

Are Members of the Clergy Without the Law? *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*

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When a church is faced with a claim of wrongful dismissal by a member of the clergy, or a claim of vicarious liability for a civil wrong committed by the clergy, to what extent (if any) should the church be exempt from the common law rules that apply to other employers? In Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston, the Ontario Court of Appeal, in staying a wrongful dismissal action by a clergy member, held that the matter was an ecclesiastical one because the plaintiff's position was established under canon law, and also held that the Church's internal dispute resolution process met the requirements of natural justice and that the plaintiff had not exhausted the process.

The Court of Appeal did not make clear, in the author's view, whether it was merely declining to intervene on the particular facts or was treating the Church as having a separate jurisdiction which overrode that of the courts. The latter, she argues, would be inconsistent with the fundamental Anglo-Canadian constitutional principle that there are no private spheres from which legislatures and courts are excluded. It would also be inconsistent with a line of English jurisprudence which treats the employment status of clergy as turning on the same factually oriented test of intention to create legal relations that is applied to any alleged employment relationship, rather than on any claim of a distinct ecclesiastical jurisdiction. The author concludes by proposing that civil claims by clergy members against their churches, and vicarious liability claims against churches, should be governed by several principles which would affirm the basic jurisdiction of the courts over all matters relating to religious institutions, with the courts deferring to the internal procedures of those institutions only where they would defer to the internal procedures of other private institutions.

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Introduction

~~I. *Fact*~~ Revisited

II. Discussion

A. Constitutional Jurisdiction

B. Office-Holders or Employees

(i) United Kingdom

(ii) Canada

C. Exhaustion of Recourse to Internal Tribunals

D. Charter Issues?

Conclusion

Introduction

Within the last decade, the highest courts in Canada,¹ the United Kingdom² and the United States³ considered similar cases on the wrongful dismissal of clergy from ecclesiastical appointments. These cases present a number of legal issues of which two are especially significant. First, do civil courts have jurisdiction over ecclesiastical disputes generally? And second, are members of the clergy in the kind of employment relationships with the church over which civil courts *ought* to exercise jurisdiction? Each of the three top courts has dealt with these questions differently. The Supreme Court of Canada declined leave to appeal without reasons, leaving both questions unanswered.⁴ The US Supreme Court has declined jurisdiction outright.⁵ The UK House of Lords and the UK Supreme Court have asserted jurisdiction and have held that there is a rebuttable presumption that clergy are employees.⁶

Broadly speaking, the American and British decisions can be explained in light of their respective constitutional systems. American courts have

1. See *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728, 344 DLR (4th) 332, leave to appeal to SCC refused, 36425 (May 17, 2012) [*Hart* ONCA].

2. See *Percy v Church of Scotland Board of National Mission*, [2005] UKHL 73 (Scot) [*Percy*]; *The President of the Methodist Conference v Preston*, [2013] UKSC 29 [*Preston* UKSC].

3. See *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*, 132 S Ct 694 (US 2012) [*Hosanna-Tabor*].

4. *Hart* ONCA, *supra* note 1.

5. *Hosanna-Tabor*, *supra* note 3 at 706–10.

6. The decision in *Percy* predated the transfer of the judicial authority of the House of Lords to the UK Supreme Court, which occurred on October 10, 2009.

largely understood their Constitution, especially the First Amendment,⁷ to mean that religious institutions operate within an autonomous sphere into which courts and legislatures should rarely venture.⁸ British courts operate within a system of parliamentary sovereignty, under which they have broad authority over all matters within their geopolitical reach. In Canada, notwithstanding the decline in religiosity in recent years,⁹ cases involving clergy (whether Christian or non-Christian) continue to come before the courts on a regular basis. But the Supreme Court of Canada has rarely granted leave to appeal, so its guidance is missing in these cases.¹⁰ The Supreme Court's decision to refuse leave to appeal in *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*¹¹ therefore represents a lost opportunity to provide such guidance, especially because impecunious clergy rarely have the financial ability to appeal to the Supreme Court.

Lest it be thought that clergy wrongful dismissal cases are of little public interest, it should be remembered that the question of whether clergy are employees arises not only in private employment disputes, but also in at least two areas of public interest. First, whether clergy are employees for the purposes of publicly funded programs such as employment insurance, public pension or income supplement plans. And, second, whether they are employees whose ecclesiastical superiors may be vicariously liable for their sexual torts, negligence or breaches of fiduciary obligation regarding children or vulnerable adults with whom they have contact.¹² Moreover, these cases raise important constitutional questions about the jurisdictional limits (if any) of the civil courts and the extent to which freedom of religion is engaged, whether on the part of individuals or religious institutions qua institutions.

7. US Const amend I.

8. See John Witte Jr & Joel A Nichols, *Religion and the American Constitutional Experiment*, 3d ed (Boulder, Colo: Westview Press, 2011).

9. See generally Statistics Canada, *National Household Survey, 2011* (Ottawa: Statistics Canada, 2013) online: Statistics Canada <<http://www.statcan.gc.ca>>.

10. For the last cases involving internal ecclesiastical disputes that have reached the SCC, see *Ukrainian Greek Orthodox Church of Canada v Ukrainian Greek Orthodox Cathedral of St Mary the Protectoress*, [1940] SCR 586, 3 DLR 670; *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165, 81 Man R (2d) 1 [*Lakeside*].

11. *Supra* note 1.

12. See *John Doe v Bennett*, 2004 SCC 17 at para 26, [2004] 1 SCR 436 [*Bennett*].

It is not the purpose of this comment to re-examine the voluminous case law on clergy dismissal,¹³ but instead, to use *Hart* as a starting point to set out the complex legal issues that clergy dismissal cases pose for the courts. The emphasis here is on clarifying those issues and briefly suggesting how future courts might resolve them.

The paper begins by providing an overview of *Hart* and identifying some of the important legal questions that remain unanswered in the decision. To answer these questions, the paper draws on precedents in Canadian and British law to determine whether the courts should have constitutional jurisdiction over the clergy and whether clergy should be classified as office-holders or employees. The paper then explores when domestic courts should become involved in civil disputes that include the clergy and briefly addresses the effect of the *Canadian Charter of Rights and Freedoms* on such disputes.¹⁴ The paper concludes by emphasizing the need for a refined, precise test to deal with clergy cases and proposes ten principles for doing so.

***L* ~~*at*~~ Revisited**

After being removed from his parish by his archbishop, Hart, a Roman Catholic priest, initiated proceedings for constructive dismissal. The archdiocese sought a stay under section 106 of the *Courts of Justice*

13. I have written about this elsewhere and will not repeat what I have previously written. See MH Ogilvie, *Religious Institutions and the Law in Canada*, 3d ed (Toronto: Irwin Law, 2010) at 300–23 [Ogilvie, *Religious Institutions*]. See also MH Ogilvie, “Ecclesiastical Law—Jurisdiction of Civil Courts—Status of Clergy: *McCaw v United Church of Canada*”, Case Comment on (1992) 71:3 Can Bar Rev 597 [Ogilvie, “Status of Clergy”]; MH Ogilvie, “Ecclesiastical Law—Jurisdiction of Civil Courts—Governing Documents of Religious Organizations—Natural Justice: *Lakeside Colony of Hutterian Brethren v Hofer*”, Case Comment on (1993) 72:2 Can Bar Rev 238; MH Ogilvie, “Ecclesiastical Law—Strict Separation of Church and State—Parliamentary Sovereignty: *Logan v Presbytery of Dunbarton*”, Case Comment on (1997) 76:3 Can Bar Rev 529 [Ogilvie, “Parliamentary Sovereignty”]; MH Ogilvie, “Christian Clergy and the Law of Employment: Office-Holders, Employees or Outlaws” (1999) 3:1 Journal of the Church Law Association 2 [Ogilvie, “Christian Clergy”]; MH Ogilvie, “Gender Discrimination Forbidden: From the Glens of Angus to a Church Near You” (2007) 86:2 Can Bar Rev 305 [Ogilvie, “Gender Discrimination”].

