S.C.C. File No. 39094

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ETHIOPIAN ORTHODOX TEWAHEDO CHURCH OF CANADA ST. MARY CATHEDRAL, MESSALE ENGEDA, ABUNE DIMETROS AND HIWOT BEKELE

Appellants

\- and -

TESHOME AGA, YOSEPH BEYENE, DEREJE GOSHU, TSEDUKE GEZAW AND BELAY HEBEST

Respondents

\- and -

CANADIAN MUSLIM LAWYERS ASSOCIATION, ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION, EVANGELICAL FELLOWSHIP OF CANADA AND CATHOLIC CIVIL RIGHTS LEAGUE, WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA, BRITISH COLUMBIA HUMANIST ASSOCIATION, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, CHRISTIAN LEGAL FELLOWSHIP, NATIONAL COUNCIL OF CANADIAN MUSLIMS, EGALE CANADA HUMAN RIGHTS TRUST AND CANADIAN CENTRE FOR CHRISTIAN CHARITIES

Interveners

FACTUM OF THE INTERVENER, EGALE CANADA HUMAN RIGHTS TRUST

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I — OVERVIEW

1. For many LGBTQI2S[1] people, faith is fundamental.[2] This is one reason why disputes between religious associations and LGBTQI2S people can be so anguishing; for LGBTQI2S people of faith, their intersecting identities are caught in the crossfire.[3] When such disputes arise — and particularly when they place religious freedom and equality rights in tension[4] — the judicial role is essential; the court's task is to reconcile the different constitutionally protected interests without establishing a hierarchy among them.[5]

2. Neither religious associations nor LGBTQI2S people of faith should be left to do this work on their own, without recourse to judicial adjudication. When purportedly religious decisions impermissibly affect the legal rights and interests of LGBTQI2S people, those individuals should be able to access justice in the courts. Whether they can do so, despite a dispute's religious character or implications, depends on the doctrines of justiciability and remedial authority that are at issue in this appeal. Fortunately, Canadian courts have consistently declined to allow the invocation of religion to circumscribe the judicial role except in the clearest, and therefore rarest, of cases. The courts' constitutional function is not curtailed merely because a dispute has a nexus with religion, or because the relief sought would have religious implications. Egale Canada Human Rights Trust ("**Egale**") intervenes to ensure that this remains the law in Canada.

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[1] Egale uses the term "LGBTQI2S" as including all sexual orientations and gender identities other than straight and cisgender, including but not limited to lesbian, gay, bisexual, trans, two spirit, genderqueer, gender non-conforming, intersex, and queer.

[2] **Cf.:** *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423, ¶¶176-180, quoting *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [***TWU v. BCCT***], ¶25.

[3] **See:** Heather Shipley, "Sites of Resistance: LGBTQI+ Experiences at Trinity Western University" (2020), 35 *Can. J. L. & Soc.* 111 (Book of Authorities of Egale Canada Human Rights Trust [**BOA**], Tab 1). **See also:** *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [***LSBC v. TWU***], ¶¶96-98.

[4] **See:** R. Wintemute, "Religion vs. Sexual Orientation: A Clash of Human Rights?" (2002), 1 *J.L. & Equal.* 125 (BOA, Tab 2); J. McGill, "'Now It's My Rights Versus Yours': Equality in Tension with Religious Freedoms" (2016), 53 *Alta. L. Rev.* 583.

[5] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at 877. **See also:** F. Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing *Charter* Rights" (2003), 20 *S.C.L.R.* 137, at 139-40; McGill, *supra* note 4, at 589-91.

3. This appeal does not involve discrimination against an LGBTQI2S person. Still, the Appellants ask this Court to depart from settled doctrine on justiciability and remedial authority in at least two ways that could seriously compromise the ability of LGBTQI2S people to challenge purportedly religious decisions that affect them. In particular, the Appellants urge this Court to rule that religious freedom: (i) shields religious membership decisions from judicial scrutiny even when such decisions engage legal rights;[6] and (ii) prevents courts from granting remedies that affect religious freedom.[7] This Court should decline each of these invitations to change the law.

