to participate in the ordinances of the Church are also purely ecclesiastical.”⁴⁸ *Dunnet* says further, “The cases to which I was referred as justifying the interposition of the Court were such as arise from refusal to administer the Sacrament at a time when this was a necessary qualification for holding civil offices, . . . or where a trust was created and the Court was held entitled to see to its proper administration, . . . but in all these civil rights were involved.”⁴⁹

It may be necessary for a court to examine a church’s constitution and bylaws to resolve issues related to control of the church *as a legal entity*, which may determine, for example, what may be done with its assets, by whom, and by what procedures. The court in *Dunnet* quotes *Forbes v. Eden*, in which Lord Cranworth says courts have *no jurisdiction* to inquire into a church’s rules, “except so far as may be necessary for some collateral purpose.” A “collateral purpose” would include the following: “If funds are settled to be disposed of amongst members . . . , the Court must necessarily take cognizance of those rules and regulations for the purpose of satisfying itself as to who is entitled to the funds.” Or it might be “a right to enjoyment of any pecuniary benefit” such as “the use of a house, or land.”⁵⁰

Again, in *Wall*, the Supreme Court drew a clear demarcation. Distinguishing *Bruker v. Marcovitz*,⁵¹ Justice Rowe points out that, while the court did say, “The fact that a dispute has a religious aspect does not by itself make it non-justiciable,”⁵² it also said that “courts should not decide matters of religious dogma.”⁵³ Rowe then reiterates the often-quoted passage from *Amselem*: “Secular judicial determinations of theological or

religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.”⁵⁴ Justice Rowe concludes, “The courts have neither legitimacy nor institutional capacity to deal with such issues, and have repeatedly declined to consider them.”⁵⁵

CHURCH LAW AND INCORPORATION⁵⁶

While the *church universal* spans across history and across the planet, the local church is where the Word is preached, the sacraments administered, and discipline carried out. Individual believers fellowship with and encourage each other, study God’s Word together, and minister to each other’s needs within the local church. Members of the local church participate in evangelism in order to bring locals into the local church. Such activities are probably what come to mind when one thinks about what the local church should be and do, and rightly so.

Of practical concern today is that “church” can also refer to a legal entity that owns property, buys insurance, enters contracts, hires employees, and so on, within a system of civil law. Such functions might be considered *incidental* rather than essential to the church—indeed there are many local churches that have no legal status or recognition (think of unregistered house churches in China). However, some overlap between church and state is hard to avoid, and not all forms of overlap need to be avoided.

The legal form a church ought to take, if any, cannot be divorced from its theology. Incorporating the local church (with church members as corporate members and elders as corporate directors) raises problems in light of Reformed ecclesiology and church discipline. The basic corporate form does not suit Reformed church polity because it makes the decisions of the elders subject to review (and possible rejection) by its members. The corporate form also subjects the church’s authority to discipline its members to review by the state. While there may be practical advantages to incorporation, such as limited liability and perpetual legal personality, other legal options may be better.

Incorporating the local church blurs the lines of ultimate responsibility between the authority of the church and the authority of the state. Through incorporation, the elders of the church cede authority over church discipline to the state. The local, incorporated church is made subject to the incorporation statute and to case law that has been developed around corporations. Had the Highwood Congregation of Jehovah’s Witnesses been incorporated, the civil judiciary would have at least had the legal authority to decide whether that church had followed its corporate bylaws.⁵⁷

As William Bassett says, “Organizing and administering communities of faith are as much exercises of religion as are worship and public prayer.”⁵⁸

Consequently, “state monitoring of the internal governance of the church and its agencies threatens entanglement with religion, ceding unwarranted competency to the civil magistrate.”⁵⁹

Scripture teaches that the final appeal on church matters is to the church (which we understand to mean the elders of the local church, and the elders who make up a classis or synod, where discipline decisions may be appealed in Reformed denominations). Absent incorporation, discipline of a church member is not reviewable by the courts. This fact alone calls into doubt the wisdom of incorporating a church.

