Justice for (W)all: Judicial Review and Religion

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Canadian jurisprudence dealing with judicial intervention in the affairs of religious associations has often been very inconsistent. As a result, interactions between the courts and religious parties have often proven to be unsatisfactory from both a legal and a religious perspective. Based on an examination of this jurisprudence, the author of this article argues that the law on the justiciability of disputes in such contexts, that is, whether the subject-matter is appropriate for judicial determination, has been both confused and unsound. In response, the author proposes reconsidering the current law and substituting a more robust analytical framework in the place of existing tests of justiciability.

Focusing on the Alberta Court of Appeal's recent decision in Wall v Judicial Committee of the Hillwood Congregation of Jehovah's Witnesses *and the Supreme Court of Canada's decision in* Lakeside Colony of Hutterian Brethren v Hofer*, the author reviews the development of the law on the justiciability of religious disputes. Examining the latter case's subsequent judicial treatment, the author argues that repeated misinterpretations of the test of justiciability have led to the application of different and lower thresholds for judicial intervention in such disputes.*

Ultimately, the author argues that a change in the law is warranted and proposes a broader analytical model that, the author argues, better aligns with the values of the Canadian Charter of Rights and Freedoms *and appropriately considers a greater variety of factors compared with previous tests of justiciability. Such factors include statutory authority for judicial review, the exhaustion of internal appeals, the essential character of the dispute, the court's analytical capacity regarding the subject-matter, and the potential effect of intervention on the dispute.*

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Introduction

Given the indelible awkwardness that accompanies some of the law's interactions with religion, it is not surprising that Canadian courts are frequently reluctant to intervene in affairs that possess a substantively religious character. Indeed, this judicial reticence is reflected in the Supreme Court of Canada's ruling in *Syndicat Northcrest v Amselem* (*Amselem*), in which Iacobucci J affirmed that: "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."[1] Thus in theory, from the law's perspective, a level of circumspection is required when it comes to involving itself in private disputes that are fundamentally of a religious nature.

But law does not become embroiled in such matters purely of its own volition. In private internal disputes, at least, it is religious associations, their members, or ex-members who petition the law to interfere. These are the parties who call upon the law to act. To some degree, this supplication to the law is itself curious, given that most religious associations adhere to a hierarchy of authority that places certain religious figures, texts, or principles in positions superior to the temporal authority of the law. Consequently, interactions be-

1. 2004 SCC 47 at para 50, 2 SCR 551 [*Amselem*]. While it is not necessary to dwell on the issue here, I refrain from employing the word "secular" in this study. On this particular point, I share Benjamin Berger's view on the polyvalent character of the term: "As a number of those writing from the fields of religious studies, anthropology, and sociology have shown, there is no single phenomenon of secularism but, rather, 'secularisms,' suffused with local history and ethnographic complexity, and manifesting wide variation." Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 33–34 [Berger, *Law's Religion*]. See also Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

tween religion and the law can involve what McLachlin CJC has referred to as a "dialectic of normative commitments":

> Case law [on religion] . . . has included those cases in which the sources of authority and content of religious conscience actually clash with the prevailing ethos of the rule of law. I wish to call this tension between the rule of law and the claims of religion a "dialectic of normative commitments." What is good, true, and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical, commitments. Where this is so, two comprehensive worldviews collide. It is at this point that the question of law's treatment of religion becomes truly exigent. The authority of each is internally unassailable.[2]

Given this dialectic of normative commitments, it is unsurprising that the law's uneasy relationship with religion is actually reciprocal. For, theoretically speaking, the divergence in normative commitments between the two entities can, in certain matters, make it impossible for religion to obtain a genuinely authoritative pronouncement from the law. In Christianity, for example, this sentiment is reflected in the apostle Paul's rhetorical question to his Corinthian congregation: "Does any one of you who has a dispute with another dare to go to court before unrighteous men, and not before the holy ones?"[3] Accordingly, when a religious association or its members decide to appeal to the law—or "outside law", as Alvin Esau describes it—such an appeal could be misplaced, given the differing normative commitments of the law and the religious adherent.[4]

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2. The Right Honourable Beverley McLachlin, PC, "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen's University Press, 2004) 12 at 21. A somewhat comparable dichotomy is noted by Alvin Esau, who uses the phrases "inside law" and "outside law", which he explains as follows:

> On one level, I am making a statement of fact—namely, that some religious groups generate a comprehensive body of norms that are considered binding on the community and take priority over laws of the state that may be inconsistent with such norms. On another level, I am also exploring a normative question about how various legal systems ought to relate to each other within our polity.

Alvin Esau, "Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 110 at 110 [Esau, "Living by Different Law"]. See also Alvin J Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004) [Esau, *The Courts and the Colonies*].

