

Canada's Surprising Constitution

Unexpected Interpretations
of the *Constitution Act, 1982*

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Introduction

The Surprising Constitution

*Howard Kislowicz, Richard Moon,
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In its relatively short life, the *Constitution Act, 1982* has been full of surprises, which is perhaps not surprising. Most of the provisions of the *Constitution Act, 1982*, including the fundamental rights and freedoms protected in the *Canadian Charter of Rights and Freedoms*,¹ as well the protection of Aboriginal and treaty rights, are stated in general terms and represent abstract political values. Constitutions are meant to endure. The broad language of the Constitution provides a measure of both stability and adaptability to changing circumstances. Although Canadians may all agree that certain rights are important and ought to be respected, we often hold different views about how these rights should be applied in actual cases. The courts and other government actors have sometimes interpreted these rights in ways that were not expected by the drafters of the constitution.

There are a variety of reasons for giving courts the authority to interpret the rights in the Constitution. Central to most justifications for judicial review is a recognition that important individual and minority rights are often overlooked, and sometimes even deliberately overridden, in majoritarian politics. We hope that governments will respect basic rights, but we recognize that they sometimes fail to do so. The idea, then, is that judges, insulated from political pressure, are well positioned to protect these rights from the give-and-take of ordinary preference-based

politics. But there are drawbacks to giving judges the authority to second-guess legislative judgments. Their lack of political accountability is a strength but also a weakness, especially when we recognize that the judgments that courts must make under the *Charter* – particularly about limits on rights – are often policy-laden and sometimes messy. And perhaps because the members of the judiciary have generally been drawn from historically dominant groups, courts may have difficulty appreciating the experiences of marginalized groups and, as a consequence, may fail to give meaningful protection to their constitutional rights. The elected branches of government, though, have the primary responsibility to protect constitutional rights, even if their actions can be reviewed by the courts. Indeed, s 33 of the *Constitution Act, 1982* gives the federal Parliament and the provincial legislatures the final say on the meaning or application of several rights in the *Charter*.

Many of the “surprises” that arose in the early life of the *Constitution Act, 1982* were the result of unanticipated interpretations of the constitution by the courts and others have been the result of the actions of the other branches of government. During the debates leading to the *Charter*’s adoption, Justice Minister Jean Chrétien had assured the public that the *Charter* would not restrict “Parliament’s ability to legislate in respect of either abortion or capital punishment”;² yet the Supreme Court of Canada (SCC) went on to strike down the *Criminal Code*³ provision restricting abortion⁴ and to rule that capital punishment was unconstitutional.⁵ The SCC has also, on a number of occasions, reversed its earlier decisions. Notably, it changed its position on the constitutionality of the prohibition against medical assistance in dying⁶ and its position on the criminalization of different forms of sex work.⁷ The SCC struck down a general ban on tobacco advertising,⁸ but later upheld a slightly revised set of tobacco-advertising restrictions.⁹ In some cases, these changes occurred with the shifting composition of the Court’s membership, but in others, some of the judges simply changed their minds. Judges may be independent but they still reside in the community, and are sensitive to changing attitudes and circumstances in the larger society.

Whatever the specific reasons for these surprises and reversals, they were possible because of the openness of the *Charter*’s text, the courts’ “living tree” interpretive approach, and the flexibility inherent in the

justification of rights infringements. Whether we welcome or worry about a particular surprise will depend on our political, interpretive, and moral commitments. Our reaction will be affected by our view of the Constitution as either a set of fixed rules or as a statement of basic values, our faith in the judiciary or legislatures as stewards of our rights, and our view about the appropriate distribution of power between judicial, legislative, and executive actors.

To explore these themes, the editors invited some of the leading Canadian constitutional scholars to reflect on the developments in their particular area of study and the extent to which any of these came as a surprise. The contributors gathered together virtually for a two-day workshop in November 2021. This collection grew out of that gathering. Although each of the book's chapters offers a detailed look at one aspect of constitutional law, there are significant common themes.

One set of surprises relates to the *underdevelopment*, even the apparent dormancy, of some parts of the Constitution. There are provisions of the *Constitution Act, 1982* that have not yet been subject to significant interpretation by the SCC. This lack of attention might be due to judicial economy, with the Court deciding cases based only on what it sees as the critical issue. Underdevelopment might also be a function of choices made by the parties. The Court controls its docket, deciding whether to grant applications for leave to appeal, without providing reasons. However, the Court does not fully determine which issues are litigated. Litigation is expensive and time-consuming, and so some issues are more likely than others to come before the courts. It is not surprising, for example, that corporations have played a large role in *Charter* challenges against government action. Even when a case comes before it, the Court has little control over the arguments and evidence that are presented and will not ordinarily rely on arguments that were not raised by the parties. The range of arguments available to the Court may be expanded to some extent by the inclusion of interveners – third parties who have an interest in the issues raised by the case and who are permitted by the Court to make their own arguments. Although some members of the Court have recently objected to this practice, some of the key developments in the interpretation of constitutional rights have been made possible because of the work of interveners.

An example of underdevelopment resulting from the SCC's own choices is the Preamble to the *Charter*, which recognizes the "supremacy of God." As Howard Kislowicz discusses in [Chapter 1](#), it was not until 2015 that the SCC considered how this reference to God might relate to the *Charter*'s protection of religious freedom, and even then, the Court simply said that the Preamble was part of the underlying "political theory" of the *Charter* and might not directly affect the scope of the right to religious freedom.

In a similar surprise, the SCC has had nothing at all to say about freedom of peaceful assembly enshrined in s 2(c) of the *Charter*. Recent events, including pipeline protests and the Freedom Convoy, have foregrounded this gap in the jurisprudence. As Basil S. Alexander shows in [Chapter 2](#), the courts have been content to address these issues through freedom of expression, the purpose of which is arguably different from (if overlapping with) the purpose of freedom of assembly. Developments in Quebec courts, discussed in detail by Alexander, demonstrate the potential for a specialized jurisprudence of peaceful assembly.

Women's groups lobbied hard for the inclusion of s 28 in the *Charter*, yet this provision has not received any direct application by the SCC. Section 28, which guarantees "rights equally to male and female persons," was the first "notwithstanding" clause inserted into the *Charter*. The Court has had several opportunities to address the question of whether s 28 contains a separate, substantive guarantee of equal rights or is instead simply an interpretive provision that adds little to the protection of equality rights in s 15 of the *Charter*. The unpleasant surprise, then, is that the Court still has not given content to the section. In [Chapter 3](#), Kerri A. Froc discusses the role of s 28 in the context of Quebec's Bill 21, its *laïcité* (secularism) law.¹⁰ In Froc's view, the "religious symbols" law violates s 28 because it denies Muslim women in Quebec equal access to religious freedom. She argues that s 28's text and history demonstrate that it is not subject to s 33, the second "notwithstanding" clause, leaving Bill 21 open to challenge on the grounds of women's entitlement to equal rights.

In the case of some *Charter* rights, one element of the right is more fully developed than another. For instance, as Caroline Magnan argues in [Chapter 4](#), the SCC has developed its jurisprudence significantly with

respect to minority official language education rights as protected by s 23 of the *Charter*. However, the Court has not revised its earlier, more restrictive reading of language rights under s 19 of the *Charter*, which protects the use of English and French in “any court established by Parliament.” As a result, there is uncertainty about the scope of bilingualism requirements in federal courts, including the SCC.

As Michael Pal shows in [Chapter 5](#), there are several issues concerning voting rights under s 3 of the *Charter* that the SCC has not yet addressed. The most significant of these is the relationship between s 3 and the s 1 limitations clause. Although the Court ultimately rejected the argument that the right to vote is internally limited, it has more recently been divided on how precisely s 1 applies to limitations on the right to vote and on whether there are certain types of restrictions on the right that can never be justified.