Incorporating the church may also undermine Reformed church governance by placing legal power in the hands of the membership to overturn decisions of the “board” (i.e., elders). Incorporation puts final decision-making power in the membership rather than consistory. Incorporation changes the consistory from Christ’s representatives as overseers of the flock into a “duly elected board.” The membership can overturn decisions made by that board, such as a decision to discipline a member, and the membership can even turf that board when they don’t like its decisions.

The laws of Ontario allow churches to take on the form of a charitable trust, which may be a preferable alternative to incorporation.⁶⁰ A church set up this way would have both a trust (which lays out the charitable purpose) and a constitution (which sets out governance issues). The appointed trustees would hold the property in trust for the church members. Some Reformed churches have the consistory members act as the trustees and replace the trustees every three years or so, or on a rotating basis, with the election of new office bearers. Of course, there are also limitations to what a trust can do for a church. For example, a trust applies only to real property, it does not give the church perpetual legal existence, and it does not confer limited liability on the members of the church.⁶¹

One idea that might work for Reformed churches is using the general incorporation statute to *incorporate only the governing body of each church, namely, the consistory*. The members of the consistory would be the corporation’s sole members and “directors.” The documents that create the corporation could make clear that the church exists to proclaim the gospel and require the directors to call an annual general meeting. In such an arrangement, the directors would not be legally bound to heed the votes of the congregation on who should become a member of the consistory. Church membership, unlike consistory membership, would have no *legal* status.

We are not experts in corporate, trust, or charity law, or in ecclesiology, so we do not claim to have the right model, if there is one right model. The point here is that simply because the corporate model is generally used for charities and is easier to create does not mean it is best for Reformed churches. We hope churches will carefully consider their legal options, with a view to preserving the church's freedom to faithfully carry out its duties without avoidable interference.

CHURCH DISCIPLINE AND “DISCRIMINATION” CONTRA THE HUMAN RIGHTS CODE

Often, the threat of state interference comes not from the judicial or legislative branch of government, but from the executive. Consider, for example, the role that human rights tribunals can play in the intersection of church and state. Human rights tribunals apply the Human Rights Code or Human Rights Act in their province.⁶² These are quasi-constitutional statutes enacted to prevent discrimination in employment, housing, and services. These same statutes also allow exemptions from the anti-discrimination clauses for churches and other religious organizations. For example, s. 24(1) of the Ontario Human Rights Code provides a narrow exemption to employment discrimination prohibitions for certain types of employers.⁶³ This exemption takes effect when a conflict arises from the collision of the *individual rights* of one person to not be discriminated against in employment with the *collective or associational rights* of other individuals who wish to associate freely (for whatever purpose) to the exclusion of others.

The Supreme Court of Canada stated clearly that the purpose of the exemption, “while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights. . . . In a negative sense [this section] is a limitation on the rights referred to in other parts of the Code. But in another sense it is a protection of the right to associate. Other sections ban religious discrimination; this section permits the promotion of the religion.”⁶⁴ This interpretation of the discrimination exemption was reinforced four years later by the same Court in the *Brossard* case, where Justice Beetz described these sections as being “designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits.”⁶⁵

Sometimes the tribunals seem to be overly generous in interpreting the scope of their own jurisdiction, as we will explore with two cases below. Indirectly, *Wall* might provide a precaution, since the Supreme Court of Canada chastised the lower courts for interfering in ecclesiastical decisions without a clear legal basis. Perhaps this warning might also influence statutory interpretation when tribunals and reviewing courts encounter human rights claims that hinge on such questions.

HOEKSTRA V. FIRST HAMILTON CHRISTIAN REFORMED CHURCH

In 2010, First Christian Reformed Church in Hamilton endured a week-long hearing before the Human Rights Tribunal of Ontario.⁶⁶ Ms. Hoekstra was one of five ladies who applied for the position of Sunday school teacher at the church. When another woman got the job, Hoekstra complained, not to her ward elder or pastor, not to the church consistory, but to the Human Rights Commission, alleging discrimination on the basis of family status. Ms. Hoekstra was living in a common-law relationship. After the trial, the tribunal ruled that there was no discrimination because the person who was hired was in fact more qualified than Hoekstra.⁶⁷