3. *New World Translation of the Holy Scriptures* (New York: Watch Tower Bible and Tract Society of Pennsylvania, 2013) at 1 Corinthians 6:1, online: <www.jw.org/en/publications/bible/nwt/> [*New World Translation*] (for contextual reasons, New Testament references throughout this article will follow the *New World Translation*, which is used exclusively by Jehovah's Witnesses).

4. For a detailed discussion of this issue in the context of the Anabaptist tradition, see Esau, *The Courts and the Colonies*, *supra* note 2 at 31–49. See also MH Ogilvie, *Religious Institutions and the Law in Canada*, 3rd ed (Toronto: Irwin Law, 2010) at 62 [Ogilvie, *Religious Institutions*].

Yet despite any theoretical inclinations to steer clear of one another in certain matters, absolute avoidance between the law and religion is obviously impossible. And while courts typically recognize the need for caution when it comes to judicial intervention in private religious disputes, encounters between these two entities continue, in some instances, to prove rather unsatisfying—whether from a legal perspective (e.g., the judiciary, legal practitioners or legal critics), a religious perspective (e.g., the religious parties who appear before the court or other advocates for religion generally), or in some cases even both.[5]

Focusing on the legal perspective, and more precisely on the area of judicial review, the majority ruling of the Alberta Court of Appeal in *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses* (*Wall*) stands as one such instance of an unsatisfying encounter.[6] Indeed, an analysis of the majority's ruling leads to a sobering realization: unfortunately, the assortment of jurisprudence in the past few decades has engendered a rather confounding bricolage when it comes to the legal test for determining when courts will interfere in the internal affairs, or decisions, of religious associations.

The following study is occasioned largely by *Wall* and is essentially comprised of two parts. First, after outlining the facts and procedural history in the case, I will address some of the confusing or problematic jurisprudence relied upon by the majority in *Wall*. In particular, I will address an important issue related to *Lakeside Colony of Hutterian Brethren v Hofer* (*Lakeside*), a Supreme Court ruling that has at times been misconstrued and misapplied.[7] Following from a discussion of *Lakeside* and a few other cases of note, it will become

5. In addition to these, I think there is also a third perspective worth noting. Following the work of scholars such as Bruce Lincoln and Jonathan Z Smith, this perspective relates not to theology or some kind of advocacy for religion, but rather to the critical study of religion. As Lincoln notes, however, such an approach is by no means ubiquitous in the field of religious studies:

> Although critical inquiry has become commonplace in other disciplines, it still offends many students of religion, who denounce it as "reductionism". This charge is meant to silence critique. The failure to treat religion "as religion"—that is, the refusal to ratify its claim of transcendent nature and sacrosanct status—may be regarded as heresy and sacrilege by those who construct themselves as religious, but it is the starting point for those who construct themselves as historians.

Bruce Lincoln, "Theses on Method" (1996) 8:3 Method & Theory in the Study of Religion 225 at 227. See also Jonathan Z Smith, *Imagining Religion: From Babylon to Jonestown* (Chicago: University of Chicago Press, 1982).

6. 2016 ABCA 255, 404 DLR (4th) 48 [*Wall*].

7. [1992] 3 SCR 165, 97 DLR (4th) 17 [*Lakeside* cited to SCR].

clear that the majority's analysis in *Wall* is in key respects unsound. After identifying the problematic aspects of the majority ruling, the second section of this study shifts into a prescriptive endeavour. There, I will propose a more robust analytical framework, with a view to recalibrating the law's methodological approach when it comes to the prospect of judicially reviewing a religious association's decisions.

I. (Bricks in) the *Wall* Ruling

A. Factual Background

In some respects, the underlying circumstances that led to Randy Wall's initial appearance before the judiciary might seem ordinary enough. Wall, who had been a member of the Jehovah's Witnesses organization for thirty-four years, was expelled, or "disfellowshipped", by the judicial committee[8] of the Highwood Congregation of Jehovah's Witnesses on March 24, 2014.[9] According to the Jehovah's Witnesses flagship publication, *The Watchtower*, this disciplinary measure of disfellowshipping is one used "only if a member of the congregation *unrepentantly* engages in gross sin".[10] As described by James Penton, the practice is aimed at "keeping the organization clean", targeting "fornicators, adulterers, drunkards, and persons guilty of other immoral practices".[11]

Yet what is also noteworthy about the practice is that it involves certain obligations on the part of those Witnesses who remain in good standing. Such Witnesses, Penton writes, "were not to speak to disfellowshipped persons or even to greet them. . . . To all intents and purposes they were regarded as eternally damned".[12] However, this comportment towards disfellowshipped it a notable qualification: although Witnesses typically "have nothing to do with

8. See generally M James Penton, *Apocalypse Delayed: The Story of Jehovah's Witnesses*, 2nd ed (Toronto: University of Toronto Press, 1997) at 89 (the use of judicial committees in the Jehovah's Witnesses organization began in the mid-1940s, under the leadership of Nathan Homer Knorr, who was named the third president of the Watch Tower Bible and Tract Society in 1942).