14. s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Act,¹⁵ which allows a court to stay proceedings on any terms it thinks just, or, alternatively, under rule 21.01(3)(a) of the *Rules of Civil Procedure* on the basis that the court had no jurisdiction over the dispute.¹⁶ The action was a motion to dismiss and, therefore, no trial occurred during which findings of fact could have been made.

Nevertheless, Beaudoin J, the motions judge of the Ontario Superior Court, adopted the facts alleged in affidavits for the archdiocese and stayed the proceedings on that basis.¹⁷ According to those affidavits, Hart was appointed to two churches in Prince Edward County in 2004. In 2004 and 2005, the Archbishop became concerned by Hart's use of parish funds regarding businesses of which he was a director and officer and ordered Hart to resign from these positions. In 2006, parish employees expressed concern about Hart's business dealings with another person. Again, the Archbishop ordered him to cease that involvement and forbade the other person from accessing church property. Despite several meetings with the Archbishop, Hart continued his business activities. The Archbishop considered this a breach of Hart's vow of obedience and ordered him to take a thirty-day retreat to consider his future as a priest. Hart then wrote to the Archbishop requesting another meeting to explain the situation but the Archbishop responded by placing him on administrative leave. Under the Code of Canon Law (CCL), this was an administrative act that Hart could challenge, but he did not do so.¹⁸

Several months later, Hart called a small meeting of parishioners to explain his business and personal dealings. The Archbishop held that this was unacceptable conduct. Hart again requested a meeting with the Archbishop to explain, who responded by asking Hart to undergo a psychological assessment. The assessor found that Hart was a "serious risk" and recommended a four-to-six month residential treatment before returning to parish work.¹⁹ Hart refused and, in 2007, the Archbishop

15. RSO 1990, c C-43.

16. RRO 1990, Reg 194, r 21.01(3)(a).

17. *Hart v Roman Catholic Episcopal Corp of the Diocese of Kingston*, 2010 ONSC 4709 at para 28, 323 DLR (4th) 212 [Hart ONSC], aff'd 2011 ONCA 728, 344 DLR (4th) 332, leave to appeal to SCC refused, 36425 (May 17, 2012).

18. There are various published editions of the CCL. See especially E Caparros, M Thériault & J Thorn, eds, *Code of Canon Law Annotated: Prepared Under the Responsibility of the Instituto Martin De Azpilcueta* (Montreal: Wilson & LaFleur, 1993), canons 1732–39.

19. *Hart* ONSC, *supra* note 17 at para 15.

suspended his faculty to exercise sacramental ministry. This was the second administrative act that Hart could have challenged under canon law. Instead, Hart retained legal counsel to pursue a civil legal remedy. The Archbishop then advised Hart that if he did not resign, he would be removed from his parish. In 2008, the Archbishop issued a decree removing Hart from his position. This was the third administrative act under canon law that Hart could have responded to, but did not. Instead, Hart commenced a civil action. At the time of the Diocese's motion to dismiss, Hart remained an ordained priest and had not been laicized, so the Church continued to have an obligation in canon law to provide him with financial support.

After noting that the courts have been reluctant to intervene in the internal matters of religious institutions unless property and civil rights or procedural irregularities were involved,²⁰ Beaudoin J held that Hart's dismissal was an ecclesiastical rather than a civil matter because the office of priest was created and governed by canon law.²¹ He found that civil courts would only intervene where the internal processes of a religious institution lacked natural justice and only after those processes had been exhausted.²² He concluded that there had been compliance with natural justice because Hart had been told of the Archbishop's concerns and had been given the opportunity to respond.²³

Some observations are called for. First, by concluding that Hart's dismissal was a purely ecclesiastical concern, Beaudoin J significantly expanded the types of cases that can be excluded from judicial oversight. If this were true, then previous cases involving employment by religious institutions (and non-religious institutions for that matter) ought not to have been considered by the courts because jobs are typically created and regulated by employers. But, in the common law system, the rule of law applies to all! The cases that Beaudoin J relied on merely expressed the reluctance of courts to become involved in purely doctrinal matters because they considered it inappropriate and beyond the competence

20. See *Levitts Kosher Foods Inc v Levin* (1999), 45 OR (3d) 147 at 155, 175 DLR (4th) 471 (Sup Ct), cited in *Hart* ONSC, *supra* note 17 at para 29. See also *Lakeside*, *supra* note 10; *Brewer v Incorporated Synod of the Diocese of Ottawa of the Anglican Church of Canada*, [1996] OJ No 634 (QL) at para 2 (Gen Div).

21. *Hart* ONSC, *supra* note 17 at para 31.

22. *Ibid* at para 38.

23. *Ibid* at paras 39–43.

of civil courts. Previous courts have never relinquished jurisdiction voluntarily and have asserted it to deal with a wide variety of disputes involving religious institutions, including employment disputes.

Second, Beaudoin J did not explain why a civil court should surrender jurisdiction to an ecclesiastical authority simply because that authority has its own internal rules.²⁴ Why should an alleged jurisdictional issue be resolved according to the CCL rather than the common law? Third, the principles of natural justice apply in the context of actual legal proceedings within a religious institution, and no such proceedings were ever held; rather, the Archbishop made a series of three administrative decisions to which Hart was alleged, though not proven, to have declined to respond. Fourth, even if the principles of natural justice do apply to administrative decisions, the motions judge failed to consider whether the Archbishop was an unbiased tribunal. Finally, in the Roman Catholic Church, internal processes are only exhausted by appeals to Rome, so Hart would likely have had to wait a very long time for a final decision!²⁵

Writing for a unanimous Court of Appeal, Laskin JA affirmed the stay of proceedings. On appeal, Hart had argued: (i) that the motions judge erred in making findings of fact on disputed issues in the context of a motion; (ii) that the motions judge erred in finding that he had no jurisdiction; and (iii) that the Archbishop treated Hart unfairly by refusing a hearing.²⁶ Justice Laskin dismissed the first argument on the ground that the findings of fact went to the issue of determining jurisdiction, and such findings are permitted provided that they do not resolve disputed and central questions of fact.²⁷ In this case, the findings related to the alleged exclusively ecclesiastical relationship between Hart and the Archbishop, the chronology of events, the canonical process, the presence of natural justice and the failure to exhaust internal process.

Hart's second argument—that the motions judge wrongly held that he had no jurisdiction—was also dismissed. Hart had argued that the civil courts have always exercised jurisdiction over employment and

24. *Ibid* at paras 44–45.

25. The Roman Catholic Church does not publish statistical data relating to appeals, but, notoriously, they can take years, even decades.

26. *Hart ONCA*, *supra* note 1 at para 6.