In late 2011, the tribunal heard a second complaint from Hoekstra, that the church had denied her communicant membership as reprisal for the earlier complaint.⁶⁸ After another lengthy and costly hearing, the tribunal dismissed the complaint.⁶⁹ But the hearing itself raises questions. As the decision recounts, the tribunal “heard the testimony of four witnesses: the applicants, the Senior Pastor of First Hamilton, and a retired Pastor of the CRCNA. I [the adjudicator] also admitted into evidence a number of documents that were tendered by the parties, including emails, letters, minutes of meetings, and pleadings from other proceedings.”⁷⁰

The consistory had to explain to a Human Rights Tribunal why it did not make Ms. Hoekstra a member.⁷¹ What would the remedy have been if Hoekstra had won? Would the tribunal have ordered the consistory to accept her as a confessing member of the church even though she is living common-law? Would it have ordered the church to pay money for “dignitary harm”? *Wall* signals to lower courts and administrative tribunals that, where membership and discipline questions arise, apart from a civil claim (contract law, property law, etc.), the state cannot interfere. This principle should carry over to statutory claims as well: while a discrimination claim in employment can arise within a church, if the question of the claim hinges on membership (a question neither a judge nor a tribunal member is qualified or competent to answer, as per *Wall*), the state actor should not interfere. Indeed, churches should be bold in saying so to state actors: where the church has exclusive authority, the state has none.

CORCORAN V. ROMAN CATHOLIC DIOCESE OF PETERBOROUGH

Another Ontario case of alleged discrimination happened in Peterborough, where a Mr. Corcoran alleged he was “removed from his role as an altar server at a church . . . on the basis of his sexual orientation.”⁷² The remedy he sought was, among other things, his “restoration to the position of altar server.”⁷³ The application was filed against Bishop De Angelis. The bishop provided “a brief outline to the substance of the applicant’s allegations” but refused to provide any more detail until the “exemption issue” was resolved.

74 The bishop argued that Mr. Corcoran’s role was voluntary and therefore outside the jurisdiction of the tribunal.

The tribunal adjudicator seemed flustered by the bishop’s limited response, and directed the bishop and diocese “to file a full Response to all issues raised in the Application,” because the tribunal’s rules “require respondents to file complete Responses prior to making any preliminary objections, including jurisdictional objections.” 75

Mr. Corcoran and the diocese ended up settling. 76 But not until after the bishop wrote to his parishes, outlining a robust defense of the autonomy of the church. According to one report, the bishop wrote, “I fail to understand how secular powers and government agencies should think they are in a position to tell the church that she is wrong in her internal rules and regulations, even though these have directed and shaped the life of the church during the last 2,000 years. However, this is what we face today.” 77

Bishop De Angelis insisted that holding a volunteer position in the church—as an altar server or in any other function—is not a “right.” “Rather, it is an invitation from the pastor or bishop, which can also be terminated at any time, particularly, when the voluntary service gives rise to tension, animosity, discord or division in the life of a parish.” 78 In preparation for the next time, churches would do well to read the bishop’s letter.

When it comes to discrimination allegations and human rights law, a case will turn on (1) whether the claim against a church is in relation to employment, housing, or services; and (2) whether the impugned church policy or decision falls within the legislative exemption for religious organizations. Should the protection of the latter fail, a church might also invoke freedom of religion and association under the Charter. Neither the Human Rights Code nor the Charter play any part in the Supreme Court’s *Wall* ruling. Nevertheless, *Wall* signals that Canada’s highest court takes seriously the independence of religious associations and demands a clearly defined legal basis for state interference therein. 79 And where the legal basis for state interference hinges on a question of membership in the church, the state actor (tribunal, judge, etc.) should keep its analysis focused on the legal right, and not the spiritual or ecclesiastical question of membership.