In this category of underdeveloped provisions, we might also include s 33, the *Charter*’s notwithstanding clause. The Court has had very little to say about the section since the *Ford* case in 1988.¹¹ In that case, the Court decided that s 33 can be invoked either by Parliament or by a provincial legislature to ensure that a law continues to operate “notwithstanding” ss 2 and 7 to 15 if Parliament or a legislature explicitly declares that it is invoking the clause. The Court determined that this declaration can be made pre-emptively – prior to any judicial consideration of the law’s constitutionality – and that, provided s 33 is invoked using the proper form, its use cannot be challenged. The Court in *Ford* also held that s 33 can be used in a blanket fashion, allowing a legislature to declare that all its laws are insulated from *Charter* review under any of these sections. As Louis-Philippe Lampron highlights in [Chapter 6](#), this interpretation has come under strain, with legislatures making greater use of the clause in recent years. This increased use of the notwithstanding clause may or may not have come as a surprise to many. Lampron, however, wonders whether there may be more surprises around the corner for s 33, including the possibility that the Court will revisit the conditions that a legislature must meet when invoking the clause.

The *unexpected interpretation* of certain constitutional provisions represents another form of surprise. Benjamin Oliphant, for example, shows in [Chapter 7](#) how the right to freedom of expression under s 2(b) of the

Charter has absorbed other constitutional rights. The Court has defined the scope of s 2(b) broadly so that it extends to claims that might have been better characterized as a violation of freedom of the press or freedom of peaceful assembly. This ties in with Alexander’s discussion of freedom of peaceful assembly, which notes that the courts’ reliance on s 2(b) has left s 2(c) to atrophy.

In a variation on this theme, Ashleigh Keall argues in [Chapter 8](#) that the SCC, in its recent s 2(a) freedom of religion jurisprudence, has lost sight of the section’s purpose as described in its initial judgments. Keall argues that instead of requiring the state to make space for minority religious value systems, the Court has allowed s 2(a) to become a vehicle for the protection of state values in many cases.

Regarding the *Charter*’s “reasonable limits” clause in s 1, Richard Moon notes that the courts’ assumption that *Charter* analysis involves two distinct steps – whether there has been a breach of a *Charter* right and, if so, whether that breach is justified – rests on the idea that the fundamental rights protected by the *Charter* are the basic conditions of individual autonomy or liberty that must be protected from the demands of collective welfare. However, as Moon argues, very few of the *Charter*’s rights fit this individual-liberty model and are better understood as social or relational in character – protecting different aspects of the individual’s interaction or connection with others in the community. One consequence of this role is that the two steps of *Charter* adjudication – the determination of the right’s scope and the justification for the limit or restriction on the right – may often be difficult to separate or the separation may seem artificial.

Another set of interpretive surprises may be described as *disappointments*. For advocates of women’s equality, the constitutionalization of equality rights in s 15, framed in sweeping terms – “Every individual is equal *before and under* the law and has the right to *the equal protection and equal benefit* of the law” [emphasis added] – seemed to promise nothing less than a transformation to a sexually equal Canadian society. Yet, as Jennifer Koshan and Jonnette Watson Hamilton show in [Chapter 10](#), it was not until a pair of cases in 2018, thirty-three years after s 15 came into force, that the SCC upheld a claim of sex discrimination against

women.¹² Prior to these decisions, the Court had ignored or rejected a variety of such claims.

Similarly, Martha Jackman shows in [Chapter 11](#) that after initially adopting an expansive interpretation of s 7 – which guarantees the rights of life, liberty, and security of the person – the SCC embraced a narrower reading of the right. The section has been used to remove state restrictions on supervised injection centres,¹³ sex work,¹⁴ and medical assistance in dying.¹⁵ However, Jackman notes that the courts have been unwilling to apply s 7 in social welfare cases, including the refusal by governments to extend medically necessary care to undocumented migrants. This approach is due, she argues, to the courts’ preoccupation with a limited set of “principles of fundamental justice”: arbitrariness, gross disproportionality, and overbreadth. Jackman maintains that the consequence of the courts’ limited focus on these principles, with the heaviest emphasis on arbitrariness, is that a law or policy will survive challenge under s 7 if the court accepts that it furthers a government objective.

Perhaps the greatest disappointment with the Court’s approach to the 1982 Constitution is its narrow reading of s 35, which constitutionalizes “aboriginal and treaty rights.” Aimée Craft makes the case in [Chapter 12](#) that the legal regime that the Court has constructed out of s 35 is often at odds with the initial purpose and promise of the provision. In her view, this has had the effect of supporting government acts, including the appropriation of land, that have undermined the culture, language, and autonomous governance of Indigenous communities.

A final set of surprises might be termed, more optimistically, *unexpected interpretive expansions of Charter rights*. These expansions can sometimes be subtle, as Natasha Bakht shows in [Chapter 13](#), which examines s 27 of the *Charter* and its call on the courts to interpret the *Charter’s* rights in light of Canada’s commitment to multiculturalism. This interpretive provision does not guarantee any rights, which led most commentators to assume that it would have little effect. Bakht, however, argues that s 27 has had a noticeable and positive impact on how courts have applied certain rights, even when they do not refer specifically to the section.

The inclusion of the right to collective bargaining and the right to strike within s 2(d)’s freedom of association may or may not have been

a surprise to the *Charter's* framers. However, Fay Faraday shows in [Chapter 14](#) that it certainly was surprising that, after initially giving s 2(d) a narrow reading, the Court later used the provision to protect an array of rights in the labour context. Faraday argues that this change now puts the *Charter's* jurisprudence in line with international law on labour rights.

A final surprise in this category involves the unexpected stability of the Court's general approach to *Charter* interpretation. Vanessa MacDonnell shows in [Chapter 15](#) how, in the *Charter's* early years, the SCC adopted an interpretive approach to the *Charter* that wedded purposivism and "living tree" constitutionalism, while placing little emphasis on historical materials. This approach has remained dominant for a surprisingly long time, even as theories of originalism have begun to gain more attention in Canada and predominance in the United States. MacDonnell notes, however, that some current members of the Court appear to be moving toward an approach that places greater emphasis on text and history and have been more willing to permit greater legislative choice with fewer constitutional constraints. Given the shifting nature of the Court's membership and challenges to received wisdom about the benefits of the "living tree" approach, it is too soon to tell whether this development will solidify into a lasting change.

The twin demands of ensuring fidelity to the values embedded in the Constitution at the time of entrenchment and ensuring the Constitution's continued relevance can be reconciled in different ways, by different interpreters, and at different moments in the Constitution's life. The reconciliation of these demands will affect the legitimacy of the Constitution and its interpreters in the eyes of the governed. This is especially the case given that the task of interpreting and applying the Constitution is not the exclusive domain of judges but falls also to a host of other political and legal actors, including legislatures, executives, scholars, advocates, and public interest organizations. It is hardly surprising, then, that the Constitution has surprised us and will continue to do so. The ambition of this volume is to identify and account for these surprises, and in doing so to offer a picture of the Constitution in action.

Notes

- 1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
- 2 Adam M Dodek, ed, *The Charter Debates: The Special Joint Committee on the Constitution, 1980–81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018) at 62.
- 3 *Criminal Code*, RSC 1985, c C-46.
- 4 *R v Morgentaler*, [1988] 1 SCR 30.
- 5 *United States v Burns*, [2001] 1 SCR 283.
- 6 *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519; *Carter v Canada (Attorney General)*, [2015] SCC 5 [Carter].
- 7 *Reference re ss 193 and 195.1(1)(C) of the Criminal Code (Man)*, [1990] 1 SCR 1123 [Prostitution Reference]; *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101 [Bedford].
- 8 *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199.
- 9 *Canada (Attorney General) v JTI-Macdonald Corp*, [2007] 2 SCR 610.
- 10 *An Act Respecting the Laicity of the State* [Bill 21], CQLR c L-0.3.
- 11 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712.
- 12 *Centrale des syndicats du Québec v Québec (Attorney General)*, [2018] 1 SCR 522; *Québec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 SCR 464.
- 13 *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134.
- 14 *Bedford*, *supra* note 7.
- 15 *Carter*, *supra* note 6.