9. *Wall*, *supra* note 6 at paras 49–53, Wakeling JA, dissenting.

10. "Always Accept Jehovah's Discipline", *The Watchtower* 127:22 (15 November 2006) 26 at 27 [emphasis added].

11. *Supra* note 8 at 89 (Penton notes however that this standard was relaxed in 1974 to allow Witnesses to treat disfellowshipped people with "ordinary courtesy and respect").

12. *Ibid*. Somewhat comparably, Hutterite colonies utilize two forms of punishment: shunning (or "Absonderung") and excommunication ("Ausschluss"). See also Esau, *The Courts and the Colonies*, *supra* note 2 at 128.

disfellowshipped persons . . . [f]amily members were always permitted some exception from this rule. . . so long as they did not discuss spiritual matters."[13]

From the perspective of the Jehovah's Witnesses, disfellowshipping members is a common enough occurrence. While data relating to disfellowshipped members is relatively sparse, *The Watchtower* lamented in a 1994 article that "each year about 40,000 individuals are disfellowshipped from Jehovah's organization."[14] Thus, within the context of the Jehovah's Witnesses organization, Wall's plight was hardly unprecedented.

In other respects, however, Wall's situation would strike some as heart-wrenching. His difficulties started after the Highwood Congregation's judicial committee disfellowshipped his teenage daughter, on account of what Wall described as improper "sexual behavior".[15] As a result of this decision, Wall and the rest of his family had a concomitant duty to shun his daughter publically, though this did not preclude her from attending congregational meetings, nor did it require the Wall family to shun her in their own household.[16] Yet despite the formal conceptual limits to this shunning, the situation still caused the family serious emotional turmoil, as "the edicts of the church pressured the family to evict their daughter from the family home".[17]

In the wake of this tumult, Wall himself was called before the judicial committee on March 24, 2014. The allegations against him related to episodes of drunkenness, one of which involved verbal abuse directed towards his wife.[18] While Wall admitted to two occasions of drunkenness in his appearance before the judicial committee, the committee concluded that his admission was not accompanied by a sufficient level of repentance.[19] Consequently, he was disfellowshipped from the Highwood Congregation.

13. Penton, *supra* note 8 at 299.

14. "Are You Resisting the Spirit of the World?", *The Watchtower* 115:7 (1 April 1994) 14 at 16. See also Penton, *supra* note 8 at 311.

15. *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses* (16 April 2015), Calgary 1401–10225 (Alta QB) (Transcript at 35) [*Wall* QB].

16. For a discussion of the rules of shunning family members, see Penton, *supra* note 8 at 299.

17. *Wall*, *supra* note 6 at para 5.

18. *Ibid.*

19. *Ibid* at para 6. As the Highwood Congregation put it in its factum before the Court of Appeal: "[T]he . . . elders did not believe Mr. Wall was sufficiently repentant or determined to avoid his sins as required by Jehovah God at Second Corinthians 7:8–11. They informed Mr. Wall he would be disfellowshipped on the Scriptural grounds of drunkenness (1 Corinthians 5:11, 6:9, 10) and reviling or abusive speech (1 Corinthians 6:10)." *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 (Factum of the Appellants at para 13).

Following this ruling, Wall appealed the decision to an appeal committee, comprised of elders from three different nearby congregations. Unfortunately for Wall, this appeal was unsuccessful, as was his attempt at seeking a further appeal through the Watch Tower and Bible Tract Society of Canada.[20] Thus, after exhausting his ecclesiastical avenues of appeal, Wall applied for a judicial review of the decision (under rule 3.15 of the Alberta *Rules of Court*),[21] claiming that the decision to expel him "was made in error".[22]

B. Judicial History of the Case

In chambers at the Court of Queen's Bench, Campbell J directed that Wall's application would first require a hearing over whether the court had jurisdiction to review the decision of the appeal committee.[23] Put differently, the first and most pressing question was whether judicial interference with the appeal committee's ruling was proper—or more precisely *warranted*. If the answer was "yes" and the Court affirmed its jurisdiction over the matter, then the application could proceed to a determination of whether or not the appeal committee's ruling should be quashed.[24]

On April 16, 2015, the first issue was argued before Wilson J, who gave an oral ruling from the bench that same day. While his ruling did not include any specific citation of jurisprudence, it was apparent that what loomed in the background of his decision was a long-standing principle of law affirmed by Gonthier J in *Lakeside*: "[C]ourts are slow to exercise jurisdiction over the question of membership in a voluntary association, especially a religious one.