Opportunity and Temptation: Wall, Trinity Western, and the Privatization of Religion

Wall was a unanimous victory for the church to exercise discipline without state interference. It provides a tool for Christians’ civil defense of the distinct responsibilities of the church, as articulated by Guido de Brès. However, we know that our calling expands outward far beyond the requirements of the institutional church to preach the Word, administer the

sacraments, and discipline members. Consider Christ's command to make disciple of all nations. What does it mean to make not just converts, but *disciples*? "Disciple" suggests more than someone who attends church on Sunday. Rather, a disciple brings his entire life under the lordship of his majesty, Jesus Christ. Discipleship characterizes life on Sunday, but also work on Monday, leisure on Saturday, charity on Wednesday, and so on. Discipleship requires education and moral formation.

The *Wall* decision was released within two weeks of the *Trinity Western University* decisions,⁸⁰ and the two cases were heard a month apart. In *Trinity Western University* (hereafter TWU), the Supreme Court ruled that the decisions of the law societies of Ontario and British Columbia to not recognize TWU's proposed law school were "reasonable." The court recognized that law societies' decisions limited the religious freedom of the TWU community, but because of the apparent "harm" of TWU's Community Covenant—particularly the clause about biblical sexual morality—the court ruled against TWU.⁸¹

Together, *TWU* and *Wall* illustrate a temptation, and perhaps a trend, for the state to protect religion within the walls of the church, but restrict its role in the public square. In fact, of the seven Supreme Court judges ruling against TWU, five believed the infringement of religious freedom was minor, since the Community Covenant is not a *required* practice of evangelical faith,⁸² and one of the seven ruled there was no infringement of religious freedom at all.⁸³ This is the temptation: privatizing religion, making Christian views on sexuality out of bounds except in church.

But privatizing religion is not only a temptation for state actors. Christians can begin to think and act with the same mindset. Government spending makes up half the economy, most education is state-provided, and public spending on cultural programming and media is enormous, and this leviathan is largely in the grip of secularism. Culture is also affected by Supreme Court of Canada decisions on significant moral issues. Given the high regard in which Canadians hold the court,⁸⁴ its ruling on the faith commitments of the evangelical community will likely affect not only what the general public thinks of these commitments but also what many pew sitters think.

Some, particularly classical liberals or libertarians, may defend the church's freedom to govern membership as something protected by the Charter's guarantee of freedom of association. But reviewing church membership decisions per se (absent a legal interest) based on merely associational grounds of membership fails to respect the nature of the church. As the Christian philosopher Herman Dooyeweerd explained, "According to its internal structural principle, the institutional church is characterized as a Christian confessional faith community. It is founded on the spiritual power of the organized service of the Word and sacraments. To define the church

as an association with a religious purpose is to contradict its inner nature.”⁸⁵

Dietrich Bonhoeffer made a similar point: “A look at the Christian views on sin, grace, Christ, Holy Spirit, and the church reveals that the concept of the voluntary association is totally inapplicable to the concept of the church.”⁸⁶

Canadian jurisprudence may speak of a church as a voluntary association in a limited sense for legal purposes, but it does not reduce churches to “multilateral contracts” over which courts have jurisdiction *per se*. While the court in *Dunnet* refers to the church as a voluntary association, it cites this as a reason not to interfere and recognized church membership as a “purely ecclesiastical matter.” The courts, the public, and the church itself ought to consider the church as a voluntary association *only* insofar as it is necessary to fairly resolve civil rights disputes. But the church is much more than that.

Conclusion: Separation of Church and State, but Not Faith and Politics

Harold Berman describes the development of the state ruled by law or “law state” as emerging out of the historical struggles between ecclesiastical and secular authorities. Rule of law meant rule by law (that the authorities would enact laws and establish legal systems), rule *under* law (that they would be bound by the laws they enacted), and that each would be limited in its authority by the laws of other jurisdictions. “If the church was to have inviolable legal rights, the state had to accept those rights as a lawful limitation upon its own supremacy. Similarly, the rights of the state constituted a lawful limitation upon the supremacy of the church.”⁸⁷

In the Charter’s preamble, “whereas” means not “while by contrast,” but “since.” *Since* Canada is founded on principles that recognize the supremacy of God and the rule of law, we enjoy various fundamental freedoms and rights. The non-exercise of state power often poses no threat to the rule of law, but its arbitrary or unlawful exercise always does.