27. *Ibid* at paras 7–14 (the findings related to the alleged exclusively ecclesiastical relationship between Hart and the Archbishop, the chronology of events, the canonical process, the presence of natural justice and failure to exhaust internal processes).

contractual disputes and that his relationship with the Archbishop was multi-faceted because it involved both ecclesiastical aspects and property and civil rights.²⁸ Justice Laskin agreed that the courts have jurisdiction over employment matters with two exceptions: (i) where there is a collective agreement; and (ii) where the rules of a self-governing organization provide a dispute resolution process to which a member voluntarily consents by virtue of their membership.²⁹ Where the latter exception applies, the courts will only intervene if the internal process is unfair or lacks natural justice, or if the internal process has been exhausted.³⁰ In such cases, the court is restricted to deciding whether the rules have been followed and whether the requirements of natural justice have been met.³¹ Justice Laskin restated the motions judge's finding that the internal canonical process met the requirements of natural justice, notwithstanding the fact that no tribunal had been convened to hear the dispute.³² Justice Laskin then turned to the proper characterization of the dispute and agreed with the motions judge that it was an ecclesiastical matter because the position of priest is created by and provided for under canon law.³³

Finally, in response to Hart's third argument, Laskin JA found that the internal process was fair. Hart had argued that the Archbishop's denial of his request for a meeting meant that he had been treated unfairly and that he had exhausted his internal remedies. However, Laskin JA held that the canonical right to respond constituted a fair process of which Hart had failed to take advantage.³⁴ The Supreme Court of Canada refused leave to appeal.

In light of the Court of Appeal's affirmation of the motions judge's decision, the observations made above are equally apposite here. We cannot know what the outcome would have been had the case gone to trial, so speculation in that regard is futile. Nevertheless, *Hart* presents the paradigm fact situation in ecclesiastical employment disputes, raising a number of important legal issues:

28. *Ibid* at para 15.

29. *Ibid* at paras 17–18.

30. *Ibid* at para 19.

31. *Ibid*.

32. *Ibid* at para 21.

33. *Ibid* at paras 23–24.

34. *Ibid* at paras 25–28.

1. Does a civil court have jurisdiction over disputes within a religious institution or do these occur within an autonomous religious sphere outside the Canadian legal system?
2. If a civil court has jurisdiction, should it voluntarily abdicate that jurisdiction to a superior claim by a religious institution, and if so, when?
3. May a civil court treat a position created by a religious institution as concurrently being a civil position having most, if not all, of the characteristics of a civil position, and exercise jurisdiction over it as well?
4. Are members of the clergy “employees” whose claims for wrongful or constructive dismissal are subject to the civil courts or are they “office-holders” whose status places them outside the jurisdiction of those courts?
5. If a civil court has jurisdiction, when should it intervene?
6. If the final stage of the internal process of a religious institution is located outside of Canada, should a civil court intervene only after the exhaustion of the entire process or should it intervene after a decision has been made at the highest stage within Canada?
7. What role does section 2(a) of the *Canadian Charter of Rights and Freedoms*,³⁵ which protects freedom of conscience and religion, play when a religious institution asserts that its group or collective right to determine a dispute with one of its members is an exercise of freedom of religion?³⁶

As stated at the outset, the purpose of this comment is to unpack the fact situation in *Hart* to show how complex it actually is and how it raises fundamental questions about how the common law should deal

35. *Supra* note 14, s 2(a).

36. The Court of Appeal in *Hart* did not expressly resolve this issue but it was implicit in the position of the Diocese that the case fell to be resolved under canon law alone.

with the claim of religious institutions that they inhabit a jurisdiction parallel to the common law. Judicial handwashing, as occurred in *Hart*, gives credence to those claims and can create pockets of injustice within Canadian society when religious authorities act unfairly.

II. Discussion

A. Constitutional Jurisdiction

The first three questions set out above go to the theoretical foundation of the Anglo-Canadian constitution—the principle of parliamentary sovereignty. To ask these questions is therefore to answer them: of course. There are no autonomous spheres from which legislatures or courts are excluded. If there are exceptional situations where the courts hesitate to act, those spheres exist at the discretion of the courts, and that discretion can be reversed at any time. That the courts in *Hart* would decline to assert jurisdiction because a religious institution has done so is, in a word, astonishing. Since the English Reformation in the early sixteenth century, Parliament has asserted authority over religion and religious actors. It did this first by abolishing the authority of the Roman Catholic Church in England through legislation, and then, in subsequent centuries, religious toleration provided full property and civil rights to all religious institutions and individuals.

Today in Canada, at a time when religious pluralism is increasing rapidly,³⁷ it is important for the courts to assert jurisdiction under the Constitution and then to consider whether they wish to exercise that jurisdiction on the facts of a particular case or to permit, on a case-by-case basis, religious institutions to operate within an autonomous sphere parallel to that of the civil courts—a sphere within which religious law such as Roman Catholic canon law or Islamic sharia law would operate. The decision to relinquish jurisdiction entirely, however, should only be made by the legislature because such a decision would represent an abandonment of sovereignty as long understood in the common law.

Historically, Canadian courts have been reluctant to consider issues regarding religious institutions and have displayed considerable modesty

37. See Statistics Canada, *supra* note 9.

as to the appropriateness of the adjudication of religious matters by secular courts. As noted in *Hart*, past courts have stated that they will not consider doctrinal or spiritual matters absent issues of property and civil rights.³⁸ But drawing the line between the two is difficult, particularly because religious institutions inevitably assert authority over all spheres of life and can produce theological arguments to support that authority.

Without relinquishing jurisdiction, civil courts have restricted themselves to acting in disputes involving religious institutions that arise in these six contexts: (i) where religious tribunals do not follow their own substantive and procedural rules; (ii) where those tribunals do not comply with the rules of natural justice; (iii) where religious tribunals act *ultra vires*, with malice, in bad faith, with bias or on some other improper basis; (iv) where the dispute occurs within a religious institution which is incorporate, and therefore clearly subject to civil jurisdiction; (v) where the dispute concerns property or civil rights; or (vi) in some unique cases, for example, to enforce a punishment determined by an ecclesiastical tribunal.³⁹

However, until *Hart*, no Canadian appellate court had relinquished jurisdiction simply because a religious institution had asserted it first. That case creates a troubling precedent because it is unclear whether the Court was exercising its discretion to decline to intervene in the particular circumstances or was acceding to a superior jurisdictional claim by the Roman Catholic Church. The former explanation is coherent with the common law, but the latter is a novelty of considerable constitutional significance and requires either judicial recantation or explanation.

38. *Hart* ONSC, *supra* note 17 at paras 29–34. Almost all cases begin with this disclaimer. For a particularly clear statement, see *Balkou v Gouleff* (1989), 68 OR (2d) 574 at 576, 15 ACWS (3d) 205 (CA). For two post-*Hart* cases that expressed the traditional reluctance to become involved in ecclesiastical matters absent issues of property and civil rights, see *Ivantchenko v The Sisters of Saint Kosmas Aitolos Greek Orthodox Monastery*, 2011 ONSC 6481 at para 5, 211 ACWS (3d) 88; *Diaferia v Elliott*, 2013 ONSC 1363 at para 29, 227 ACWS (3d) 1149.

39. See e.g. *Bishop of Columbia v Cridge* (1874), 1 BCR (Pt 1) 5 (available on QL) (SC) (this unique case may have been based on a mistaken view that the Church of England was an established church in colonial British Columbia).