20. See *Wall* QB, *supra* note 15. Wall's decision to write to the Watch Tower and Bible Tract Society of Canada was unconnected to any formally instituted appeal process. As argued by Highwood Congregation's counsel before the Court of Queen's Bench: "[T]here is no provision for this kind of appeal. But a person is always free to write in exactly as Mr. Wall did". *Ibid* at 65–66.

21. Alta Reg 124/2010, vol 1, r 3.15 [*Rules of Court*].

22. *Wall*, *supra* note 6 at para 60. While the reference to an erroneous decision implies that Wall's application was premised on a concern over the substantive decision of the judicial committee, it is worth noting that Wall's originating application also alleges that the respondents breached the principles of natural justice. It also bears noting that Wall acted—quite effectively, it seems—as a self-represented litigant before both the Court of Queen's Bench and the Court of Appeal.

23. See *Randy Wall v Judicial Committee of the Highwood Congregation of Jehovah's* (October 6, 2014), Calgary 1401–10225 (Alta QB) (order).

24. More precisely, the final remedy in *Wall* would likely entail a direction to have the matter remitted to the judicial committee to be re-heard.

However, the courts have exercised jurisdiction where a property or civil right turns on the question of membership."[25]

In Wall's submissions to the Court, he argued that the decision to have him disfellowshipped was one that had a tangible impact on his economic well-being, given that "his client base, about half of whom were members of various Jehovah's Witnesses congregations, refused to conduct business with him".[26] Wall's argument on this point proved pivotal. In his oral ruling, Wilson J determined that the appeal committee's decision affected Wall's civil rights, and thus judicial intervention was warranted:

> Now, the issue . . . is . . . whether or not you've got civil rights implicated here. I think you've got civil rights written all over this thing, my friend.
>
> And I'll tell you in two ways, freedom to associate under the [*Canadian Charter of Rights and Freedoms*] is a constitutional right here. It's not a fact about being a member of the Jehovah's Witness[es] that has an impact upon him as a realtor. But the reality is, these people, like most people belonging to any religious . . . organization, become close to each other. They know each other. And just like I would know if I was a member of the church and I needed some electrical work done and there's a member of the church who I got to know and he's an electrician, why would I not give him a call? Of course I would.
>
> And you generally go to your friends. You go to those who you may have good relations with and you can understandably go to your church. The issue about shunning has [a] phenomenal impact on this personal relationship, the freedom to associate.
> . . .
> [T]his is a problem. We've actually got the business effect here, the shunning. Part of what the church teaches has, I am satisfied on the basis of [Wall's] affidavit, established an economic threat here. You're right, people can come and go [to meetings], but the reality is if you've got the shunning they are expected to leave. And if they're not following that tenet, they themselves are going to be in dutch with the church. So it does have an economic impact, my friend. I'm satisfied [Wall] can make out the case.[27]

25. *Supra* note 7 at 173–74.

26. *Wall*, *supra* note 6 at para 10. The formulation of this statement, however, is curious. Read literally, it claims that Wall's *entire* client base refused to do business with him, while simultaneously acknowledging that only about *half* of his client base was comprised of Jehovah's Witnesses. There is no indication, however, that the non-Witnesses among Wall's client base would have been affected by the judicial committee's decision.

27. *Wall* QB, *supra* note 15 at 58–59. See also *Wall*, *supra* note 6 at para 62 quoting *Wall* QB, *supra* note 15. Being sympathetic to the fact that Wilson J's ruling was delivered orally from the bench, it nonetheless strikes me that his invocation of Wall's section 2(d) *Charter* right (freedom to associate) is entirely misplaced, given that "the *Charter* does not apply to private litigation". *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 597, 33 DLR (4th) 174 [*Dolphin Delivery*]. The relevance of the *Charter* here will be addressed in more detail below.