Separation of church and state protects the church from state interference and limits the authority of both. As Jean Bethke Elshtain argues, “Given the power and reach of the modern state, the encroachment by one into the mandate of the other is more likely to flow from structures of governmental power.”⁸⁸ But “it is a terrible mistake to carry over the logic of church-state separation into this realm [of civil society]. Were such separation to be fully effected . . . we would be much poorer as a culture and as a society.”⁸⁹ The state must show deference and restraint with respect to ecclesiastical matters of gospel preaching, celebration of the sacraments, and the exercise of church discipline. This seems to have been achieved in *Wall*. Where the law related to religious freedom requires further development is with

respect to the mission of the organic church in the public square. Here too the gospel is preached. Here too communion is celebrated. Here too charity is dispensed. Here too holiness is encouraged through discipline and community. The public square is not the exclusive domain of the state. And while the public square does have overlapping jurisdiction between church, state, family, and other spheres of society, a default to the state as ultimate authority and arbiter of truth, law, and rights risks further erosion of religious freedom.

Professor Robert Joustra suggests that “reasonable accommodation is a dialogical practice—not a paternalistic state dispensing rights, but a process of mutual resonance, of what sorts of beliefs and practices are fit, and indeed which ones aren’t.”⁹⁰ Joustra continues, “A dialogical approach to reasonable accommodation means that religious communities are not beggars at the doorstep of the state, but rather full, legitimate partners with the rest of society in debating and defining religion and its practices.”⁹¹ Joustra challenges religious communities to not be “ghettoized”: he asks, “So you say your religion matters not just in private, but in important, constructive, public ways? Prove it.”⁹² The challenge is a bold one. Religious associations can’t just beg to be left alone by the state to wallow in their ghetto;⁹³ rather, they have value, and ought to prove their value. Hopefully in this way, religious communities will not be looked at with suspicion, but rather welcomed for their valuable contributions to the public good.

And religious communities are “proving it.” They demonstrate the value of their religion every day, not just for themselves, but also for broader society. Elshtain, citing Cardinal Bernardin, explains that religion contributes to civil society in three vital public roles: “through religiously based institutions in education, health care, and family services; in direct outreach to the poorest members of society; and finally, in the realm of civic and moral formation as religion teaches service to one’s neighbours and a sense of civic stewardship.”⁹⁴

What comes next, then, depends largely on how the body of Christ in Canada decides to live. What comes next should be faithful witness, seizing every opportunity to proclaim boldly the whole counsel of God and apply it fearlessly to all of our lives—work, education, charity, or politics. This proves religion’s public good, and by God’s grace, this can transform culture. Canada needs Christians’ faithful witness in politics, as in all areas of life. Hopefully, with the opportunity of Wall, we overcome the temptation of *Trinity Western*.