B. Office-Holders or Employees

The third and fourth of the above questions—whether clergy should be treated as secular employees even though they may also be also ecclesiastical office-holders—raise the issue of whether the fact that a clergy position was created by a religious institution completely excludes it from the jurisdiction of civil courts over disputes involving that position. Once common law jurisdiction has been asserted, the question resolves to how the courts will exercise it: will they leave the dispute to the internal processes of the religious institution or will they resolve it themselves? The case law demonstrates both approaches and shows that there has been considerable controversy as to which one is correct, because the issue engages the question of the jurisdiction of the courts over religious institutions. A brief survey of these cases is salutary.⁴⁰ I will begin with cases about alleged wrongful dismissal per se and then consider the cases involving vicarious liability for the alleged tortious actions of clergy. British and Canadian cases will be reviewed separately.

(i) United Kingdom

The earliest cases, which date back to 1912, were concerned with whether Church of England curates and probationer Methodist ministers were employed under contracts of service for the purposes of employment insurance. In *Re Employment of Ministers of the United Methodist Church*, Joyce J stated that ministers were not employees, but gave no reasons for this decision.⁴¹ In *Re National Insurance Act, 1911: In Re Employment of Church of England Curates*, Parker J found that curates were ecclesiastical office-holders and not employees pursuant to a contract.⁴² He equated the position of curate to that of a beneficed clergyman in the Church of England because a curate was subject to a vow of obedience to his bishop in respect of appointment, dismissal and fulfilment of duties. In another early case, *Scottish Insurance Commissioners v Church of Scotland*, the Court of Session came to the same conclusion about assistants to ministers, student

40. For more extensive analysis, see Ogilvie, *Religious Institutions*, *supra* note 13; Ogilvie, "Status of Clergy", *supra* note 13 at 612–15; Ogilvie, "Christian Clergy", *supra* note 13.

41. (1912), 28 TLR 539 (Ch Eng).

42. [1912] 2 Ch 563 (Eng). See also *Coker v Diocese of Southwark* (1997), [1998] ICR 140 (CA Eng).

ministers and lay missionaries of both the established Church of Scotland and the voluntary United Free Church of Scotland.⁴³ An assistant minister was said to hold an ecclesiastical office and performed duties subject to the laws of the Church rather than the control and direction of an employer.⁴⁴ It was held that an assistant minister's authority was derived from being licenced to perform his duties and not from any contract with a minister.⁴⁵

In concluding that the clergy in those three cases were ineligible to participate in employment insurance because they were not employed pursuant to contracts of employment within the meaning of the relevant legislation, all three courts held that their position as office-holders was derived solely from their ecclesiastical status. Although the courts heard the disputes, they looked to each church's understanding with respect to its own clergy. Similarly, in another early case, *Rogers v Booth*, the English Court of Appeal found that a Salvation Army officer could not receive workers' compensation because the Army's regulations expressly defined his position as spiritual, not contractual.⁴⁶ Because these early cases dealt with whether clergy qualified as employees for the receipt of a public benefit, their respective churches were scarcely involved in the litigation at all. This is in contrast to later cases involving alleged wrongful dismissal or vicarious liability on the part of the particular church itself.

The distinction between an office-holder and an employee has historically been nebulous. Examples of office-holders have included police officers, judges and holders of various state appointments. In *The President of the Methodist Conference v Preston*, Lord Sumption defined an office-holder as "a position of a public nature, filled by successive incumbents, whose duties were defined not by agreement but by law or by the rules of the institution".⁴⁷ Early courts automatically assumed that members of the clergy were office-holders, especially clergy of established churches such as the Church of England or the Church of Scotland.⁴⁸ They stretched this courtesy to non-established churches as well.

43. [1914] SC 16 (CSIH Scot).

44. *Ibid* at para 23.

45. *Ibid*.

46. [1937] 2 All ER 751 (CA).

47. *Preston* UKSC, *supra* note 2 at para 4.

48. MH Ogilvie, "What Is a Church by Law Established?" (1990) 28:1 Osgoode Hall LJ 179 at 195-217.

In Canada, where there is no established church, it is much more difficult to think of the clergy of any church, Christian or otherwise, as public office-holders. The recent privatization of religion and the trend toward viewing religious institutions as voluntary organizations further undercuts the conceptualization of clergy as office-holders rather than employees. Thus, it becomes fair to ask whether clergy are both holders of a spiritual office and employees engaged to exercise that office pursuant to contract. Yet, the modern English cases continue to view clergy as office-holders rather than employees. The courts continue to look to the constitutional documents of religious institutions to properly characterize clergy and, typically, those constitutions either fail to characterize clergy as employees or ambiguously hint that they are office-holders.

In the mid-1980s, in *President of the Methodist Conference v Parfitt*⁴⁹ and *Davies v Presbyterian Church of Wales*,⁵⁰ the English Court of Appeal and the House of Lords respectively decided that a dismissed minister was not an employee and could not bring a claim of unfair dismissal to a tribunal established by legislation to adjudicate such claims by employees. In *Parfitt*, the Court of Appeal looked to the Church's constitution, which defined the position as spiritual with a stipend for necessities only, and concluded that there was no intention to create legal relations.⁵¹ The Court took the view that the presence of characteristics common to modern employment contracts, such as provisions for pensions and benefits, was not determinative in light of the terms of the Church's constitution,⁵² and expressly condemned the position that a minister would exploit a divine call to ministry to bargain for an employment package.⁵³ In *obiter dicta*, however, the Court suggested that it would be possible to draw up a contract of employment for clergy.⁵⁴ In *Davies*, the House of Lords confirmed this approach of looking to the Church's constitution, adding that a civil court should ensure that the dismissal of clergy follows its internal procedural rules. Both *Davies* and *Parfitt* emphasized the spiritual nature of the minister's position and treated the respective constitutions as the rules within which that calling ought to be exercised. Both courts

49. [1983] 3 All ER 747 (CA) [*Parfitt*].

50. [1986] 1 All ER 705 HL [*Davies*].

51. *Supra* note 49 at 754–55, May LJ.

52. *Ibid* at 753, Dillon LJ.

53. *Ibid* at 750–52.

54. *Ibid* at 752.

declined either to characterize those rules as a contract of employment or to find intention to create contractual relations.⁵⁵

This presumption against contract and in favour of status was challenged in *Percy v Church of Scotland Board of National Mission*, in which an associate minister was accused of having an adulterous relationship with a married male elder and was persuaded to resign.⁵⁶ Regretting that decision, she then commenced an action for unfair dismissal under the *Sex Discrimination Act 1975*,⁵⁷ on the ground that the Church had not taken similar action against male ministers equally compromised. In a four-to-one decision, the law lords concluded that the associate minister was an employee for the purposes of the Act. In the leading speech for the majority, Lord Nicholls cast doubt on the utility of the term “office-holder” for characterizing contemporary relationships between clergy and religious institutions; not only was the word “office” ambiguous, but an office-holder could also be an employee in some circumstances.⁵⁸ He further stated that a contract of employment could exist concurrently with office-holding provided that there was an intention to contract, as evidenced by offer and acceptance of a position with provisions for duties, remuneration, expenses and accommodation.⁵⁹ Lord Nicholls found that Percy had entered into a contract of employment and that her claim should proceed before an employment tribunal.⁶⁰

55. Although not invoked by these courts, the analogy of *Balfour v Balfour* in relation to spousal relationships comes to mind. See [1919] 2 KB 571 (CA Eng).