4. Religious freedom "is an essential part of life in Canadian society".[8] It does not, however, entail freedom from judicial scrutiny. While matters that are "strictly spiritual or narrowly doctrinal in nature"[9] are not justiciable, the purportedly religious character of an impugned decision does not necessarily place it beyond the courts' reach, provided the decision engages legal rights.[10] Maintaining this well-established principle is essential to ensuring that equality-seeking Canadians, including LGBTQI2S people, can seek judicial recourse against purportedly religious decisions that affect their legal rights.

5. Courts have broad authority to grant appropriate legal remedies (as opposed to "purely ecclesiastical"[11] ones), even if those remedies have significant religious implications.[12] Canadian courts (including this Court) have not accepted that religious freedom limits the scope of legal remedies available to a successful claimant. If any such limit exists, then it must, as a matter of

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6 Appellants' Factum [**AF**], ¶¶71, 78.

7 AF, ¶¶76, 78-79.

8 *LSBC v. TWU* (S.C.C., 2018), *supra* note 3, ¶209, *per* Rowe J. **See also:** *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at 549.

9 *Bruker v. Marcovitz*, 2007 SCC 54 [***Bruker***], ¶42 (emphasis added), quoting M. H. Ogilvie, *Religious Institutions and the Law in Canada* (2nd ed. 2003) [**Ogilvie, *Religious Institutions***], at 217-18 (BOA, Tab 3).

10 **See:** *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586 [***Ukrainian Greek Orthodox Church***], at 591; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 [***Lakeside Colony***], at 174; *Bruker* (S.C.C., 2007), *supra* note 9, ¶¶41-47; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 [***Wall***], ¶31.

11 *Lakeside Colony* (S.C.C., 1992), *supra* note 10, at 174, quoting *Ukrainian Greek Orthodox Church* (S.C.C., 1940), *supra* note 10, at 591.

12 **See, e.g.:** *Lakeside Colony* (S.C.C., 1992), *supra* note 10, at 225; *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481 (C.A.) [***McCaw***], at 488-91 (BOA, Tab 4).

common law, reflect not only the values that underpin the religious freedom guarantee in section 2(*a*) of the *Charter*, but rather all of the values underpinning the *Charter*, including those that underpin the equality guarantee in section 15.[13] In exercising their remedial authority, courts should consider whether, on a particular record, a proposed remedy's deleterious effects on the values underpinning section 2(*a*) — including, in cases involving purportedly religious discrimination against LGBTQI2S people, the religious freedom interests of the LGBTQI2S people involved — outweigh the proposed remedy's salutary effects, including on *Charter* values such as equality, human dignity, and liberty.[14] The jurisprudence indicates that this will be so only exceptionally.

6. This is as it should be. For LGBTQI2S people who are harmed by purportedly religious decisions, seeking justice can entail a deeply personal and painful conflict between identity, faith, and community. A court's involvement may not be sufficient to resolve that conflict, but it may be necessary where an LGBTQI2S person's legal rights or interests are implicated. In deciding this appeal, this Court should ensure that judicial intervention, whenever it is necessary, is possible.

PART II — STATEMENT OF ARGUMENT

A. THE PURPORTEDLY RELIGIOUS CHARACTER OF A DECISION DOES NOT SHIELD IT FROM JUDICIAL SCRUTINY

7. Courts will not decide purely religious matters that do not engage legal rights. However, "[t]he fact that a dispute has a religious aspect does not by itself make it non-justiciable".[15] Canadian courts may engage with religious decisions if "some property or civil right is affected thereby".[16] As this Court confirmed in *Wall*, where a person can show "that [they have] suffered some detriment or prejudice to [their] legal rights" as a result of a religious decision, they may seek redress through private law.[17] Courts may resolve disputes that involve legal rights, even if

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13 *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [***Dolphin Delivery***], ¶39.