CITATIONS

- 1)** Guido de Brès, *The Belgic Confession*, 1561, <https://canrc.org/the-belgic-confession>.
- 2)** This article of the Belgic Confession was revised in 1905. It is the revised version to which we appeal. More on this below.
- 3)** *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26
- 4)** Rémi Brague, *The Law of God: The Philosophical History of an Idea* (Chicago: University of Chicago Press, 2007), at 129.
- 5)** Brague, *Law of God*, 129. See also Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 10: "Perhaps the most distinctive characteristic of the Western Legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems. . . . Legal pluralism originated in the differentiation of the ecclesiastical polity from secular polities."
- 6)** John Witte Jr., *Law and Protestantism* (Cambridge: Cambridge University Press, 2002), 35–37.
- 7)** Witte, *Law and Protestantism*, 36.
- 8)** Brague, *Law of God*, 144.
- 9)** Brague, *Law of God*, 142.
- 10)** Witte, *Law and Protestantism*, 58.
- 11)** See, e.g., John Calvin: "For the church has not the right of the sword to punish or restrain, has no power to coerce, no prison or other punishments which the magistrate is wont to inflict." *The Institutes of the Christian Religion*, trans. Henry Beveridge (repr., Peabody, MA: Hendrickson, 2008), 4.11.3.
- 12)** John Witte Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 70–73. M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed. (Toronto: Irwin Law, 2017), 19.
- 13)** Jules Bonnet, *Letters of John Calvin* (Philadelphia: Presbyterian Board of Publication, 1858), 424. For context see Bernard Cottret, *Calvin: A Biography*, trans. M.W. Macdonalds (Grand Rapids: Eerdmans, 2000), 195–97.
- 14)** Calvin, *Institutes* 4.11.5.
- 15)** Calvin, *Institutes* 4.20. See also Belgic Confession, art. 36.
- 16)** *The Heidelberg Catechism* (1563), Lord's Day 39, Question and Answer 104, <http://www.heidelberg-catechism.com/en/>.
- 17)** *The Westminster Larger Catechism* (1647, modern English 2011), Question and Answer 124, <http://www.rpcerie.org/PDFs/wcf-lcmmodern-2011.pdf>.
- 18)** Quote from Kuyper's inaugural address at the dedication of the Free University. Found in Abraham Kuyper: *A Centennial Reader*, ed. James D. Bratt (Grand Rapids: Eerdmans, 1998), 488.
- 19)** The Right Honourable Beverley McLachlin, PC, "Freedom of Religion and the Rule of Law: A Canadian Perspective," in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*, ed. Douglas Farrow (Montreal: McGill-Queen's University Press, 2005), 14.
- 20)** As far as we can tell, by "law" McLachlin does not mean the God-ordained structure of creation in all its aspects—physical, biotic,

aesthetic, moral, and more. If that were the case, we could affirm her claim.

21) Ogilvie, *Religious Institutions*, 95.

22) Ogilvie, *Religious Institutions*, 2.

23) Bruce Ryder, “State Neutrality and Freedom of Conscience and Religion,” *Supreme Court Law Review* 29 (2005): 177 (emphasis added).

24) David M. Brown, “Freedom from or Freedom for? Religion as a Case Study in Defining the Content of Charter Rights,” *UBC Law Review* 33 (2000): 551–615, at para. 20. Brown outlines multiple levels of court and various constitutional academics who are dismissive of the “supremacy of God” clause. Perhaps the clearest example he cites is the British Columbia Court of Appeal, which wrote, a mere seventeen years after the Charter was enacted, that the clause had “become a dead letter,” in *R. v. Sharpe*, [1999] B.C.J. No. 1555 at ss. 78, per Southin J.A.

25) *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 SCR 3, 2015 SCC 16, at para. 147. But see Professor L. Sossin, “The ‘Supremacy of God’, Human Dignity and the Charter of Rights and Freedoms,” *University of New Brunswick Law Review* 52 (2003): 227, who is willing to take the supremacy clause a little more seriously.

26) Iain T. Benson, “The Limits of Law and the Liberty of Religion Associations,” in *Religion, Liberty and the Jurisdictional Limits of Law*, ed. Iain T. Benson and Barry W. Bussey (Toronto: LexisNexis Canada, 2017), xxiii n. 5.

27) Benson, “Limits of Law,” xxii.

28) *Belgic Confession* (1561), art 29.

29) *Heidelberg Catechism* (1563), Lord’s Day 31, Question and Answer 83.

30) Wall, *supra* note 3, *Factum of the Intervener Association for Reformed Political Action (ARPA) Canada* (hereinafter “ARPA Canada factum”), online arpacanada.ca/wp-content/uploads/2018/08/Wall-Facta.pdf at para. 4.

31) *Ibid*, at para. 5.

32) Wall, *supra* note 3, *Factum of Mr. Wall*, at paras 39, 43, and 85.

33) Wall, para. 2.

34) Wall, para. 17.

35) *Factum of Mr. Wall*, Wall, paras 3, 4, 10, and 15, respectively.

36) Wall, para. 30.

37) M.H. Ogilvie, “Case Comment: *Lakeside Colony of Hutterian Brethren v. Hofer*,” *Canadian Bar Review* 72 (1993): 249 (Respondent’s Book of Authorities, Tab 15).

38) Ogilvie, “Case Comment,” 249.