56. *Supra* note 2. For comments, see Frank Cranmer & Scot Peterson, “Employment, Sex Discrimination and the Churches: The Percy Case” (2006) 8:39 Ecclesiastical Law Journal 392; Ogilvie, “Gender Discrimination”, *supra* note 13.

57. (UK), c 65, s 82(1). For Percy’s arguments, see *Percy*, *supra* note 2 at para 1.

58. *Ibid* at paras 14–22.

59. *Ibid* at paras 23–28. This point was conceded in *obiter dicta* in both *Parfitt*, *supra* note 49 at 752 and *Davies*, *supra* note 50.

60. *Percy*, *supra* note 2 at paras 29–36. A second issue in the case was the assertion of spiritual jurisdiction by the Church of Scotland pursuant Article IV of the Articles Declaratory under the *Church of Scotland Act, 1921* (UK), 11 & 12 Geo V, c 29, s 3. This issue had to do with the establishment in Scotland and was not germane to the first issue of whether Percy was an employee. Interestingly, the law lords found that once there was a civil contract of employment, claims of spiritual jurisdiction ceased to be relevant. Since there is no Canadian equivalent and no established church in Canada, the matter is largely irrelevant, although it underlines the position that in the absence of a legally established church with a parallel jurisdiction, there can be even less support for the claims of the

Lord Hope and Baroness Hale delivered extensive concurring speeches emphasizing the existence of an intention to create legal relations on the facts. Baroness Hale further stated that (in contrast to the approach taken in earlier cases) there should be no presumption against finding contracts of employment for professionals who also adhere to higher principles and values than those determined by their employers. In her view, it was difficult to discern any difference in principle between the duties of ministers employed to minister to spiritual needs, the duties of doctors employed to minister to bodily needs, and the duties of judges appointed to administer the law.⁶¹ In dissent, Lord Hoffmann agreed that the relationship was made with the intention to create legal relations, not through a contract of employment, but through an office with well-defined duties within the church. As an office-holder, Percy could not sue for unfair dismissal pursuant to the *Sex Discrimination Act 1975*, which was restricted to those who were employed under an employment contract.⁶²

While the House of Lords did not expressly overrule *Parfitt* and *Davies* or the approach in the earlier cases, in the words of Maurice Kay LJ, Percy “caused the tectonic plates to move”.⁶³ It replaced a presumption that a member of the clergy was an office-holder with the presumption that there can be an intention to create contractual relations between members of the clergy and their religious institutions. This change in presumptions required courts to look more specifically for evidence of an intention to create contractual relations. Two subsequent courts found clergy to be employees by virtue of finding such an intention as well as the usual indicia of employment—for example, written contractual duties, provisions on salary, payment of various state deductions, and report and control requirements.⁶⁴

archdiocese in *Hart*. See generally Ogilvie, “Gender Discrimination”, *supra* note 13 at 317; Ogilvie, “Parliamentary Sovereignty”, *supra* note 13.

61. *Percy*, *supra* note 2 at para 151.

62. *Ibid* at paras 61–68.

63. *The President of the Methodist Conference v Preston*, [2011] EWCA Civ 1581 at para 25.

64. *The New Testament Church of God v Rev Stewart*, [2007] EWCA Civ 1004; *Singh v Bristol Sikh Temple*, [2012] UKEAT/0429/11/ZT. *Singh* may be contrasted with two earlier decisions involving non-Christian religions in which courts found no employment contract: *Santokh Singh v Guru Narak Gurduara*, [1990] ICR 309 CA (Eng) and *Birmingham Mosque Trust v Alavi*, [1992] ICR 435 EAT (Eng). Compare *Macdonald v Free Presbyterian*

The UK Supreme Court recently revisited the question of the existence of a contract of employment in *Preston*, in which a Methodist superintendent minister resigned and brought an action for constructive dismissal. The English Court of Appeal found that there was a contract of employment but the Supreme Court reversed that finding in a four-to-one ruling. In the leading judgment for the majority, Lord Sumption devoted considerable attention to the Church's constitution, Deed of Union, and various standing orders, which contained considerable detail about the duties, maintenance and dismissal of ministers, and characterized the position as a spiritual one. Although the language of offer and acceptance was used in the exchange of letters confirming Preston's appointment, Lord Sumption emphasized that this exchange occurred within the context of the Deed of the Union, which was considered in *Parfitt*. In his view, that constitution characterized the minister's relationship with the Church as a vocation.⁶⁵ He further stated that *Percy* stood for the proposition that the spiritual character of the ministry does not result in a presumption against contractual intention, but neither is that spiritual character irrelevant. Rather, it is a significant part of the background and should be considered along with the overt terms of the arrangement when deciding whether a contract was made. According to Lord Sumption, "The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister."⁶⁶ In short, the question of whether there was a contractual relationship depends on whether an intention to create contractual relations was evident in all the circumstances at the time of formation. The situation does not differ from ordinary contractual formation. On the facts, Lord Sumption found that there was no contractual intention in relation to the specific position of superintendent. Rather, service for Methodist ministers was a lifelong commitment with no right to resign, with a stipend offered for maintenance and support⁶⁷—a stipend which

Church of Scotland, [2010] UKEAT/0034/19/1002 (no intention to contract found). See also Frank Cranmer, "Clergy Employment, Judicial Review and the Free Presbyterian Church of Scotland" (2010) 12:3 Ecclesiastical Law Journal 355.

65. *Preston* UKSC, *supra* note 2 at para 20.

66. *Ibid* at para 26.

67. *Ibid*.

Lord Sumption tentatively saw as being “enforceable as part of the trusts of the Church’s property”.⁶⁸

In his concurring judgment, Lord Hope, who had been part of the majority in *Percy*, agreed with Lord Sumption’s interpretation of *Percy* but distinguished *Preston* on the ground that there was no express contract and no contract could be implied because of the way the Church set out its relationship with its clergy in its constitution.⁶⁹ However, Baroness Hale, who had also been part of the majority in *Percy*, dissented. While acknowledging the spiritual nature of a minister’s duties, the nature of the position as an office and the conceptualization of ministry set out in great detail in the Church’s constitution, Baroness Hale found an intention to create legal relations in respect to the particular position that Preston held, giving her the status of an employee for the purposes of wrongful dismissal.⁷⁰ While ministers are required to go where they are sent, Baroness Hale said that, practically, there is negotiation for a specific position that carries with it a particular time for appointment, a stipend, a manse and a set of duties.⁷¹

In the context of clergy suing for wrongful dismissal, the position of the English appeal courts is now that the relationship between clergy and church is one of contract where an intention to create contractual relations is found. It is no longer a barrier that members of the clergy are office-holders, nor is it a problem that the calling and duties can be characterized as spiritual in nature. A particular church’s constitution and characterization of ministry in that document is only one factor to be considered. Where there is intention, there is a contract of employment. Such constitutional provisions alone are insufficient to exclude from the jurisdiction of the common law courts a contract that is otherwise within their realm.

The UK Supreme Court has reached a similar conclusion regarding vicarious liability: members of the clergy are employees for whom their ecclesiastical superiors are liable in relation to sexual torts. While the vicarious liability of ecclesiastical superiors in tort and fiduciary obligation is now well established on the basis of a close connection

68. *Ibid* at para 28.

69. *Ibid* at paras 30–34.

70. *Ibid* at paras 47–50.