Having affirmed that the Court would exercise its jurisdiction in the circumstances, Wilson J left the remaining component (i.e., the substantive review of the decision) as a matter to be heard at a later date. Yet before any such hearing occurred, the Highwood Congregation appealed the ruling on jurisdiction to the Alberta Court of Appeal. In a succinct six page ruling, the majority (comprised of Paperny JA and Rowbotham JA) agreed with Wilson J's conclusion, affirming that the tribunal's decision was within the purview of the Court to review.[28] Justice Wakeling, on the other hand, disagreed, as articulated in an emphatic and detailed twenty-page dissent.[29]

At present, the matter still remains unsettled, on potentially two fronts. First, the Highwood Congregation was granted leave on April 13, 2017 to have the matter heard before the Supreme Court.[30] Given this development, the jurisdictional issue is yet to be finally resolved. Second, regardless of whether or not the majority's decision stands, it remains the case that at this juncture, it is *only* the issue of jurisdiction that has been analyzed by the courts. As such, even if the judiciary retains jurisdiction over the matter, it will still become necessary for a court to substantively analyze the appeal committee's ruling. This qualification is important. For given the procedural bifurcation of the issues in *Wall*, there has yet to be any sustained analysis on matters relating to the applicable standard of review and the evaluation of the judicial committee's ruling. At this stage, it is *only* the issue of jurisdiction that has been addressed by the courts.[31]

C. Lakeside*: Jurisdiction or Justiciability*

The majority's analysis in *Wall* began with its application of the aforementioned principle drawn from *Lakeside*.[32] Beyond this, the majority did not discuss *Lakeside* further. Yet given its frequent citation in cases involving religious organizations, and given its relevance to the issue of jurisdiction, the case is one that warrants some further examination.

28. *Wall*, *supra* note 6 at para 29.
29. *Ibid* at para 142.
30. *Ibid*, leave to appeal to SCC granted, 37273 (13 April 2017).
31. See *Wall*, *supra* note 6 at paras 13, 29. More precisely, while the majority correctly suggested that a standard of deference would apply in these circumstances, the Court did not perform any such review, and remitted the substantive aspects of a judicial review to the Court of Queen's Bench.
32. *Ibid* at para 15. See also *Lakeside*, *supra* note 7 at 173–74.

Lakeside involved a decision by a Hutterite group, Lakeside Colony, to expel some of its members, which led to the colony's subsequent endeavour to have the judiciary enforce those expulsions. The expulsions themselves were the result of a dispute over patent rights to a particular type of hog feeder—while Lakeside Colony member Daniel Hofer claimed to have come up with the design for this feeder, another Hutterite colony had patented a similar feeder and assigned the patent rights to C & J Jones Ltd., a third party corporation with no colony affiliation. In turn, C & J Jones Ltd. attempted to enforce its patent rights against Lakeside Colony, and the ensuing internal conflict over this issue eventually led the colony to expel not only Hofer, but his sons as well. While Lakeside Colony succeeded in having the validity of the expulsions affirmed at lower court levels, the Supreme Court ultimately overturned these decisions, meaning that Hofer and his sons remained members of the colony.

Writing for the majority, Gonthier J affirmed the principle referenced by the majority in *Wall*, namely that "the courts have exercised jurisdiction where a property or civil right turns on the question of membership".[33] This principle was derived from a much older ruling, *Ukrainian Greek Orthodox Church of Canada v Trustees of Ukrainian Greek Orthodox Cathedral of St Mary the Protectress* (*St Mary*), in which Crocket J wrote: "[I]t is well settled that, unless some property or civil right is affected . . . the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order."[34]

Following from this principle of law, the question of jurisdiction in *Lakeside* (and indeed in *Wall*) was not whether the court was *permitted* to intervene, but rather whether the court *ought* to intervene in the circumstances.[35] In the Lakeside Colony litigation, this issue had previously been addressed by Huband JA at the Manitoba Court of Appeal:

33. *Lakeside*, *supra* note 7 at 174.

34. [1940] SCR 586 at 591, [1940] 3 DLR 670 [*St Mary*]. See also *Lakeside*, *supra* note 7 at 174; *Bruker v Marcovitz*, 2007 SCC 54 at paras 41–42, [2007] 3 SCR 607. This principle in *St Mary* draws from the seminal assertion contained in *Forbes v Eden*:

> There is not authority in the courts, either of England or Scotland, to take cognisance of the rules of a voluntary society entered into merely for the regulation of its own affairs, save only so far as it may be necessary that they should do so for the due disposal or administration of property.

(1867), 4 Scot LR 6 at 8.

35. Put in much different (though topically relevant) terms, one could view the issue of jurisdiction as being analogous to Paul's admonishment to the Corinthians: "'All things are lawful for me,' but not all things are advantageous." *New World Translation*, *supra* note 3 at 1 Corinthians 6:12.