PART 1

Surprises of Underdevelopment

The “Supremacy of God” Clause

A Surprisingly Empty Political Theory

1

Howard Kislowicz

Introduction

Imagine you are turning forty and the way you have been introducing yourself all your life has left people bewildered. Maybe you have been deliberately vague, misunderstood, or some combination of the two. That is close to what it must be like to be the *Canadian Charter of Rights and Freedoms*. The *Charter*'s Preamble provides that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”¹ Although there is case law that has relied on the principle of the rule of law both to limit legislative power² and to guide the implementation of constitutional remedies,³ the “supremacy of God” clause has rarely been invoked by the Supreme Court of Canada (SCC). In the one case where the Court directly addressed the clause, the majority held that it “articulates the ‘political theory’ on which the *Charter*'s protections are based.”⁴ The import of this interpretation, however, is unclear. The statement might be taken to treat the clause as fundamental, but some lower courts have read it as holding that the clause is legally meaningless or a “dead letter.”⁵ It would be quite a surprise if a constitutional provision, designed to stand the test of time, died before its fortieth birthday.

This lack of effect and interpretation by the SCC is surprising.⁶ More interestingly, the clause also bears the potential for the phrase to surprise

in new ways. The SCC's choice of the phrase "political theory" is significant; it is a reference to case law regarding the Constitution's unwritten principles. This suggests that the clause may guide the interpretation of the *Charter's* protection of religious and conscientious freedom while also containing some independent constitutional principles. The main question for this chapter is whether the clause means that the Canadian Constitution recognizes a kind of jurisdictional autonomy for religious institutions. This "autonomy of the church" approach to religious freedom has been developed principally by American academics, but legal and scholarly developments in the United States tend to influence their Canadian counterparts. Already parties before the SCC have drawn on such ideas, as discussed below. I argue that, although courts recoil from interpreting religious doctrine, such a strong approach to church autonomy is not consistent with the constitutional text or with judicial practice. Instead, we see in the case law a balancing of the "supremacy of God" and its preambular companion, the "rule of law": courts do what they can to avoid interpreting religious doctrine, but religious organizations are subject to state jurisdiction.

Origins

The "supremacy of God" language was not in the draft proposed by the government. It was "inserted as an amendment to the *Charter's* preamble as a result of a motion made in the House of Commons by the Honourable Jake Epp, member for Provencher, Manitoba, in February 1981, and ... accepted by the Prime Minister of the day."⁷ Epp said that "the preamble was meant to 'emphasize that rights do not come from government but other sources ... that there are powers beyond the government and people.'"⁸ His intention was to affirm that *Charter* rights are not born of political compromise or delivered by Parliament but instead are fundamental, as they pre-existed the *Charter*. The clause draws on the Preamble of the 1960 *Canadian Bill of Rights*, which affirms that "the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions." This Preamble further states that "men and institutions remain free only

when freedom is founded upon respect for moral and spiritual values and the rule of law.”⁹ The *Charter’s* briefer Preamble, which avoids many of the concepts referred to in the *Bill of Rights*, leaves more room for interpretation. But as seen in the next sections, interpretation by both courts and commentators has been rare.

Judicial Interpretation

Whereas the SCC has rarely engaged with the “supremacy of God” clause, it has come up in a few lower-court rulings. Given the apparent intentions of the clause’s main advocate, some of these interpretations are quite surprising. In one case, a litigant invoked the clause in arguing that he could withhold part of his income taxes because he objected to the provision of abortion services. In response, Justice Francis C. Muldoon of the Federal Court held that the clause “goes no further than [preventing] the Canadian state from becoming officially atheistic.”¹⁰ In another case, he explained that the clause is “seen principally as a counter to the then Soviet Union and its repression if not outright persecution of believers of all creeds.”¹¹ In less surprising cases, other courts relied on Muldoon J’s analysis to hold that the Preamble did not make Canada’s laws subject to the “supremacy of God.”¹²

Other judges have given idiosyncratic interpretations of the clause that have had little impact. These readings of the clause have viewed it as support for nondenominational references to God in city council prayers,¹³ as a signal that “we all must bring humility to our dealings with our fellow citizens,”¹⁴ and as a gesture toward an ideal world where law and morality coincide while maintaining the predominance of legal rules.¹⁵ Stronger interpretations of the clause have been rejected by appellate courts. The clause has been cited to exclude hate speech from the protection granted by freedom of expression¹⁶ (overturned by the SCC)¹⁷ and similarly to exclude pornography¹⁸ (a view rejected in a different case by the SCC).¹⁹ Most exceptionally, a court relied on the clause to justify reference to religious principles in the determination of a criminal case, although this aspect of the reasoning was disclaimed on appeal.²⁰ Overall, despite the clause’s prominence at the outset of the *Charter*, attempts to attribute meaning to it have not been taken up by higher courts.

Academic Commentary

Like courts, academics have seldom considered the “supremacy of God” clause. Lawyer (now Justice) David M. Brown comments that early engagement with the clause by courts and academics “treated the Preamble ... as an embarrassment to be ignored.”²¹

Some have argued, in line with the comments of Epp cited above, that the clause points to a source of rights external to the *Charter*. Lawyer Robert Danay and professor Jonathon Penney read the clause as a gesture toward a natural-law theory of human rights, in which *Charter* rights have their sources beyond the state.²² Professor Richard Moon also reads the reference to “God” as locating the source of *Charter* rights in an “objective moral order” rather than the “will of man.”²³ Professor Dwight Newman’s work on the debates leading to the clause’s inclusion also emphasizes this theme, although he notes that parliamentarians also framed the clause as embodying “particular characteristics of Canada, its moral and spiritual values, and its legal traditions.”²⁴ Professor (now Justice) Lorne Sossin similarly sees the clause pointing to equal human dignity as the true source of *Charter* rights.²⁵ This concept implies, he argues, a commitment to positive rights: equal human dignity “is not just what separates us as individuals but also rather what binds us together as a community of mutual obligation ... [Issues of human dignity include] the right to a roof over your head ... food to feed your family ... [and] adequate health care.”²⁶

Some commentators have read the “supremacy of God” clause as a reminder of humility. For professor Bruce Ryder, the clause is “a recognition that there are other truths, other sources of competing world-views, of normative and authoritative communities that are profound sources of meaning in people’s lives that ought to be nurtured as counterbalances to state authority.”²⁷ Brown arrives at a similar interpretation from a different perspective: “[A]ny effort to understand the meaning of civil rights by reason alone ignores the limits of human reason, the contingency of man, and the supremacy of God ... [L]egal freedoms must be interpreted with a humility stemming from man’s ‘creatureliness.’”²⁸

Lawyer Robert Thompson argues that the clause legitimizes Canada’s link to monarchy. In his view, what distinguishes a constitutional monarchy from a republic is the theocratic justification for the monarch’s

rule. The clause therefore acknowledges the foundation of the monarch’s reserved prerogatives.²⁹

The common themes in these works are the acknowledgment of the existence of sources of rights beyond the state and respect for religious worldviews. Although these themes might be taken to generally support broader claims for religious freedom, it is still a leap to claim that the Constitution protects the autonomy of the church. To trace and assess this line of argument more carefully, I return to the case law.