71. *Ibid* at para 49.

between the wrongful conduct and the offender's employment,⁷² prior to these cases the questions of whether the offender was an employee and whether his conduct fell within the scope of employment remained unanswered. This meant that an ecclesiastical superior could argue that the priest was not an employee for whom the superior was liable. But, in three recent English appellate cases,⁷³ including the most recent of which was heard in the UK Supreme Court,⁷⁴ it was held that for the purpose of vicarious liability, priests were either employees or in situations akin to employment. In contrast to the earlier cases involving various other Christian denominations, these vicarious liability cases involved only the Roman Catholic Church.

In the first of those three cases—*Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church*—the archdiocese did not concede that priests should generally be treated as employees but did concede that the plaintiff priest should be treated as an employee for the purposes of this case.⁷⁵ The archdiocese argued, however, that because sexual abuse was not part of the role of a priest, the archdiocese should not be vicariously liable. The English Court of Appeal unanimously found that since youth work was part of the priest's duties of evangelization, there was a sufficiently close connection between his employment and his conduct to make the archdiocese vicariously liable. The other two cases—*JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*⁷⁶ and *The Catholic Child Welfare Society v Various Claimants*⁷⁷—examined in more detail the relationship of priest to bishop and priest to religious order respectively and concluded that it was akin to employment but was not employment per se.

72. See *Bazley v Curry*, [1999] 2 SCR 534, 174 DLR (4th) 45; *Jacobi v Griffiths*, [1999] 2 SCR 570, 174 DLR (4th) 71; *Lister v Hesley Hall Ltd*, [2001] UKHL 22; *Bernard v Attorney General of Jamaica*, [2004] UKPC 47.

73. *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church*, [2010] EWCA Civ 256 [*Maga*]; *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*, [2012] EWCA Civ 938 [*JGE*]; *The Catholic Child Welfare Society v Various Claimants*, [2012] UKSC 56 [*Welfare Society*].

74. *Ibid.*

75. *Supra* note 73 at para 36.

76. *Supra* note 73.

77. *Supra* note 73.

JGE was decided between *Percy* and *Preston*. In *JGE*, Ward LJ held that the appropriate approach after *Percy* was to consider each case on its facts, including the particular understanding of the church, and without a general presumption about the intention to create legal relations. Lord Justice Ward concluded that because there was no intention to create a contract and that the relationship between priest and bishop, in this case, was governed by canon law. According to Ward LJ, a priest is appointed to an ecclesiastical office and is not an employee of the bishop.⁷⁸ Nonetheless, he concluded that the relationship was akin to employment because a number of the characteristics of an employment relationship were present,⁷⁹ including: *control*, whereby the priest is appointed and dismissed by his bishop and is subject to light supervision in carrying out various, well-established priestly duties; *organization*, insofar as a priest is expected to perform and effect the fundamental objectives of his church; *integration*, insofar as a priest is wholly integrated into the church's organizational structure; and *absence of entrepreneurship*, because a priest is not like an entrepreneur or independent contractor in business for himself, but rather derives his income from the church's enterprise much like a salary. The priest's relationship to his bishop is of such proximity that it is just and fair to impose vicarious liability. Lord Justice Ward used justice and fairness as a salutary check on his conclusion rather than as a stand-alone test. For Ward LJ, this struck a proper balance between unfairness to an employer in imposing vicarious liability and the risk of unfairness to a victim who would otherwise be left without redress.⁸⁰ He further opined that the fictional reasonable man on the Clapham omnibus would regard a priest as an employee and the bishop as being liable, and further, if a priest had negligently knocked someone down while riding his bicycle to visit a parishioner in the course of his employment, the bishop would have been vicariously liable for the resulting injuries.⁸¹

Lord Justice Davis concurred, but carefully restricted his judgment to the facts of the case so as to avoid deciding the question of whether a bishop can never be vicariously liable for the actions of a priest where

78. *JGE*, *supra* note 73 at paras 29–30.

79. In his decision, Ward LJ relied on *Bennett*, *supra* note 12 at para 27. See *JGE*, *supra* note 73 at paras 31–35.

80. *Ibid* at paras 75–81.

81. *Ibid* at paras 82–83.

there is insufficient control over the day-to-day duties of a priest.⁸² He accepted that the relationship was akin to employment and that there was a sufficient degree of control to find vicarious liability. While priests were free to organize their daily activities, a bishop has the power to appoint and dismiss; moreover, a priest is appointed to advance the bishop's purposes.⁸³ Lord Justice Tomlinson dissented but emphasized at the outset that he did not think that a Roman Catholic bishop would always be immune from liability—each case has to be determined on its facts.⁸⁴ Nor did he think that a bishop owed a duty to every member of the church within his diocese.⁸⁵ In fact, he thought it difficult to decipher precisely what the legal issue was in this case because ordination alone should not be sufficient to attach vicarious liability to a bishop.⁸⁶ For Tomlinson LJ, the mere fact that the bishop was, financially, able to pay was an insufficient reason to impose liability.⁸⁷

Finally, in *Welfare Society*, the UK Supreme Court, in a unanimous decision, found that the Christian Brothers Institute was vicariously liable for sexual assaults by individual brothers against numerous students in their schools on the ground that the relationship between the brothers and the order was akin to employment. Analysis of the relationship between the brothers and the order showed it to be similar to that between a priest and his bishop because it involved vows of obedience, placement in a teaching position, teaching as an activity carried on to further the mission of the Institute, integration into the mission of the Institute and control, generally.⁸⁸ As Lord Phillips noted, if one of the brothers injured a pedestrian while driving a car owned by the Institute to collect groceries for the community, few would doubt the vicarious liability of the Institute to the injured person.⁸⁹

It is not clear, however, why a member of the clergy can be treated as an employee for the purposes of employment insurance and wrongful dismissal but not for vicarious liability. The cases do not even hint at

82. *Ibid* at paras 116–18.

83. *Ibid* at paras 123–31.

84. *Ibid* at para 86.

85. *Ibid* at para 92.

86. *Ibid* at para 108.

87. *Ibid* at para 109.

88. *Welfare Society*, *supra* note 73 at paras 34–61.

89. *Ibid* at para 61.

an answer. A possible distinction is that the former issue, employment insurance and wrongful dismissal, typically arises in cases involving various Christian denominations, including the two churches that are legally established in England and Scotland, while the latter issue, vicarious liability, typically arises in cases involving the Roman Catholic Church. Yet, there is no obvious reason why the Roman Catholic Church and the issue of vicarious liability should be treated differently if the same test—whether there was the intention to create legal relations—is applied. Perhaps the delicate matter of imputing vicarious liability to a bishop who was, according to the cases, otherwise innocent, explains why “akin to employment” is adopted as the standard in these cases. But, on the face of it, there is no good reason why Roman Catholic priests cannot be employees, or conversely, why the clergy of Christian denominations cannot be in positions akin to employment.

Despite this puzzling feature, the net outcome of this recent flurry of cases in England can be summarized simply. First, there is no presumption that a member of the clergy cannot be an employee or in a position akin to employment. Second, where there is an intention to create contractual relations, a member of the clergy can be an employee; where there is no such intention, the relationship is to be treated as being akin to employment. Third, in discerning whether there is intention, a court should look to all the facts, including the constitution of the religious institution, and factors such as control, integration in an organization and entrepreneurship. Fourth, the presumption that clergy are office-holders rather than employees has generally been overtaken but, in appropriate cases, it can nonetheless be sustained on the facts.