14 *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [***Hutterian Bretheren***], ¶88.

15 *Bruker* (S.C.C., 2007), *supra* note 10, ¶41. **See also:** *Shergill v. Khaira*, [2014] UKSC 33, ¶48.

16 *Ukrainian Greek Orthodox* (S.C.C., 1940), *supra* note 10, at 591; *Lakeside Colony* (S.C.C., 1992), *supra* note 10, at 174. **See also:** *Bruker* (S.C.C., 2007), *supra* note 10, ¶46, quoting *Re Morris and Morris* (1973), 42 D.L.R. (3d) 550 (Man. C.A.), at 559-60, *per* Freedman C.J.M. (dissenting); *Pankerichan v. Djokic*, 2014 ONCA 709 [***Pankerichan***], ¶54.

17 *Wall* (S.C.C., 2018), *supra* note 10, ¶31. **See also:** *ibid.*, ¶¶24, 29, 39.

doing so requires examining religious doctrine.[18]

8. The Appellants urge this Court to adopt Wakeling J.A.'s reasoning in *Wall* (before it reached this Court) that the values underlying section 2(*a*) of the *Charter* protect religious membership decisions from judicial scrutiny even where there is a contract governing such decisions.[19] This position runs counter to this Court's jurisprudence on justiciability. If accepted, it could seriously compromise the rights and interests of LGBTQI2S people, particularly those who seek to challenge discriminatory decisions purportedly justified by religion.

9. The justiciability inquiry requires the court to consider, based on all the circumstances, "whether it has the institutional capacity and legitimacy to adjudicate the matter".[20] Matters that are "purely ecclesiastical", "strictly spiritual", or "narrowly doctrinal" are non-justiciable.[21] Courts will not act as "arbiter[s] of religious dogma", "endorse or apply a religious norm", "consider the merits of a religious tenet", or question "the merits of the decision to expel" a person from a religious community.[22]

10. Yet, this Court has appropriately not refrained from adjudicating matters that, while "religious" in some respect, engaged legal rights and were found to be justiciable. It has done so even when deciding those cases required the Court to examine the beliefs, practices, and traditions of a religious community in some detail.[23] For example, in *Bruker v. Marcovitz*, this Court

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[18] *Pankerichan* (Ont. C.A., 2014), *supra* note 16, ¶¶57-64; A. J. Esau "The Judicial Resolution of Church Property Disputes: Canadian and American Models" (2003), 40 *Alta. L. Rev.* 767, at 814.

[19] AF, ¶71, citing *Wall v. Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255, ¶114, *per* Wakeling J.A. (dissenting), rev'd 2018 SCC 26. **See also:** AF, ¶78.

[20] *Wall* (S.C.C., 2018), *supra* note 10, ¶34, citing L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at 294 (BOA, Tab 5).

[21] *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733, ¶33 (emphasis added), cited in *Wall* (S.C.C., 2018), *supra* note 10, ¶36; *Bruker* (S.C.C., 2007), *supra* note 10, ¶42 (emphasis added), quoting Ogilvie, *Religious Institutions*, *supra* note 9, at 217-18 (BOA, Tab 3).

[22] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 [***Amselem***], ¶50; *Bruker* (S.C.C., 2007), *supra* note 10, ¶20; *Wall* (S.C.C., 2018), *supra* note 10, ¶37; *Lakeside Colony* (S.C.C., 1992), *supra* note 10, at 175.

[23] **See:** Richard Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008), 42 *S.C.L.R.* (2d) 37, at 44-45.

considered the enforceability of a contract requiring a party to remove a religious barrier to remarriage by providing a *get* (a Jewish religious divorce). While resolving this dispute required the Court to "take into account the particular religion [and] the particular religious right",[24] this did not render the dispute non-justiciable. Similarly, in *Lakeside Colony of Hutterian Brethren v. Hofer*, this Court considered whether a religious colony's decision to expel persons from its membership breached the requirements of procedural fairness. While resolving this dispute required the Court "to come to the best understanding possible of the applicable tradition and custom" of the colony,[25] this did not render the dispute non-justiciable.