Saguenay’s Puzzle

The SCC’s most recent engagement with the “supremacy of God” clause came in *Saguenay*, in which a citizen and a secularist organization challenged a municipal council’s practice of opening its meetings with a prayer that referenced God.³⁰ Part of the council’s argument was that, as the Constitution refers to God, referring to God cannot violate the Constitution. The Quebec Court of Appeal agreed: “[I] est difficile de soutenir que le récit d’une prière s’inspirant d’un des principes fondamentaux de la Constitution pourrait tout de même violer les droits.”³¹ The SCC overturned this ruling, holding that the “the reference to the supremacy of God does not limit the scope of freedom of conscience and religion and does not have the effect of granting a privileged status to theistic religious practices.”³² In this vein, one might think that, as part of the Preamble rather than an operative clause in the *Charter*, the “supremacy of God” clause might properly have little effect.

However, as Newman notes, the SCC has in other cases given preambular clauses legal effect.³³ Indeed, the *Saguenay* majority cited the *Judges Reference*,³⁴ a case that set the high-water mark for the invalidation of legislation based on the Preamble to the *Constitution Act, 1867* and on unwritten principles of the Constitution. Similarly, the language of “political theory” links it to an older line of judgments, authored by Justice Ivan Rand, that developed the notion of unwritten constitutional rights in Canada. These cases focused on the Preamble of the *Constitution Act, 1867* and on “the historical development in Britain of the parliamentary institutions that Canada enjoyed”³⁵ to articulate a set of implied rights that limited the exercise of parliamentary sovereignty.

In *Switzman v Elbling*, for example, Rand J interpreted the 1867 Preamble's statement that Canada will have "a Constitution similar in principle to that of the United Kingdom" to mean that "the *political theory* which the Act embodies is that of parliamentary government, with all its social implications."³⁶ On the basis of this reasoning, Rand J found an unwritten constitutional guarantee of free expression.³⁷

Saguenay's puzzle is that Justice Clément Gascon did not explain the implications of holding that the political theory of the *Charter* recognizes the "supremacy of God." Does treating God as supreme mean that churches and other religious institutions have a constitutionally protected autonomy from state interference? If God, not the state, is supreme, does this amount to recognizing churches' inherent jurisdiction, as some proponents of the autonomy of the church insist?³⁸ Although the Preamble may not itself create rights, it has the potential to colour the interpretation of the right to religious freedom. Imagine, for example, if a member of a religious organization sought to argue that the organization had behaved oppressively, seeking a remedy in the corporate and not-for-profit statutes of several Canadian jurisdictions.³⁹ Could the organization respond by arguing that the right to religious freedom, as interpreted through the lens of the "supremacy of God" clause, prevents the state from imposing such remedies because this would make the state supreme over God?

The Autonomy of the Church

One way to start answering these questions is to look to other jurisdictions where the "autonomy of the church" concept has been more fully developed. As professor Christopher McCrudden notes, the European Court of Human Rights (ECHR) has interpreted the guarantee of religious freedom to include a protection for "organizational autonomy," which it views as deriving from democracy.⁴⁰ In *Hasan and Chaush v Bulgaria*, the ECHR held that the "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection [of religious freedom]."⁴¹ Discussing the *Church of Scotland Act 1921*,⁴² professor Julian Rivers has argued that "[r]eligious liberty requires autonomy, or self-government ... Church and state are separate entities, sovereign in their own spheres."⁴³

But the notion of the autonomy of the church has received the most elaboration in the United States. Early in the idea's development, professor Douglas Laycock argued that "churches have a constitutionally protected interest in managing their own institutions free of government interference."⁴⁴ This "interference" is taken to include the actions of "legislators, administrative agencies, labor unions, disgruntled lay people, or other actors lacking authority under church law."⁴⁵ On this view, the "complex and open-ended nature of the processes that lead to doctrinal change"⁴⁶ within religious communities is such that ceding jurisdiction to the state on any internal matters can disrupt the development of religious doctrine. So, because of the "free exercise" guarantee,⁴⁷ internal decisions are beyond the state's jurisdiction.⁴⁸

Part of the justification for this claim to autonomy over internal matters is founded in respect for individual autonomy. On this theory, because individuals *choose* their religious affiliations, "[t]he state has no legitimate interest sufficient to warrant protection of church members from their church with respect to discrimination, economic exploitation, or a wide range of other evils that the state tries to prevent in the secular economy."⁴⁹ Given its emphasis on voluntarism, a church and its members may, by agreement, create rights between members that are enforceable in state courts.⁵⁰ It follows that churches' dealings with outsiders, who do not voluntarily join the association, are subject to state jurisdiction.⁵¹ His theory also proposes a sliding scale of protection depending on the strength of the group's religious interest and the degree of state intrusion: "[I]ts interest in conducting a worship service is clearly greater than its interest in organizing a trip to a baseball game."⁵² Similarly, where the autonomy interest cannot justify a resulting harm, such as the sexual abuse of children, the autonomy can be overridden by courts.⁵³

Laycock's theory differs from those of legal scholars like Ira Lupu and Robert Tuttle who found their views in the Establishment Clause, which states that "Congress shall make no law respecting an establishment of religion." On this argument, "[c]onsent of the affected religious organization does not eliminate the constitutional problems."⁵⁴ If the right stems from the constitutional prohibition on establishment, courts' jurisdiction cannot be granted voluntarily by private actors. That said, like Laycock, Lupu and Tuttle do not envisage "complete legal immunity" for churches'

decisions. For instance, if a child is abused by a pastor, the child “may sue the congregation for negligent selection or retention of the pastor, even though that cause of action may have a chilling effect on religious bodies’ employment decisions.”⁵⁵ Further, it remains within courts’ jurisdiction to determine who qualifies as a minister, as “the court’s classification serves only the government’s interest in avoiding impermissible judgments.”⁵⁶

Professor Richard Garnett takes these ideas further, arguing that “the ‘idea’ of the ‘freedom of the church’ ... remains a crucial component of any plausible and attractive account of religious freedom under and through constitutionally limited government.”⁵⁷ He argues that the two clauses of the First Amendment work together to achieve the practical result of church autonomy.⁵⁸

For Garnett, this doctrinal result is the fulfillment of the deeper purpose of political pluralism: “the idea that political liberties are best served through competition and cooperation among plural authorities and jurisdictions, and through structures and mechanisms that check, diffuse, and divide power.”⁵⁹ Garnett argues that the freedom of the church should be thought of “as a structural feature of social and political life – one that promotes and enhances freedom by limiting government – and also as a moral right to be enjoyed by religious communities.”⁶⁰ As professor Kathryn Chan notes, Garnett’s view stems from a narrative of religious freedom that differs from the one commonly relied upon in Canadian case law.⁶¹ Canadian courts trace religious freedom to the Reformation and the “religious struggles” that followed.⁶² They tell a story of the state receding to respect individual conscience, as “[a]ttempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures.”⁶³ In contrast, Garnett’s theory “traces Western constitutionalism instead to the Gregorian assertion of *libertas ecclesia*, emphasizing the central role of the Roman Catholic Church in setting limits to monarchical power.”⁶⁴ In this view, the autonomy of the church is not granted by the state; the jurisdiction of churches is inherent.⁶⁵ And this, says Garnett, is to the good, as the autonomy of diverse religious institutions is “among the necessary conditions for everyone else’s religious freedom.”⁶⁶

Consequently, in this argument, churches are entitled to engage with their employees in ways that would constitute illegal discrimination if they were other private enterprises.⁶⁷

In these theories of church autonomy, Lupu and Tuttle’s focus on the Establishment Clause and Garnett’s focus on political pluralism offer more expansive interpretations of the “supremacy of God” clause. They insist more forcefully on the inherent jurisdiction of churches as part of the vision of the (American) state. These perspectives are potentially attractive because they might give a clear interpretive role to the clause. If “freedom of conscience and religion” can be interpreted either to include or to exclude some form of “church autonomy,” perhaps it might be said that the “supremacy of God” clause tips the scales in favour of autonomy by recognizing the limits of state authority. And consonant with Garnett’s approach, some have argued that the “supremacy of God” clause resonates with this idea.⁶⁸ If advocates are to rely on the opening created by *Saguena*y’s reference to the *Charter*’s “political theory,” they will need to show that the autonomy of the church can be qualified as an unwritten constitutional principle. As I explain in the next section, I doubt that it can be.