> Should the court become involved at all in resolving internal disputes in voluntary associations, including religious bodies? The general rule is that unless civil rights or property rights are implicated, the courts should not adjudicate issues of faith or doctrine: *Ukrainian Greek Orthodox Church v Trustees of Ukrainian Greek Orthodox Cathedral of St Mary* . . . Where an issue, such as the validity of excommunication from a religious body, impacts solely on the individual's status within a voluntary association, the court will not become involved in adjudicating the matter. It makes no difference whether the procedures for excommunication comply with the requirements of natural justice or not. It is otherwise, however, where the excommunication is linked with a property issue.[36]

Justice Huband's view was more or less echoed in Gonthier J's ruling, though the latter framed the issue in terms of the Court "assuming" or "exercising" its jurisdiction.[37] Again, the issue was not whether the Court actually possessed the power to determine the matter—it obviously did under the rule of law—but rather whether it was appropriate in the circumstances to utilize that power.[38] Viewed in this manner, the question of jurisdiction in cases such as *Lakeside* and *Wall* is more precisely understood as a question of *justiciability*, as described by Lorne Sossin:

> [J]usticiability relates to the subject matter jurisdiction (*ratione materiae*) of a court . . . justiciability may be defined as a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.[39]

Thomas Cromwell (now Cromwell J) has described the concept in a similar fashion:

> The justiciability of a matter refers to its being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. This appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it.[40]

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36. *Lakeside Colony of Hutterian Brethren v Hofer* (1991), 77 DLR (4th) 202 at 222, 70 Man R (2d) 191 (CA) [*Lakeside* MBCA].

37. *Lakeside*, *supra* note 7 at 173, 191.

38. *Cf Operation Dismantle Inc v R*, [1985] 1 SCR 441, 18 DLR (4th) 481. In the context of a discussion on justiciability, Wilson J stated in dissent that courts should "focus . . . attention on whether the courts should or must rather than on whether they can deal with [certain] matters". *Ibid* at 467 [emphasis in original].

39. Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 6–7. See also *Wall*, *supra* note 6 at paras 77–79, Wakeling JA, dissenting.

40. Thomas A Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 192.

In *Lakeside*, the concept of justiciability is reflected in the following words of Gonthier J:

> If [Hofer and his sons] have a right to stay, the question is not so much whether this is a property right or a contractual right, but whether it is of sufficient importance to deserve the intervention of the court and whether the remedy sought is susceptible of enforcement by the court. Here the rights in question are of the utmost importance and the "remedy" requested is merely that the court not intervene to enforce the expulsion.[41]

While the word "justiciable" is nowhere present in Gonthier J's ruling, it is clear that his remarks here were oriented towards the concept. Yet beyond the above reference, there was little attention given to the notion of justiciability. Bearing in mind the facts in *Lakeside*, the dearth of analysis on this issue was somewhat understandable. For on the one hand, it was Lakeside Colony that had initiated the proceedings in the first place, and had itself sought the court's intervention to enforce the expulsions. Given this objective, the colony had acceded to the court's jurisdiction.[42] On the other hand, Hofer and his sons likewise desired court intervention, as they hoped that the court would declare the expulsions invalid. Given this, none of the litigants in *Lakeside* had any reason to argue that the matter was *not* justiciable.

Upon affirming that there was no issue as to jurisdiction, the Court moved on to scrutinize the decision making process that led to the expulsion of Hofer and his sons, analyzing whether the colony's procedures accorded with the requirements of natural justice.[43] Concluding that they did not, the majority ultimately declared that the expulsion of Hofer and his sons was invalid.[44]

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41. *Supra* note 7 at 175.

42. *Ibid* at 175–76. See also Esau, *The Courts and the Colonies*, *supra* note 2 at 161. Esau states that: "On the first issue of the jurisdiction of the civil courts to adjudicate the dispute . . . [Gonthier J] did not expand on it. Obviously, the plaintiffs did not object to the jurisdiction of the courts, since the whole point of their action was to get the court to exercise jurisdiction and get the police force of the state into action to enforce the decision of the church." *Ibid*. See also *Wall*, *supra* note 6 at para 105 (where the concession by Lakeside Colony on the issue of jurisdiction was also noted by Wakeling JA).

43. *Lakeside*, *supra* note 7 at 195. Apart from its relevance to the issue of jurisdiction or justiciability, the ruling in *Lakeside* has also proven seminal in terms of courts appealing to the concept of "natural justice" when examining the decisions of religious associations. *Ibid*. Also of relevance, Grant Huscroft (now Huscroft JA) has noted that the issue of "natural justice" is essentially synonymous with what has come to be described as the "duty of fairness". See Grant Huscroft, "From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) 147 at 150. While the role of natural justice in the context of religious decisions is an issue that certainly deserves much consideration, it will not be addressed here.

44. *Lakeside*, *supra* note 7 at 173–74. Of note, McLachlin CJC was the sole dissenting member of the Court. She concluded: "I cannot accede to the conclusion that the colony's conduct dis-

D. (Mis)Understanding Lakeside

While *Lakeside* has frequently been cited in cases involving judicial interference in religious affairs, its *ratio* has been frequently misunderstood. Unfortunately, the majority decision in *Wall* does not remediate this misunderstanding.