11. Provincial appellate jurisprudence offers further examples. In *McCaw*, the Court of Appeal for Ontario considered whether a church's dismissal of a minister complied with the "law of the church". The Court of Appeal affirmed that "[t]he civil courts are properly reluctant to interfere with the internal affairs of a church, but they will do so to ensure that a member of a church is not treated unfairly. *A fortiori* they ought to interfere if a member of a church is treated unlawfully".[26] Similarly, in *Bentley*, the Court of Appeal for British Columbia considered a church property dispute arising out of a schism over the liturgical blessing of same-sex unions by clergy in a diocese. The Court of Appeal recognized that, while most church property disputes result from an "irreparable rift within a church about a fundamental doctrinal matter", this does not render such disputes non-justiciable. It affirmed that, "[w]hether Canadian courts wish to do so or not, they are obliged to deal with church property disputes, including their doctrinal aspects".[27]

12. As these examples illustrate, "freedom of religion, like any freedom, is not absolute"; it "is inherently limited by the rights and freedoms of others".[28] Thus, it does not allow a person to

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[24] *Bruker* (S.C.C., 2007), *supra* note 10, ¶18. **See also:** *ibid.*, ¶¶3-6.

[25] *Lakeside Colony* (S.C.C., 1992), *supra* note 10, at 191.

[26] *McCaw* (Ont. C.A., 1991), *supra* note 12, ¶¶11, 30 (BOA, Tab 4).

[27] *Bentley v. Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506 [***Bentley***], ¶55, leave to appeal refused, 2011 CanLII 35983 (S.C.C.), quoting M. H. Ogilvie, "Church Property Disputes: Some Organizing Principles" (1992), 42 *U.T.L.J.* 377, at 393 (BOA, Tab 6).

[28] *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at 182 [***P. (D.)***], *per* L'Heureux-Dubé J. **See also:** *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [***Big M***], at 337; *Young v. Young*, [1993] 4 S.C.R. 3 [***Young***], at 94, *per* L'Heureux-Dubé J. (dissenting, but not on this point); *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [***B. (R.)***], at 383 (*per* La Forest J.), 435 (*per* Iacobucci and Major JJ.); *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, ¶72; *TWU v. BCCT* (S.C.C., 2001), *supra* note 2, ¶29; *Amselem* (S.C.C.,

"injure his or her neighbours".[29] Where the exercise of religious freedom violates others' rights, courts can and should intervene, even if that intervention has significant religious implications.[30]

13. The Appellants' narrow and unprecedented approach to justiciability would upset these well-established principles. Such a jurisprudential development would disadvantage LGBTQI2S people, who are vulnerable to experiencing discrimination purportedly justified by religion.[31] LGBTQI2S people have legal rights against such discrimination under "quasi-constitutional" human rights legislation[32] and the *Charter*.[33] They also have legal rights against certain unfair treatment under common law principles of procedural fairness, which may apply to religious disciplinary proceedings, membership decisions, and other internal matters engaging a person's legal rights.[34]

14. Thus, the would-be Sunday school teacher who is not hired because they are gay, the pastor who is fired because they are trans, and the tailor who loses their job after being expelled from a religious colony without a hearing because they are bisexual have legal rights that are properly the

2004), *supra* note 22, ¶¶61, 63; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [***Multani***], ¶30.

[29] *Big M* (S.C.C., 1985), *supra* note 28, ¶123. **See also:** *Amselem* (S.C.C., 2004), *supra* note 22, ¶62; *Multani* (S.C.C., 2006), *supra* note 28, ¶26; *LSBC v. TWU* (S.C.C., 2018), *supra* note 3, ¶101.