39) Wall, para. 38.

40) Of course, an abuse of church discipline for financial gain or other improper purpose (not alleged in this case) might give rise to a cause of action.

41) *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 SCR 165, and *Cohen v. Hazen Avenue Synagogue*, 1920 CarswellNB 17 (SC) involved property interests; *Ash v. Methodist Church*, (1901) 31 SCR 497 involved an employment relationship; in *Dunnet v. Forneri*, 1877 OJ No 227, there was no jurisdiction.

- 42)** Factum of Mr. Wall, Wall, para. 25, 26, 29
- 43)** Ogilvie, “Case Comment,” 247.
- 44)** Ogilvie, “Case Comment,” n55.
- 45)** Dunnet, para. 18. A related point is made by Justice Crocket in *Ukrainian Greek Orthodox Church v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] SCR 586 at 591: “It is well settled that, unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastic decree or order.” Nor should the civil courts be used to quash such an order.
- 46)** Wall, para. 39.
- 47)** Wall, para. 24.
- 48)** Dunnet, para. 38.
- 49)** Dunnet, para. 39.
- 50)** Dunnet, para. 34.
- 51)** *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607.
- 52)** *Bruker*, para. 41.
- 53)** Wall, para. 36.
- 54)** *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551, 2004 SCC 47, at para. 50.
- 55)** Wall, para. 36.
- 56)** This subsection is substantially based on the ARPA Canada blog series on church and state, André Schutten and John Sikkema, “Handing Over the Keys to the State? The Challenges of Church as Legal Entity Part 3 of 3,” May 28, 2018, <https://arpacanada.ca/news/2018/05/28/handing-over-the-keys-to-the-state-the-challenges-of-church-as-legal-entity-part-3-of-3/>.
- 57)** In the Wall case, the Supreme Court is silent on the matter of ecclesiastical decisions of a body that is incorporated under statute. While the Wall decision has strong language about ecclesiastical decisions being non-justiciable, that language is premised on the assumption of no civil law right being present.
- 58)** William Basset, “Religious Organizations and the State: The Laws of Ecclesiastical Polity and Civil Courts,” in *Christianity and Law: An Introduction*, ed. John Witte Jr. and Frank Alexander (Cambridge: Cambridge University Press, 2008), 295.
- 59)** Basset, “Religious Organizations,” 294.
- 60)** See generally Albert H. Oosterhoff, Robert Chambers, and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014).
- 61)** Oosterhoff, Chambers, and McInnes, *Oosterhoff on Trusts*.
- 62)** For a fantastic explanation and comprehensive analysis of the different legislative frameworks from province to province and territory to territory, see Alvin Esau, “‘Islands of Exclusivity’: Religious Organizations and Employment Discrimination,” *UBC Law Review* 33 (2000): para. 69–127.
- 63)** Human Rights Code, R.S.O. 1990, c.H.19, s.24.(1)(a).
24.(1) The right . . . to equal treatment with respect to employment is not infringed where,
(a) a religious, philanthropic, educational, fraternal or social institution or organization

that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment.

64) *Caldwell et al. v. Stuart et al.*, [1984] 2 S.C.R. 603 at 626.

65) *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279; [1988] S.C.J. No. 79 at para. 100 (emphasis added).

66) *Hoekstra v. First Hamilton Christian Reformed Church*, 2010 HRT0 245.

67) *Hoekstra* (2010), para. 19.

68) *Hoekstra v. First Hamilton Christian Reformed Church*, 2011 HRT0 2108, at paras. 1, 2.

69) *Hoekstra* (2011), paras. 97–104.

70) *Hoekstra* (2011), para. 9.

71) The consistory clarified that membership was not “denied” but “deferred . . . until outstanding issues between her and First Hamilton, which were unrelated to her human rights complaint, were resolved.” *Hoekstra* (2011), para. 3.

72) *Corcoran v. Roman Catholic Episcopal Corporation of the Diocese of Peterborough*, 2009 HRT0 1600 at para. 2.

73) *Corcoran*, para. 2.

74) *Corcoran*, para. 3.

75) *Corcoran*, para. 12.