Might the Autonomy of the Church Be an Unwritten Constitutional Principle?

In 2021, a significant ruling by the SCC confined the operation of unwritten constitutional principles more narrowly than in previous cases.⁶⁹ Under this ruling, reliance on unwritten principles is limited to their use as interpretive guides to the written Constitution. If advocates want to claim that the “supremacy of God” clause refers to the unwritten constitutional principle of church autonomy, the argument would run something like:

- (1) s 2(a) is open to alternative interpretations, and
- (2) the “supremacy of God” clause refers to an unwritten principle of church autonomy;
- (3) therefore, s 2(a) (as well as legislation and the common law) should be interpreted to respect the autonomy of the church.

Whether step 2 is correct depends on either a structural analysis of the constitutional text or evidence of historical practice.⁷⁰ I consider each of these in turn.

Structural Analysis of the Constitutional Text

The strongest textual signal away from the autonomy of the church is that the protection of dissentient religious schools constitutionally enshrines the “rights and privileges” of certain religious schools (generally Protestant schools in Quebec and Catholic schools elsewhere) based on the arrangements that existed when each province joined the federation.⁷¹ This protection is uneven across the country, depending on which schools were legally protected at the time a province joined Confederation, and in Quebec and Newfoundland and Labrador, it has been amended away.⁷² This disharmony alone suggests that there is not one unifying principle. More to the point, that religious schools are guaranteed public funding in some provinces stands in stark contrast to the American tradition, which insists on a stronger separation of religion and publicly funded education. This public funding means that, in some provinces, the decisions of religious schools and school boards are public decisions, subject to judicial review.⁷³

Another textual signal that the autonomy of the church is not a constitutional principle is that the Queen, the natural person who represents Canada’s Head of State, is also the head of England’s established church. Although there are important points of theory distinguishing between the Queen’s various roles, this basic unity in a single natural person suggests something less than full autonomy.

Historical Practice: The Not-So-Jurisdictional Approach to Religious Doctrine

If the text is at best ambiguous, we might instead look to the practices of constitutional actors to derive the principle, in a fashion analogous to how courts identify constitutional conventions.⁷⁴ To be sure, there are many examples of courts displaying reticence about becoming involved in matters internal to religious communities. A leading statement from the SCC holds that “the State is in no position to be, nor should it become, the arbiter of religious dogma ... Secular judicial determinations

of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.”⁷⁵ Moreover, despite the absence of a textual constitutional duty of state religious neutrality, “[t]his duty results from an evolving interpretation of freedom of conscience and religion.”⁷⁶ Although there were “periods when there was a close union of ecclesiastical and secular authorities in Canada ... societal changes have tended to create a clear distinction between churches and public authorities, placing the state under a duty of neutrality.”⁷⁷

The case law on justiciability does not engage with the “supremacy of God” clause, but it might be thought to reflect a recognized limitation on state authority. The SCC has held that, for voluntary associations, disputes are justiciable only when there is a legal right at stake, such as a property or contractual right. In 2018, the SCC held that an expulsion from an unincorporated religious congregation was not justiciable because the church’s action did not affect the property rights of the expelled member.⁷⁸ Likewise, even in a case where a religious organization had a written constitution, the dispute was nonjusticiable because the constitutional provisions did not disclose an objective intention to create a legal relationship.⁷⁹ Although the religious nature of the organizations was argued by some as a reason for judicial restraint,⁸⁰ the Court’s theory of the limitation on state power is not particular to the religious context and so does not shed much light on the “supremacy of God” clause.

A closer look at the wider body of cases reveals a more nuanced approach that balances legal rights and the autonomy of religious institutions in much the way that the “supremacy of God” and the “rule of law” are conjoined in the *Charter*’s Preamble. Although the SCC has held that a dispute involving the interpretation of a religious text is nonjusticiable,⁸¹ that a dispute occurs within a religious organization does not oust state jurisdiction. In Canada, the question of jurisdiction is less relevant than the question of justiciability; courts ask not whether they have authority to intervene but whether they should exercise their discretion to intervene.⁸² This analysis has focused on whether there is a legal right at issue, an approach not very different from that taken in other kinds of private disputes. As discussed below, if a dispute involves a legal right that would be recognized as such in a nonreligious context, courts will not treat

the presence of a religious organization or matters of religious significance as limits to their authority.⁸³ Instead, courts will engage with the religious doctrine as much as necessary to resolve the legal controversy.⁸⁴ The SCC has held that where an “underlying legal right” such as a property right or a statutory cause of action is at stake, a decision to expel a member from an organization must adhere to the requirements of natural justice.⁸⁵ In the pre-*Charter* era, it ruled on whether an expulsion from an incorporated religious community was consistent with the articles of incorporation.⁸⁶ It has held that a contractual term requiring the performance of a religious divorce is valid and its breach compensable in damages.⁸⁷ In all these situations, courts did not adopt a hands-off approach to questions with religious significance.

As much of the doctrinal foundation for the American approach to the autonomy of the church stems from the case law on the “ministerial exception,” it is instructive to compare this approach to parallel Canadian case law. In a 2020 statement of the American rule by the US Supreme Court, if a church employee is a “minister,” a category with a still open definition but taking on a functional emphasis,⁸⁸ courts have no jurisdiction to review the employee’s hiring and firing.⁸⁹ As developed below, there are two underlying themes in analogous cases in Canada. First, courts state that although they are not competent to make decisions regarding religious doctrine,⁹⁰ they are willing to vindicate underlying legal rights. Second, courts have enforced the internal rules of religious bodies while shying away from commenting on the substance of those rules.⁹¹

For instance, in *Caldwell v Stuart*,⁹² a teacher sought remedies under British Columbia’s human rights legislation. She had been terminated by a Catholic school because of her marriage to a divorced man, contrary to church doctrine. The Court treated the case as one where civil rights conflicted: “[T]he law of the land has conferred rights regarding employment which have come into conflict with the rights of the respondent in the operation of its denominational school.” Although the Court held that provincial human rights legislation applied to the dispute, it argued that the requirement of “religious conformance” was a *bona fide* occupational qualification for a Catholic school teacher and thus found that the termination was not discriminatory. The Court noted the rarity

with which "religious conformance can pass the test of *bona fide* qualification" but held that, in this case, "the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects" met the requirements.⁹³

This approach is emblematic: it treats religious organizations as subject to legislative and judicial jurisdiction while declining to scrutinize religious doctrine.⁹⁴ The Court drew additional support from a provision of British Columbia's human rights legislation, which allows not-for-profit organizations that operate for the benefit of an "identifiable group" to prefer group members.⁹⁵ The Court said that this provision is aimed at "recognizing the historically acquired position of the denominational school," protecting it from discrimination claims in such cases.⁹⁶ Notably, the Court treated this exemption as "a further basis"⁹⁷ for its decision, suggesting that the result would have been the same in the absence of the exemption.