(ii) Canada

In Canada, in contrast to the UK, the question of whether members of the clergy are employees or office-holders has largely been dealt with only in the lower courts, which have generally not given searching consideration to the matter. However, the broad outline of their collective approach is discernible.

The first case, *McCaw v United Church of Canada*, came rather late, in 1991.⁹⁰ In response to difficulties between McCaw and his congregation, his

90. (1991), 4 OR (3d) 481, 82 DLR (4th) 289 (CA), aff'g (1988), 64 OR (2d) 513 (H Ct J).

presbytery directed him to take a course of study and placed his name on its discontinued service list. The Church's conference and General Council confirmed these actions. When McCaw sued for wrongful dismissal, the trial judge found that the Church had not met the requirements of natural justice to give him notice of complaints and meetings and a right to reply, and that its constitution had not been properly followed. The trial judge was reluctant to interfere in internal church matters and declined to make an order of *certiorari* to strike down the Church's decision. He regarded a minister's position as analogous to that of an employee and the Church's constitution as analogous to an employment contract and therefore awarded damages for wrongful dismissal. The Ontario Court of Appeal agreed that McCaw had been unfairly treated and that the Church had not followed its own constitution, but declined to determine the legal nature of the relationship between minister and church. Instead, the Court found that the Church had significant control over McCaw's ability to earn a living and had treated him unfairly. It awarded damages for loss of salary and benefits and McCaw's name was ordered to be restored to the ministerial roll so that he would be eligible for another appointment. But while the Court treated him as if he was an employee in making its award, it shied away from characterizing the position as analogous to employment, instead leaving considerable ambiguity on that matter.

The other Canadian decisions prior to *Hart* were equally problematic. In *Brewer v Incorporated Synod of the Diocese of Ontario*, an Anglican priest whose bishop was unsuccessful in placing him in a parish brought an action for wrongful dismissal on grounds and failed.⁹¹ The trial judge found that there was no intention to create contractual relations between the priest and the diocese, meaning that the priest was an office-holder in similar manner to secular office-holders such as judges or heads of state.⁹² In the Court's view, he could maintain an action against the parish to enforce the diocesan canons in relation to the employment of priests, but this action failed because there was no canonical right of employment in a parish.⁹³

91. *Supra* note 20.

92. *Ibid* at paras 36–37, Soubliere J. The Court also refers to the “traditional established Churches” of Canada as if to suggest that as a priest in an established state church, the plaintiff is an office-holder within the state. *Ibid* at para 36.

93. The court's reasoning in this case defies comprehension.

Several brief preliminary motions in other cases suggest that courts tend to assume that members of the clergy can be employees.⁹⁴ In one case, a rabbi employed by a synagogue on the basis of a written contract of employment sued successfully for wrongful dismissal as an employee pursuant to the contract.⁹⁵ Finally, two cases involving the Salvation Army, whose constitution expressly states that officers are not employees, also touched on the issue without examining the question at length. In one case, a trial court decided that a retirement plan had to comply with provincial pension legislation for employees because the plan was found not to be fundamental to the Church's doctrine.⁹⁶ In the other, an officer who was dismissed because his wife divorced him, as was permitted under the Salvation Army's constitution, failed in a wrongful dismissal suit because the Court applied the constitution's provision that he was not an employee.⁹⁷ In both cases little consideration was given to the employee/office-holder issue.

The only Canadian appellate case after *McCaw* to directly address the question of the employment status of a member of the clergy was *John Doe v Bennett*,⁹⁸ in which the Supreme Court of Canada confirmed the vicarious liability of a bishop for the sexual torts of a priest. On the issue of whether the relationship between the bishop and priest was sufficiently close to impose vicarious liability, McLachlin CJC stated:

The relationship between the bishop and a priest in a diocese is not only spiritual, but temporal. The priest takes a vow of obedience to the bishop. The bishop exercises extensive control over the priest, including the power of assignment, the power to remove the priest from his post and the power to discipline him. It is akin to an employment relationship. The incidents of control far exceed those characterizing the relationship between foster parents and the government . . . and . . . the priest is reasonably perceived as an agent of

94. See *Graham v United Church of Canada*, 2002 SKQB 456, 226 Sask R 40; *Greaves v United Church of Canada*, 2003 BCSC 1365, 27 CCEL (3d) 46; *Melnik v Wirwchar*, 2007 SKQB 118, 295 Sask R 125; *Incorporated Synod of the Diocese of Toronto v Ontario (Human Rights Commission)* (2008), 236 OAC 110, 78 Admin LR (4th) 121 (Sup Ct (Div Ct)).

95. *David v Congregation B'Nai Israel* (1999), 44 CCEL (2d) 302, 99 CLLC 210-031 (Ont Ct J (Gen Div)).

96. *Salvation Army, Canada East v Ontario (AG)* (1992), 88 DLR (4th) 238, 40 CCEL 130 (Ont Sup Ct (Div Ct)).

97. *Lewery v Salvation Army in Canada* (1993), 135 NBR (2d) 348, 104 DLR (4th) 449 (CA), leave to appeal to SCC refused, 104 DLR (4th) 449.

98. *Supra* note 12. This decision was considered by the UK House of Lords and UK Supreme Court in *Preston and Welfare Society*.

the diocesan enterprise. The relationship between the bishop and the priest is sufficiently close.⁹⁹

The net result of these cases is that Canadian appellate courts are prepared to regard members of the clergy as holding a position analogous to or akin to employment and to treat them like employees for the purposes of wrongful dismissal or tort liability. This compromise has the advantages of both permitting religious institutions to engage in the fantasy that their clergy, as office-holders, are somehow special while also permitting courts to do justice to clergy when they are wronged and to their victims when they do wrong. On the other hand, it has the disadvantage of creating a space for religious institutions to make the argument that clergy are not employees and—if successful—escape more searching inquiry into possible wrongdoing by an ecclesiastical superior, as may have occurred in *Hart*. This disadvantage is particularly evident for religious institutions with complex internal arrangements which civil courts find difficult to penetrate and risks creating differential treatment among religious institutions generally.

By contrast, the advantage of the English approach is that a court is free to look at all of the facts to analyze them in accordance with standard legal tests and to come to a decision that may or may not characterize a particular member of the clergy as an employee. The Ontario Court of Appeal in *Hart* precluded this approach, creating an aura of injustice in the final outcome. Most clergy appointments today are subject to extensive control and their appointments are largely assimilated to secular appointments insofar as there are written contracts (constitutions, collective agreements) and provisions for salary, benefits, pensions and vacations. This weighs heavily in favour of a finding of employment status rather than office-holder status. But as the Salvation Army cases show, where the constituting documents explicitly provide provisions to the contrary, courts will honour them. On the analysis proposed by the House of Lords and the UK Supreme Court, the answers to the third and fourth of the seven questions set out above depend heavily on the facts, as in any other intention to create legal relations case, and not on an

99. *Ibid* at para 27. For the correlative view that a national church organized on an episcopal basis has no such relationship, see *BM v Mumford*, 2000 BCSC 1787, 84 BCLR (3d) 146.

ecclesiastical assertion of a superior or parallel jurisdiction to that of the common law. However, in the circumstances of *Hart*, even the finding of a relationship akin to employment would have produced a full trial and a second-best approach after the English approach.