[30] **See, e.g.:** *Big M* (S.C.C., 1985), *supra* note 28; *P. (D.)* (S.C.C., 1993), *supra* note 28; *Young* (S.C.C., 1993), *supra* note 28; *B. (R.)* (S.C.C., 1995), *supra* note 28. **See also:** *V.B. v. C.*, 2003 CanLII 2429 (Ont. S.C.) [***V.B.***], ¶133.

[31] **See:** Wintemute, *supra* note 4 (BOA, Tab 2); B. MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages" (2006), 69 *Sask. L. Rev.* 351 (BOA, Tab 7); L. P. Lafferty, "Religion, Sexual Orientation and the State: Can Public Officials Refuse to Perform Same-Sex Marriage?" (2007), 85 *Can. Bar Rev.* 287, at 296; E. S. Thompson, "Compromising Equality: An Analysis of the Religious Exemption in the *Employment Non-Discrimination Act* and Its Impact on LGBT Workers" (2015), 35 *Boston College J. L. & Soc. Just.* 285.

[32] *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, ¶31, quoting *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, ¶17. **See, e.g.:** *Heintz v. Christian Horizons*, 2008 HRTO 22, ¶¶158, 164, 189-204, var'd 2010 ONSC 2105 (Div. Ct.).

[33] **See, e.g.:** *Hall (Litigation Guardian of) v. Powers*, 2002 CanLII 49475 (Ont. S.C.) [***Hall***], ¶32.

[34] **See, e.g.:** *Lakeside Colony* (S.C.C., 1992), *supra* note 10; *McCaw* (Ont. C.A., 1991), *supra* note 12 (BOA, Tab 4); *Davis v. United Church of Canada*, 1992 CanLII 7731 (Ont. S.C.) [***Davis***]. **See also:** *Wall* (S.C.C., 2018), *supra* note 10, ¶24; *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 [***Sandhu***], ¶¶53-54, leave to appeal refused, 2015 CanLII 52181 (S.C.C.).

subject of judicial enforcement, even if those rights have been violated for purportedly religious reasons. Religious associations may, in certain limited circumstances, lawfully give preference to co-religionists,[35] but only to the extent that human rights legislation permits. Religious associations cannot, however, oust a court's jurisdiction merely by asserting that a decision is based on religious beliefs.

15. Yet, that is how the Appellants ask this Court to change the law in this appeal. If they succeed, the resulting gaps in legal protections could be large, as "religious institutions inevitably assert authority over all spheres of life and can produce theological arguments to support that authority".[36] If such assertions and arguments were conclusive of justiciability, the result would be lacunae in the law's reach, with unjust consequences for LGBTQI2S people in Canada. Indeed, "[i]f individuals in Canada were permitted to simply assert that their religious beliefs require them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and lesbians in Canada because everyone who wished to discriminate against them could make that assertion".[37] Such a result would permit the long and continuing history of wrongs against LGBTQI2S people[38] to occur behind the veil of religion.[39]

B. PROVIDED THE MATTER IS JUSTICIABLE, COURTS HAVE BROAD REMEDIAL AUTHORITY

16. Courts have broad authority to grant appropriate legal remedies — even if they have significant religious implications — in order to vindicate successful claimants' legal rights. As noted above, courts will not decide purely religious matters that do not engage legal rights because

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35 **See, e.g.:** *Human Rights Code*, R.S.O. 1990, c. H.19, s. 24(1)(a); *Charter of Human Rights and Freedoms*, CQLR c. C-12 [**Quebec *Charter***], s. 20; *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 41(1).

36 M. H. Ogilvie, "Are Members of the Clergy Without the Law? *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*" (2013-2014), 39 *Queen's L.J.* 441, at 451.

37 *Hall* (Ont. S.C., 2002), *supra* note 33, ¶31.