Ontario's Court of Appeal reached a similar conclusion for different reasons in *Daly v Attorney General of Ontario*. The question there was whether the Ontario legislature could prohibit Roman Catholic school boards from taking religion into account in making employment decisions. The Court held that the constitutional protection of denominational schools in s 93 of the *Constitution Act, 1867* made this legislation invalid because "[t]he denomination of teachers was the explicit subject of pre-Confederation legislation relating to separate schools."⁹⁸ Although this outcome might be thought to depend on Ontario's particular historical circumstances, the Court also offered a normative argument for its position by relying on *Caldwell v Stuart*, in which s 93 did not apply.⁹⁹

Given the normative positions underlying these decisions, one might claim that there is some unwritten constitutional principle at work. But what is the shape of this principle? In both cases, the reasoning rested on a concept of human rights law, namely the *bona fide* occupational requirement/qualification. The application of this concept suggests not a jurisdictional limit but a balancing of considerations: the legislative rule still applies but in a manner sensitive to religious freedom.

We see a thorough application of this rule in *Christian Horizons*, a case where an Evangelical Christian organization terminated an employee for having a same-sex relationship in breach of the organization's

“Life and Morality Statement.” The Ontario Superior Court held that the prohibition on involvement in a same-sex relationship was not a *bona fide* qualification for a support worker.¹⁰⁰ Even if Christian Horizons considered the job of a support worker religious in nature, “from an objective perspective, the support workers are not actively involved in converting the residents to, or instilling in them, a belief in Evangelical Christianity. There is nothing in the nature of the employment itself which would make it a necessary qualification of the job that support workers be prohibited from engaging in a same sex relationship.”¹⁰¹ In this analysis, we see the Ontario court engaging carefully with the organization’s religious nature but not treating it as a bar to assessing the organization’s internal decisions. Although there is overlap between this analysis and the American “ministerial exception” test, there is also a significant difference: the question was not whether the employee was a minister but whether her job required the particular qualification. This question entails a more searching analysis and shows a stronger willingness to engage with the detailed facts at issue rather than with the nature of the position. In the American context, the determination that a person is a minister ends the matter, and government regulation of the employment relationship is disallowed.¹⁰² As professor Carolina Mala Corbin notes, “The ministerial exception grants religious organizations immunity from employment-discrimination suits by ministers even if the discrimination is not religiously required.”¹⁰³ In Canada, there is still room to assess a human rights complaint; whether a particular requirement is a *bona fide* occupational necessity depends on evidence of its nexus with religion and the nature of the employment.

We see a similar pattern of taking the religious nature of the organization into account while still subjecting its decisions to scrutiny in cases where a claim of wrongful dismissal is made against a religious organization. Although courts will not question the justice of internal church rules for the employment of clergy, they will ensure that the procedural rules adopted by the organization are followed. In *McCaw*, for example, the Ontario Court of Appeal held that “[i]f a minister’s eligibility to earn his living in the church is unlawfully taken away, it is obvious that the unlawful action will cause pecuniary loss to the minister” and thus “attract damages.”¹⁰⁴ What made the conduct unlawful in this case was the

church's failure to comply with its own disciplinary code. The SCC has explained that the Ontario court's intervention in *McCaw* was based on the "underlying legal right" against wrongful dismissal, underscoring that common law rights can ground courts' jurisdiction in religious disputes.¹⁰⁵ That said, the Ontario Court of Appeal has also held that where a dispute is "at its core ... ecclesiastical in nature ... [r]edress must be sought through the internal review process established by canon law for disputes of an ecclesiastical nature,"¹⁰⁶ even where some aspects of the dispute concern property.¹⁰⁷

Church property cases are similar. As leading scholar M.H. Ogilvie explains, the dominant approach is for courts to "examine the constitutional documents of the religious organization, decide whether they have been followed precisely, and if so, confirm the internal decision to be the correct application of the constitution (or if not, vacate it and order that internal procedures be followed)."¹⁰⁸ In Ogilvie's view, courts treat the constituting documents of "religious institutions as they would the constitutions of secular organizations."¹⁰⁹ When these documents are unclear or their procedures are not followed scrupulously, courts may need to engage with theological questions.¹¹⁰

In addition, in a small number of cases, courts have made determinations that are more clearly religious in nature. In the 1950s, for instance, the Quebec courts determined the meaning of "Protestant" to assess the constitutional right of a Jehovah's Witness parent to access the dissentient school. The Court of Queen's Bench held that "to be considered a Protestant it is sufficient to be a Christian and to repudiate the authority of the Pope."¹¹¹

More recently, in *Hall*, a student at a s 93 Catholic high school in Ontario sought to overturn the principal's decision prohibiting him from attending prom with his boyfriend. In granting the injunction, the Ontario court held that "[i]t is not the task of a civil court to direct the principal, the Board, the Roman Catholic Church or its members, or indeed any member of the public as to what his or her religious beliefs ought to be."¹¹² Nevertheless, the court found that it was open to the student "to question the correctness of the statement in the defendant's materials that Catholic teachings and Board policy in fact proscribe 'homosexual behaviour' and a 'homosexual lifestyle.'"¹¹³ In other words,

if a litigant relies on Catholic teachings, courts can determine what they mean.

The finding in *Hall* should likely be treated with caution, as it is in tension with the SCC's subjective approach to religion and may be limited to the context of s 93 schools. Yet, even outside the context of s 93 schools, courts have offered interpretations of religious texts on rare occasions. In *Owens*, the applicant was held to have violated the hate speech provision of a human rights code for publishing an ad that cited the book, chapter, and verse of four Bible passages, followed by an equals sign and two stickmen holding hands with a "not permitted" symbol superimposed on them.¹¹⁴ Saskatchewan's Court of Appeal distinguished between the drawing and the Bible citations, published without the text to which they referred. Although the passages included language that might have violated the hate speech provision – such as the description of male-male sexual relations as "detestable" and those who engage in them as "deserv[ing] death" – the Saskatchewan court held that the citations did not violate *The Saskatchewan Human Rights Code*¹¹⁵ because of the ambiguity of the Bible as a whole. According to the court, the Bible is "the source of messages involving themes of love, tolerance and forgiveness," and it went on to quote a number of passages from the Gospels to this effect.¹¹⁶ Although the court claimed that it was not determining the meaning of the language, it also gave an "objective" interpretation that the text is not hateful because of the contrasting messages of other parts of the Bible. Then, in offering yet another biblical interpretation, the court reasoned that "the Bible passages in issue refer to *behaviour* said to be sinful or morally wrong and do not condemn the mere fact of gay men's sexual identity."¹¹⁷ Although the Court did not endorse the distinction, it held that its presence in the cited passages diminished their impact and thus not violate the hate speech prohibition.

In sum, even if the cases in this last set are exceptional, there is not much evidence of a strongly jurisdictional unwritten principle of religious autonomy. Instead, courts assume jurisdiction whenever there is a justiciable issue at stake and will answer religious questions where necessary to resolve the legal dispute. Often, courts can resolve the controversy without wading into religious interpretation, but that may not

always be so. For instance, federal not-for-profit legislation provides that remedies are limited where a religious corporation reasonably acts on the basis of a tenet of faith.¹¹⁸ It is difficult to imagine assessing the reasonableness of such actions without getting into some degree of religious interpretation. This was precisely the kind of dispute at issue in *Amselem*, which the SCC said that courts ought to avoid.¹¹⁹

Conclusion

That the SCC has had little to say about the “supremacy of God” clause is surprising given its age and the volume of cases that have considered religious freedom, with which the clause seems intimately tied. Although some lower courts and academics have considered the clause, this attention has had surprisingly little impact on constitutional law in general. The SCC opened the door to greater influence in *Saguenay*, and some have tried to walk through that door and down the path of church autonomy. I have argued that the SCC’s acceptance of such arguments would also be surprising given the case law in the area. Yet the possibility remains open that in the years to come the clause will surprise in new ways when some new interpretation that reconciles the clause with religious freedom and constitutional case law arises.