C. Exhaustion of Recourse to Internal Tribunals

The fifth and sixth questions are closely related to each other. The fifth question asks what the relationship should be between resorting to internal church process and court intervention (in cases, among others, where natural justice has been denied), and the sixth question extends that inquiry to cases where those processes culminate outside of Canada. While the latter question appears to be of particular importance to the Roman Catholic Church because of its international organization centred in the Vatican; many Orthodox churches as well as some Christian churches operating in Canada have international organizations whose heads and superior tribunals are in foreign jurisdictions. However, for the vast majority of Christian denominations and for many non-Christian religious communities, which are organized on a local or national level, the sixth question does not arise because final decisions can be made expeditiously within Canada.

To ask the fifth question is to answer it: of course. Since ecclesiastical tribunals do not operate outside the common law, courts have the constitutional power to intervene and they exercise this on a regular basis when tribunals operate unfairly, in breach of natural justice or in breach of their own rules.¹⁰⁰ More difficult is the sixth question, and two cases before *Hart* dealt with the issue of intervention prior to exhaustion of internal tribunals. In *Davis v United Church of Canada*, a case in which the Church did not follow its own procedural rules regarding sexual assault charges brought against two of its ministers, Greer J intervened after the presbytery had dealt with the cases but before the conference or General Council had.¹⁰¹ Conversely, in *Pedersen v Fulton*, where a Roman Catholic priest was suspended from priestly duties because he had made accusations of misconduct about other priests to his bishop, the priest

100. For the cases and analysis, see Ogilvie, *Religious Institutions*, *supra* note 13.

101. (1991), 8 OR (3d) 75, 92 DLR (4th) 678 (Gen Div).

failed to persuade the Court to remove the suspension because he had not exhausted his remedies under the CCL.¹⁰²

Hart followed this course without expressly relying on *Pedersen*.¹⁰³ But, given the protracted nature of internal tribunal exhaustion within the Roman Catholic Church, it may be asked whether this is an appropriate outcome. By contrast, in *Davis*, the Court intervened when there was a failure of natural justice at the lowest internal tribunal. In *Bennett*, the Supreme Court declined to deal with the issue of liability on the part of the Roman Catholic Church because there was insufficient evidence as to its status in law; the Church is unincorporated in Canada and tracing the lines of ecclesiastical authority beyond the specific bishop was problematic.¹⁰⁴ It may, then, be wondered why the existence of an international ecclesiastical organization can bar relief in some cases but not in others. In *Pedersen* and in *Hart*, it was a bar to relief until recourse to internal international tribunals had been exhausted, yet in *Bennett* that same international recourse was treated as if it did not exist, in order to facilitate recovery against the Church's local emanation—the bishop. After *Hart*, there is a need for the courts to clarify the understanding of the legal nature of the Roman Catholic Church to ensure uniform treatment of the Church. Ironically, in *Davis*, the exhaustion of internal tribunals would have occurred within a year, while in *Pedersen* and *Hart*, where the number of years was unknown, the Court was unwilling to intervene. *Hart* squarely raises the question of whether courts ought to intervene when the internal tribunal process is protracted or outside the country. The two-year limitation period for breach of contract cases would seem to indicate a reasonable maximum period within which internal church tribunals ought to be expected to complete their proceedings. A longer delay in those proceedings should not preclude a civil action.

D. Charter Issues?

The final issue raised in these cases is whether section 2(a) of the *Charter*, which protects freedom of conscience and religion, can be

102. (1994), 111 DLR (4th) 367, 45 ACWS (3d) 665 (Ont Ct J (Gen Div)).

103. Although the motions judge relied on *Pedersen* in relation to natural justice. See *Hart* ONSC, *supra* note 17 at paras 32, 34–35.

104. *Supra* note 12 at paras 34–36, McLachlin CJC.

invoked as a group right by religious institutions to exclude civil courts from adjudicating disputes between those institutions and their clergy. Again, to ask the question is to answer it: of course not. No religious institution is above or autonomous from the common law. As noted earlier, courts show reluctance and modesty in dealing with disputes in religious institutions, but there is no doubt that they have the authority to deal with those disputes to the fullest extent they think appropriate.

Conclusion

In light of the foregoing analysis, and in light of the need for Canadian courts to clarify and refine a test for dealing with claims by clergy members against their churches, the following ten principles are proposed:

1. By virtue of parliamentary sovereignty, courts have jurisdiction over all matters relating to every religious institution operating within Canada, including the authority to ensure compliance with the evolving jurisprudence of the *Charter* regarding both individual and group rights.
2. In the exercise of their jurisdiction, the courts should show sensitivity to, and a reluctance to become involved in, disputes over doctrinal issues—even though, from a constitutional law perspective, the courts have the authority to deal with those disputes and over issues upon which they tangentially touch.
3. There are no parallel or autonomous religious spheres of authority to the common law and assertions by religious institutions of such spheres are meaningless from the perspective of the common law.
4. In disputes involving members of the clergy, the employment status of that person should be determined by whether there is an intention to create contractual relations as evidenced in both the constitutional documents of the religious institution and in the oral and written exchanges between the religious institution and that person prior to their entry into the position.

5. Where there is an intention to create legal relations, the member of the clergy is an employee and should be treated as such for all purposes of contract and tort, including vicarious liability.
6. Where there is no contractual intention, a member of the clergy is an office-holder but is also in a position akin to employment. Therefore, where that member of the clergy has caused harm to others, his superior may be vicariously liable *as if* the member was an employee.
7. Evidence of contractual intention may be presumed where the usual indicia of intention to create an employment contract are present, including an exchange of terms on such matters as salary, pensions, benefits and vacations. Such evidence of contractual intention is only negated where there is an express written statement in the constitution of a religious institution to the effect that the clergy member is not an employee.
8. A member of the clergy may be an office-holder within a religious institution and an employee at common law, but, where that is so, he or she should be treated by the common law courts as an employee.
9. Where a dispute involving a member of the clergy is under adjudication in the internal processes of a religious institution, that person should enjoy the normal right of all citizens to have recourse to the civil courts, whether by way of appeal or judicial review. Where a dispute is concerned with alleged illegal conduct, such as a crime or a tort, the civil courts should have prior jurisdiction.
10. Civil courts should not hear appeals or applications for judicial review in disputes between clergy members and their religious institutions which do not involve alleged illegal conduct until the institution's internal processes have been exhausted, if that process is located entirely in Canada and is completed early enough to allow recourse to the courts within the civil limitation periods of the relevant Canadian jurisdiction. Where the institution's internal processes extend beyond Canada or are unlikely to be complete

before the expiry of the civil limitation period, Canadian courts should hear appeals or review applications on any grounds on which such applications may normally be brought, including an absence of natural justice, bad faith and failure to follow internal procedural rules.

These ten principles are drawn from the recent case law and are designed to clarify fundamental understandings about the common law and provide a chronological order that courts may use to dispose of issues in ecclesiastical appeal cases. They also provide clearer statements than those found in *Hart* on the appropriate position of the civil courts (especially regarding jurisdiction) when faced with claims of autonomy by religious institutions. They are not inimical to the interests of religious institutions except those who claim separate jurisdiction outside the common law and the Canadian state. Requiring religious institutions to treat their clergy fairly and to be responsible to those whom their clergy very occasionally harm is more like a reminder of the principles they espouse than a form of coercion. Gentle reminders by the courts that the Canadian Constitution and the common law apply to all ought to be sufficient to remind religious institutions of the many benefits of living in a parliamentary democracy with a fuller freedom of religion than in any other country in the world.