38 **See:** *Egan v. Canada*, [1995] 2 S.C.R. 513, ¶¶173-75; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, ¶84; *M. v. H.*, [1999] 2 S.C.R. 3, ¶64; *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, ¶65. **See also:** J. Fisher, "Outlaws or In-Laws: Successes and Challenges in the Struggle for LGBT Equality" (2004), 49 *McGill L.J.* 1183; S. Rotondo, "Employment Discrimination Against LGBT Persons" (2015), 16 *Georgetown J. of Gender and the Law* 103; Human Rights Watch, *"All We Want Is Equality": Religious Exemptions and Discrimination Against LGBT People in the United States* (2018).

39 **See:** M. H. Ogilvie, "Case Comment: *Lakeside Colony of Hutterian Brethren v. Hofer*" (1993), 72 *Can. Bar Rev.* 238, at 249 (BOA, Tab 8).

such matters are not justiciable. As a corollary, courts will not grant remedies that are purely religious. Thus, courts will not grant a freestanding declaration on the correct interpretation of a religious text, on the validity of a religious belief, or on what it means to be a "good Christian".[40] But these restrictions of remedial authority are exceptional; as a rule, claimants who seek remedies for legal wrongs are not denied those remedies because they may have religious ramifications.

17. The Appellants ask this Court to depart from this principle, or at least to limit its reach. They submit that, "even if there is some underlying civil right at issue", section 2(*a*) of the *Charter* "prevents Canadian courts from issuing orders or declarations of a religious nature" such as "a [declaration] on who holds or does not hold status within a church".[41] They maintain that such remedies "would clearly intrude on … religious freedom", and therefore should not be available when, as here, a religious association asserts that a proposed order would involve "religious actions, and declarations on religious or ecclesiastical matters".[42]

18. This position, if accepted, could seriously compromise the rights and interests of LGBTQI2S people. It is, in any event, not supported by the case law, as this Court's jurisprudence illustrates. For example, in *Lakeside Colony*, this Court ordered that, because the religious colony in question had failed to observe the principles of procedural fairness in expelling the appellants from the colony, those expulsions must be set aside. This order had significant religious implications. It meant that the appellants "remained members of the colony throughout" and "maintained a right to remain on the colony",[43] thereby affecting the colony's internal affairs and even altering its membership. These significant religious implications did not, however, prevent this Court from ordering the remedy required to vindicate the successful claimants' legal rights.

19. Similarly, in *McCaw*, the Court of Appeal for Ontario concluded that a church's dismissal of a minister did not comply with the "law of the church" and granted: (i) a declaration that the church's removal of the minister's name from the church rolls was invalid; (ii) an order directing that the minister's name be restored to the rolls; and (iii) damages. The Court of Appeal noted that,

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40 *R. v. Jones*, [1986] 2 S.C.R. 284, at 295; *Amselem* (S.C.C., 2004), *supra* note 22, ¶¶43, 50-51; *Bruker* (S.C.C., 2007), *supra* note 10, ¶20.

41 AF, ¶¶78-79.

42 AF, ¶76.

43 *Lakeside Colony* (S.C.C., 1992), *supra* note 12, at 225.

in granting these remedies, it was "simply passing upon the legality of certain of [the church's] actions and putting [the minister] in the position with respect to Presbytery and Conference which he would have been in had it not been for their illegal actions".[44] While these remedies had significant religious implications, this did not prevent the Court of Appeal from ordering them.

20. These cases and others[45] confirm that courts have broad authority to grant legal remedies that have significant religious implications. While such remedies may be "of a religious nature", they are fundamentally legal because they are required to vindicate the successful claimant's legal rights. As such, they are properly within the scope of available judicial remedies.