Acknowledgments

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Notes

- 1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- 2 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, [2014] 3 SCR 31.
- 3 *Reference re Manitoba Language Rights*, [1992] 1 SCR 212; *Ontario (Attorney General) v G*, 2020 SCC 38.
- 4 *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 147 [*Saguenay*].
- 5 *Potvin (Re)*, 2018 ABQB 652 at para 108; *R v Sharpe*, 1999 BCCA 416 at para 79; *CP (Re)*, 2019 ABQB 388 at para 15; *R v David T Little*, 2018 NBPC 2 at para 18.
- 6 The underdevelopment of *Charter* provisions after forty years is a running theme in this volume. See the chapters by Basil S Alexander on s 2(c), Michael Pal on s 3, Caroline Magnan on s 19, and Kerri A Froc on s 28.

- 7 *O'Sullivan v Canada*, [1992] 1 FC 522 at para 16 [O'Sullivan].
- 8 Quoted in Kerri A Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38:1 National J Constitutional L 35 at 81–82.
- 9 *Canadian Bill of Rights*, SC 1960, c 44. I found no significant judicial interpretation of the "supremacy of God" phrase in this statute.
- 10 *O'Sullivan*, *supra* note 7 at paras 17–19, per Muldoon J.
- 11 *Prince v Canada (Department of Indian Affairs & Northern Development)*, [1994] 89 FTR 249 (TD) at paras 6–7. In this case, a Catholic First Nations woman initiated a federal human rights complaint after the Department of Indian Affairs and Northern Development terminated its policy of funding the living expenses of First Nations children who left home to attend a denominational school. Muldoon J made the point that Canada is a secular country – neither theocratic nor atheistic – with the exception of the protection of dissentient religious schools. He held, however, that this obligation did not exist in the federal system of managing First Nations reserves and education and that the Human Rights Tribunal had no jurisdiction over the exercise of discretion granted by the *Indian Act*, RSC 1985, c I-5, pursuant to s 67 of the *Canadian Human Rights Act*, RSC 1985, c H-6. See also *Baquial v Canada (Minister of Citizenship and Immigration)*, [1995] 1995 FCJ No 279 at para 6.
- 12 *Meads v Meads*, 2012 ABQB 571 at paras 280–81. See also *R v Westover*, [2013] 2013 ONCJ 472 at para 37.
- 13 *Allen v Renfrew (Corp of the County)*, [2004] 69 OR (3d) 742 at para 19.
- 14 *Batty v City of Toronto*, [2011] 108 OR (3d) 571 at para 1.
- 15 *R v Drainville*, [1991] [1992] 3 CNLR 44 at paras 62–63.
- 16 *R v Keegstra*, 1984 Court of Queen's Bench at paras 50, 54, and 59–60.
- 17 *R v Keegstra*, [1990] 3 SCR 697.
- 18 *R v Ghnaim*, [1988] AWLD 1965.
- 19 *R v Butler*, [1992] 1 SCR 452.
- 20 *R v Graham*, [1994] 151 NBR (2d) 81; *ibid* at para 13. See also *Pappas v The Queen*, 2006 TCC 692 at paras 9–10.
- 21 David M Brown, "Freedom from or Freedom For: Religion as a Case Study in Defining the Content of Charter Rights Religion, Morality and Law" (1999) 33:3 UBC L Rev 551 at 561.
- 22 Jonathon W Penney and Robert J Danay, "The Embarrassing Preamble – Understanding the Supremacy of God and the Charter" (2006) 39:2 UBC L Rev 287 at 28.
- 23 Richard Moon, "Neutrality and Prayers: *Mouvement laïque v Saguenay*" (2015) 4 Oxford JL & Religion 512 at 519.
- 24 Dwight Newman, "God in the Constitution: The Supremacy of God Clause in the Preamble to the Canadian Charter of Rights and Freedoms" (2022) 105 SCLR (2d) 39 at para 19.

- 25 Lorne Sossin, “The Supremacy of God, Human Dignity and the Charter of Rights and Freedoms” (2003) 52 UNBLJ 227 at 228.
- 26 *Ibid* at 230.
- 27 Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87 at 94.
- 28 Brown, *supra* note 21 at 562–63. Some Christian groups in New Zealand were dismayed that the *New Zealand Bill of Rights Act 1990* did not include a similar acknowledgment of God. “For them, the only real check upon tyranny was the divine one.” Rex Tauati Ahdar, “How Well Is Religious Freedom Protected under a Bill of Rights – Reflections from New Zealand” (2010) 29:2 U Queensland LJ 279 at 282–83.
- 29 Robert Thompson, “Canada, Secularity and a Constitutional Monarchy” (2005) 18:1 National J Constitutional L 1. See also Julian Rivers, “The Secularisation of the British Constitution” (2012) 14:3 Ecclesiastical LJ 371 at 375.
- 30 *Saguenay*, *supra* note 4.
- 31 *Saguenay (Ville de) v Mouvement laïque québécois*, 2013 QCCA 936 at para 100.
- 32 *Saguenay*, *supra* note 4 at para 148; Justice Clément Gascon, for the majority, relied on Sossin, *supra* note 25 at 229: “The reference to the supremacy of God in the *Charter* should not be construed so as to suggest one religion is favoured over another in Canada, nor that monotheism is more desirable than polytheism, nor that the God-fearing are entitled to greater rights and privileges than atheists or agnostics. Any of these interpretations would be at odds with the purpose and orientation of the *Charter*, as well as with the specific provisions regarding freedom of religion and conscience.”
- 33 Newman, *supra* note 24 at paras 2–5. See also *Reference re Manitoba Language Rights*, *supra* note 3; *Ref Re Remuneration of Judges of the Prov Court of PEI*; *Ref Re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 [*Judges Reference*].
- 34 *Judges Reference*, *supra* note 33 at para 95.
- 35 Lorraine E Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada’s Constitution” (2001) 80:1–2 Can B Rev 699 at 713.
- 36 *Switzman v Elbling and AG of Quebec*, [1957] SCR 285 at 306 [emphasis added].
- 37 See also *Saumur v City of Quebec*, [1953] 2 SCR 299 at 327, in which Rand J held that the right to religious freedom is an unwritten guarantee of the Constitution; this finding was confirmed in *Robertson and Rosetanni v R*, [1963] SCR 651 at 655.
- 38 See *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [*Wall*] (Factum of the Association for Reformed Political Action Canada at paras 6–12; Factum of the Seventh-Day Adventist Church in Canada and the Church of Jesus Christ of Latter-Day Saints in Canada at paras 28–29).