In the majority's ruling, *Lakeside* was simply cited in connection to the principle that "courts are slow to exercise jurisdiction over the question of membership in a voluntary association, especially a religious one but courts had exercised jurisdiction when a property or civil right turned on a question of membership".[45] As mentioned earlier, this is a principle derived from *St Mary*, and the majority in *Wall* correctly noted its application in *Lakeside*. After this, however, the majority went on to add that "a line of cases since [*Lakeside*] suggests that courts also have jurisdiction when there has been a breach of the rules of natural justice or the complainant has exhausted the organization's internal process".[46] It is at this point that the majority's analysis begins to slide off the mark.

While the majority correctly identified the *ratio* of *Lakeside*, they did not give due consideration to—or perhaps simply failed to recognize—the way in which *Lakeside* has been interpreted by legal scholars and the judiciary. For, contrary to the majority's understanding, the notion that courts "have jurisdiction [to intervene] when there has been a breach of the rules of natural justice"[47] is, in fact, a principle that is genealogically traced to *Lakeside* itself. This is evidenced in a number of places. Margaret Ogilvie, for example, states that: "[T]he *ratio decidendi* of *Lakeside Colony* is that ecclesiastical procedures are subject to the rules of nat-

closes any breach of the principles of natural justice . . . Like Luther with Rome, the problem lay not in unfair procedures or lack of opportunities for hearing; the problem lay rather in the fundamental divergence between the parties, a divergence which doomed any proceedings, no matter how just, to failure." *Ibid* at 232–33. Unfortunately, McLachlin CJC's remarks also turned out to be somewhat prescient, given the aftermath of *Lakeside*. For in the immediate wake of the Supreme Court's ruling, the colony held a further meeting on December 11, 1992, at which time it was again decided that Hofer and his sons were to be expelled. This resulted in a second round of litigation; in its second attempt, Lakeside Colony eventually succeeded in its endeavour to have the law validate the expulsion of Hofer and his sons. See *Lakeside Colony of Hutterian Brethren v Hofer* (1994), 93 Man R (2d) 161, 1994 CarswellMan 247 (WL Can) (QB). See also Esau, *The Courts and the Colonies*, *supra* note 2.

45. *Wall*, *supra* note 6 at para 15.

46. *Ibid* at para 16.

47. *Ibid*.

ural justice".[48] Similarly, in *Keess v Saskatchewan Teachers' Federation*, Mills J noted that "the Supreme Court determined [in *Lakeside*] that an expulsion of a member from a Hutterite colony could be reviewed by the courts to ensure that the rules of the colony and their principles of natural justice were followed".[49] An even more explicit iteration of this is found in *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada* (*Hart*), in which the Court cited *Lakeside* in support of the following principle: "[C]ourts will interfere in the internal affairs of a self-governing organization in only two situations: where the organization's internal processes are unfair or do not meet the requirements of natural justice; or where the aggrieved party has exhausted the organization's internal processes".[50]

All of these interpretations of *Lakeside* are technically incorrect. Strictly speaking, what *Lakeside* affirms is that on those occasions *when* the court exercises its jurisdiction with respect to the decision of a religious association, *then* it will be the case that ecclesiastical procedures may be analyzed in terms of whether they comply with the rules of natural justice (or the association's own internal rules). Put another way, the *Lakeside* case simply sets out the methodological approach that is applicable *if* a particular case has been deemed justiciable: if the matter is a justiciable one, then the courts will look to determine whether the rules of natural justice have been complied with. On the other hand, if the matter is *not* justiciable in the first place, then there is no need

48. MH Ogilvie, "Ecclesiastical Law—Jurisdiction of Civil Courts—Governing Documents of Religious Organizations—Natural Justice: *Lakeside Colony of Hutterian Brethren v Hofer*" (1993) 72:2 Can Bar Rev 238 at 245 [Ogilvie, "Ecclesiastical Law"]. See also MH Ogilvie, "Three Recent Cases Confirm Canadian Approach to Church Property Disputes" (2015) 93:2 Can Bar Rev 537 at 546; Ogilvie, *Religious Institutions*, *supra* note 4 at 219, 313. Ogilvie cites *Lakeside* in support of the notion that "church tribunals are required to comply with the rules of natural justice—in particular, the rights of the parties to know the case, to reply to the case, and to have an unbiased tribunal—and judicial intervention will occur where there has been failure to comply with these rights". *Ibid* at 219.

49. 2015 SKQB 94 at para 8, 98 Admin LR (5th) 15.