76) Brett Popplewell, “Church Reconciles with Gay Altar Server,” June 6, 2010, *The Star*, https://www.thestar.com/news/ontario/2010/06/06/church_reconciles_with_gay_altar_server.html.

77) Patrick B. Craine, “Peterborough Bishop Responds to Human Rights Complaint,” *The Interim*, October 23, 2009, <http://www.theinterim.com/issues/human-rights-commissions/peterborough-bishop-responds-to-human-rights-complaint/>.

78) Craine, “Peterborough Bishop.”

79) Perhaps Wall also provides opportunity for legislatures to amend human rights legislation to recognize in statute what the Supreme Court has recognized in common law: that the church’s independence should be respected, particularly as it relates to membership.

80) *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32; *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33.

81) It is not the place of this article to parse the decision. Much has and will be written on it. We commend the commentary of Geoffrey Trottier, “Implications for the Evangelical Community of the Supreme Court Decision in the Trinity Western University Law School Case,” *Evangelical Fellowship of Canada*, September 11, 2018, <https://files.evangelicalfellowship.ca/si/Religious%20Freedom%20in%20Canada/EFC/TWU-implications-Geoffrey-Trotter-2018-09-04.pdf>. Since that decision was released on June 15, 2018, TWU has lifted the mandatory nature of the community covenant for students.

82) *Trinity Western* 2018, paras. 87–88: “First, the limitation in this case is of minor significance because a mandatory covenant

is, on the record before us, not absolutely required for the religious practice at issue: namely, to study law in a Christian learning environment. . . . The decision to refuse to approve TWU's proposed law school with a mandatory covenant only prevents prospective students from studying law in their optimal religious learning environment where everyone has to abide by the Covenant. Second, the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community's religious beliefs as preferred (rather than necessary) for their spiritual growth."

83) Trinity Western 2018, para. 157, where Justice Rowe writes, "a review of the jurisprudence leads me to the conclusion that s. 2(a) is not infringed in this case."

84) See survey by Angus Reid Institute, "Canadians Have a More Favourable View of Their Supreme Court than Americans Have of Their Own," August 17, 2015, <http://angusreid.org/wp-content/uploads/2015/08/2015.08.14-Supreme-Court-final.pdf>, which found that 74 percent of Canadians have a favourable view of the court, and 61 percent have confidence in it. See also Lori Hausegger and Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada," *Canadian Journal of Political Science* 37, no. 1 (2004): 23–50, where the authors argue that support for the court is becoming more tied to the decisions they make in the charter era.

85) Herman Dooyeweerd, *A Christian Theory of Social Institutions*, trans. Magnus Verbrugge (Ontario: The Herman Dooyeweerd Foundation, 1986), 92.

86) Dietrich Bonhoeffer, *Sanctorum Communio: A Theological Study of the Sociology of the Church*, trans. Reinhard Krauss and Nancy Lukens, ed. Clifford J. Green, *Dietrich Bonhoeffer Works 1* (Minneapolis: Fortress, 1998). Viewing the church as "a voluntary association of people with a religious interest" that "exists for the free enjoyment of each individual" cannot make sense of infant baptism (which Reformed and other churches practice) and the spiritual authority churches claim over baptized members, Bonhoeffer notes (257).

87) Berman, *Law and Revolution*, 292.

88) Jean Bethke Elshtain, "A Response to Chief Justice McLachlin," in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*, ed. Douglas Farrow (Montreal: McGill-Queen's University Press, 2005), 36.

89) Elshtain, "Response," 38–39.

90) Robert Joustra, "Reasonable Accommodation in Reverse," *Convivium*, April 26, 2013, <http://www.cardus.ca/blog/2013/04/reasonable-accommodation-in-reverse>.

91) Joustra, "Reasonable Accommodation in Reverse."

92) Joustra, "Reasonable Accommodation in Reverse."

93) To be clear, we are not advocating that the state force religious associations to "prove their worth." The challenge comes from one religionist to another: "we have something to contribute, some positive value to add, we are a public good, so let's engage!"

94) Elshtain, "Response," 39.