- 39 See Anna Lund and Howard Kislowicz, “The Oppression Remedy in Religious Organizations” (Forthcoming) UBC L Rev.
- 40 Christopher McCrudden, “Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered” (2011) 9:1 Int J Constitutional L 200 at 224.
- 41 *Hasan and Chaush v Bulgaria*, No. 30985/96, ECHR (Grand Chamber), October 26, 2000, at para 62.
- 42 *Church of Scotland Act 1921*, 1921 c 29 (Regnal 11 and 12 Geo 5).
- 43 Rivers, *supra* note 29 at 373–74.
- 44 Douglas Laycock, “Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy” (1981) 81:7 Columbia L Rev 1373 at 1373.
- 45 Douglas Laycock, “Church Autonomy Revisited” (2009) 7 Georgetown JL & Public Policy 253 at 254. As Laycock notes, a quirk of the US case law makes parochial schools immune from federal labour regulation, but lower courts have applied other employment statutes to those schools and have applied federal labour law to institutions “that can be characterized as less religious than a parochial school” (at 259).
- 46 Laycock, *supra* note 44 at 1391.
- 47 The First Amendment provides, “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*.” *US Constitution*, amend I [emphasis added].
- 48 Laycock, *supra* note 45 at 264.
- 49 Laycock, *supra* note 44 at 1403.
- 50 *Ibid*.
- 51 *Ibid* at 1406.
- 52 *Ibid* at 1409 and 1412.
- 53 Laycock, *supra* note 45 at 277.
- 54 Ira C Lupu and Robert W Tuttle, “Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders” (2009) 7 Georgetown JL & Public Policy 119 at 145.
- 55 *Ibid* at 140.
- 56 *Ibid* at 147–48. Caroline Mala Corbin argues that this approach creates more Establishment Clause problems than it solves, as determining who is a “minister” is a matter of religious doctrine. Caroline Mala Corbin, “The Irony of *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*” (2012) 106:2 Northwest UL Rev 951 at 966.
- 57 Richard W Garnett, “‘The Freedom of the Church’: An Exposition, Translation, and Defense” (2013) 21 J Contemporary Leg Issues 33 at 34.
- 58 *Ibid* at 37.

- 59 *Ibid* at 38. See also Kathryn Chan, “Religious Institutionalism: A Feminist Response” (2021) 71:4 UTLJ 443; and Victor M Muñoz-Fraticelli and Lawrence David, “Religious Institutionalism in a Canadian Context” (2015) 52:3 Osgoode Hall LJ 1049.
- 60 Garnett, *supra* note 57 at 51–52.
- 61 Chan, *supra* note 59 at 454.
- 62 *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 118.
- 63 *Ibid* at para 120.
- 64 Chan, *supra* note 59 at 454.
- 65 Garnett, *supra* note 57 at 41–42.
- 66 Richard W Garnett, “Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses” (2008) 53:2 Villanova L Rev 273 at 293.
- 67 *Ibid* at 287.
- 68 See *Wall*, *supra* note 38 (Factum of the Association for Reformed Political Action Canada at paras 6–12; Factum of the Seventh-Day Adventist Church in Canada and the Church of Jesus Christ of Latter-Day Saints in Canada at paras 28–29).
- 69 *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 65.
- 70 See Robin Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80:1–2 Can B Rev 67; (Alyn) James Johnson, “The Judges Reference and the Secession Reference at Twenty: Reassessing the Supreme Court of Canada’s Unfinished Unwritten Constitutional Principles Project” (2019) 56:4 Alta L Rev 1077; *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Judges Reference*, *supra* note 33; *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*].
- 71 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 93 and s 29n2.
- 72 *Ibid*, s 93A; *Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25; *Constitution Amendment, 2001 (Newfoundland and Labrador)*, SI/2001-117.
- 73 For example, see *Hall (Litigation Guardian Of) v Powers*, [2002] 59 OR (3d) 423 [*Hall*]; *Bezaire v Windsor Roman Catholic Separate School Board*, (1992), 9 OR (3d) 737.
- 74 *Patriation Reference*, *supra* note 70. In this section, my aim is not to assess the case law critically but to search for support in the existing case law for the autonomy of the church as a constitutional principle.
- 75 *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551 at para 50 [*Amselem*].
- 76 *Saguenay*, *supra* note 4 at para 71.
- 77 *Ibid* at paras 69 and 71, citing *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650.
- 78 *Wall*, *supra* note 38.
- 79 *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga*, 2021 SCC 22.

- 80 See *ibid* (Factum of the Association for Reformed Political Action Canada at paras 20–21).
- 81 *Wall*, *supra* note 38 at para 38.
- 82 See Kathryn Chan, “*Lakeside Colony of Hutterian v Hofer*: Jurisdiction, Justiciability and Religious Law” in Renae Barker, Paul T Babie, and Neil Foster, eds, *Law and Religion in the Commonwealth: The Evolution of Case Law* (Surrey: Hart, 2022) 211.
- 83 *Bruker v Marcovitz*, [2007] 3 SCR 607 at para 41; Alvin Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004) at 305.
- 84 There is a resonance here with Ashleigh Keall’s chapter in this volume, where she argues that the SCC’s analysis of religious freedom under s 2(a) has come to be in the service of state values.
- 85 *Wall v Judicial Committee of the Highwood Congregation of Jehovah’s Witnesses*, [2016] ABCA 255 at para 25; *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165.
- 86 *Hofer et al v Hofer et al*, (1970) 13 DLR (3d) 1.
- 87 *Bruker v Marcovitz*, *supra* note 83.
- 88 See “*Our Lady of Guadalupe School v. Morrissey-Berru*” (2020) 134:1 Harv L Rev 460.
- 89 *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 565 US 171, 132 S Ct 694 (2012); *Our Lady of Guadalupe School v Morrissey-Berru*, 591 US ____ (2020).
- 90 The most authoritative statement of this position is in *Amselem*, *supra* note 75 at para 50. See also *Levitts Kosher Foods Inc v Levin*, [1999] 45 OR (3d) 147 at para 31 [*Levitts*].
- 91 *Levitts*, *supra* note 90, at para 31. For a case where the court declined to intervene until the internal church remedies had been exhausted, see *Pederson v Fulton*, [1994] 111 DLR (4th) 367.
- 92 *Caldwell et al v Stuart et al*, [1984] 2 SCR 603 [*Caldwell v Stuart*].
- 93 *Ibid* at 625.
- 94 *Ibid* at 625–26.
- 95 *Human Rights Code*, RSBC 1996, c 210, s 41. At the time, this was s 22 of the BC legislation, but the language is the same.
- 96 *Caldwell v Stuart*, *supra* note 92 at 625–26.
- 97 *Ibid* at 625.
- 98 *Daly v Attorney General of Ontario*, [1999] 44 OR (3d) 349 at para 17.
- 99 *Ibid* at para 25.
- 100 *Ontario Human Rights Commission v Christian Horizons*, [2010] ONSC 2105 at para 90.
- 101 *Ibid* at para 105.
- 102 “Of Priests, Pupils, and Procedure: The Ministerial Exception as a Cause of Action for On-Campus Student Ministries” (2019) 33:2 Harv L Rev 599 at 599.

- 103 Corbin, *supra* note 56 at 953. Corbin argues that the ministerial exception is not required by US law, and she advocates an approach fairly close to prevailing Canadian law (at 958).
- 104 *McCaw v United Church of Canada (CA)*, [1991] 4 OR (3d) 481 at 488. For another successful wrongful dismissal claim against a church, see *Smith v Worldwide Church of God*, [1980] No 419 NSJ.
- 105 *Wall*, *supra* note 38 at para 25.
- 106 *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728 at paras 23–24.
- 107 See also *Ash v Methodist Church*, [1901] 31 SCR 497 at 498.
- 108 MH Ogilvie, “Three Recent Cases Confirm Canadian Approach to Church Property Disputes” (2015) 93:2 Can B Rev 537 at 537–38.
- 109 *Ibid.*
- 110 *Ibid* at 538.
- 111 *Perron v School Trustees of the Municipality of Rouyn and Attorney-General of Quebec*, [1955] 1 DLR (2d) 414.
- 112 *Hall*, *supra* note 73 at para 31.
- 113 *Ibid.*
- 114 *Owens v Saskatchewan (Human Rights Commission)*, 2006 SKCA 41 at para 6 [*Owens v Saskatchewan*].
- 115 *The Saskatchewan Human Rights Code*, 2018, 7 c S-24.2.
- 116 *Owens v Saskatchewan*, *supra* note 114 at para 79.
- 117 *Ibid* at para 82 [original emphasis].
- 118 *Canada Not-for-Profit Corporations Act*, SC 2009, c 23, s 224(2).
- 119 *Anselem*, *supra* note 75.

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