21. The Appellants seek to support a different conclusion by relying on American jurisprudence.[46] Canadian courts must treat this law with caution; section 2(*a*) of the *Charter* and the First Amendment to the U.S. Constitution use different language, have different histories, and have received different interpretations.[47]

22. In Canada, courts have not circumscribed their remedial authority on the basis of religious freedom concerns, as the cases canvassed above indicate. That said, the common law of remedies must be developed in a manner consistent with all of the values enshrined in the Constitution, not just those underpinning the religious freedom guarantee in section 2(*a*) of the *Charter*.[48] Courts

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[44] *McCaw* (Ont. C.A., 1991), *supra* note 12, at 488-91 (BOA, Tab 4).

[45] **See, e.g.:** *Hofer v. Hofer*, [1970] S.C.R. 958 (declaring that persons were no longer members of a religious colony); *Garcha v. Khalsa Diwan Society – New Westminster*, 2006 BCCA 140 (cancelling a religious society's membership enrolment, providing for a new enrolment process and enrolment list, and issuing directions about the membership of the society's committees); *Sandhu* (Alta. C.A., 2015), *supra* note 34 (amending a religious society's bylaws and restructuring its membership approval process); *Davis* (Ont. S.C., 1992), *supra* note 34 (restoring a reverend's pastoral responsibilities and privileges); *Etemad v. Hasanzadeh*, 2014 ONSC 6737, *Bakhshi v. Hosseinzadeh*, 2015 ONSC 7407, *A.M. v. M.S.*, 2017 BCSC 2061, *Kariminia v. Nasser*, 2018 BCSC 695 (ordering parties to apply for a religious divorce).

[46] AF, ¶¶77-79.

[47] *Big M* (S.C.C., 1985), *supra* note 28, at 339-41; *Young* (S.C.C., 1993), *supra* note 28, at 96, *per* L'Heureux-Dubé J. (dissenting, but not on this point); *Bentley* (B.C.C.A., 2010), *supra* note 27, ¶55.

[48] *Dolphin Delivery Ltd.* (S.C.C., 1986), *supra* note 13, ¶39.

should consider whether, on the evidence, the remedy's deleterious effects on the values underpinning section 2(*a*) outweigh its salutary effects, including on *Charter* values such as equality, human dignity, and liberty.[49] The jurisprudence indicates that this will rarely, if ever, be so — or, at least, that it has not been to date.

23. When a remedy is opposed on the basis of religious freedom concerns, the court should consider not only (i) the nature, importance, and sincerity[50] of the asserted religious belief or practice, and the nature and extent of the proposed remedy's impact on that belief or practice, but also (ii) the nature and importance of the legal rights violated, the nature and extent of the impact on the successful claimant's constitutionally protected interests, and the "public policy benefit of preventing individuals from avoiding the usual legal consequences of their [unlawful actions]".[51]

24. In developing the law in this area, this Court has carefully balanced the need to avoid unnecessary intrusions into religious freedom with the need to protect legal rights. Egale urges this Court to do so here by confirming that, notwithstanding the importance of religious freedom, it cannot be deployed to deny a legal right or an appropriate legal remedy. To hold otherwise would risk denying LGBTQI2S people the full protection of the law. This would be inconsistent not only with this Court's jurisprudence, but also with the values enshrined in the *Charter*.

PART III — SUBMISSIONS ON COSTS AND ORDER SOUGHT

25. Egale requests that no costs be awarded either for or against it, and takes no position with respect to the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of November, 2020.

Adam Goldenberg / Connor Bildfell

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[49] *Hutterian Bretheren* (S.C.C., 2009), *supra* note 14, ¶88. **See also:** *V.B.* (Ont. S.C., 2003), *supra* note 30, ¶¶139-140.

[50] Courts may assess sincerity by considering factors including: (i) credibility; (ii) whether the asserted belief is consistent with the individual's other current religious practices; and (iii) expert evidence on whether the asserted belief is consistent with the beliefs of other adherents of the particular faith: *Amselem* (S.C.C., 2004), *supra* note 22, ¶¶51-54.

[51] *Bruker* (S.C.C., 2007), *supra* note 10, ¶80.

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