50. 2011 ONCA 728 at para 19, 344 DLR (4th) 332 [*Hart*] (this case will be discussed in more detail below). See also *Boucher v Métis Nation of Alberta Association*, 2009 ABCA 5, 88 Admin LR (4th) 305. There, the Alberta Court of Appeal expressed a somewhat agnostic view of *Lakeside*'s *ratio decidendi*. In that case, the applicant sought to have the decision of the defendant quashed, and at issue was whether or not the defendant's decision was subject to judicial review. Writing on behalf of the Court, Côté JA stated: "It is argued that breach of the rules of natural justice would also be a ground to quash a decision of a private consensual tribunal: see *Lakeside v Hofer*, *supra*. I do not have to decide whether that proposition of law is correct or not, because I see no such breach here." *Ibid* at para 18.

to proceed with any analysis concerning a religious tribunal's adherence to the principles of natural justice.[51]

Unfortunately, misinterpretations of *Lakeside* have led to confusion over the relation, or distinction, between justiciability and natural justice. To a certain extent, this confusion is unsurprising. Given that *Lakeside* neither involved, nor required, a comprehensive analysis of this distinction, there was—and still remains—a lack of clarity in this area. Indeed, this lack of clarity is at the root of why judicial analysis on the issue of jurisdiction, or justiciability, has developed in the troubling fashion evidenced in *Wall*.

*E. Notable Post-*Lakeside *Cases:* Hart *and* Sandhu

Two other cases warrant some consideration when it comes to the issue of justiciability in the context of religion.[52] One of these is *Hart*, which was referenced above in connection to its misinterpretation of *Lakeside*. In *Hart*, a Roman Catholic priest was removed from office by his Archdiocese, leading him to commence a civil action alleging constructive dismissal. The action was ultimately dismissed, largely on the grounds that Hart's failure to exhaust the available ecclesiastical processes effectively prohibited him from having his matter determined before a civil court. The Ontario Court of Appeal framed its analysis of the matter in this way:

> The courts will interfere in the internal affairs of a self-governing organization in only two situations: where the organization's internal processes are unfair or do not meet the requirements of natural justice; or where the aggrieved party has exhausted the organization's internal processes. In the latter case, subject to any enabling statutory provision, the reviewing court will not consider the merits of the internal decision, but will determine only whether the decision was carried out in accordance with the organization's rules and the requirements of natural justice.[53]

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51. This notion is entirely consistent with the remarks of Huband JA, who affirmed that: "Where an issue, such as the validity of excommunication from a religious body, impacts solely on the individual's status within a voluntary association, the court will not become involved in adjudicating the matter. *It makes no difference whether the procedures for excommunication comply with the requirements of natural justice or not.*" *Lakeside* MBCA, *supra* note 36 at 222 [emphasis added].

52. In addition to these two cases, I would add a brief comment on the majority's reliance upon *Mott-Trille v Steed*. See *Wall*, *supra* note 6 at paras 17–19. Factually, the case is of limited analogical utility, as *Mott-Trille v Steed* involved a procedural context that was entirely disparate to that found in cases such as *Lakeside* or *Wall*. It did not involve the prospect of reviewing a religious tribunal's decision, nor was it framed as any sort of judicial of review at all; rather, it was a civil action aimed at temporarily inhibiting the operation of a religious tribunal. See *Mott-Trille v Steed* (1996), 27 OR (3d) 486, 1996 CanLII 7955 (Sup Ct).

53. *Hart*, *supra* note 50 at para 19. See also *Levitts Kosher Foods Inc v Levin* (2004), 45 OR (3d) 147, 175 DLR (4th) 471 (Sup Ct); *Kong v Vancouver Chinese Baptist Church*, 2014 BCSC 1424, 17 CCEL (4th) 108 [*Kong*]. Somewhat akin to the circumstances in *Hart*, *Kong* also related to the termination of a pastor from his church. Unlike *Hart*, however, *Kong* involved no formal

As mentioned already, the Court's assertion here involves an erroneous interpretation of the *ratio* in *Lakeside*. Indeed, this faulty understanding is also evidenced by the confusing analytical framework constructed in *Hart*. For while the ruling ostensibly presents two distinct categories under which court interference would be warranted, these both essentially boil down to the issue of natural justice. On the one hand, the Court stated that if there is a breach of natural justice in the organization's processes, then judicial interference is justified. On the other hand, if internal processes are exhausted, then judicial interference can also be justified, *if* there is a breach of natural justice (or the association's own internal rules). Consequently, it is clear that natural justice is in fact the central issue in both components, making it difficult to locate any substantive distinction between the two categories articulated in *Hart*.

In fairness, the intention of the Court in *Hart* was certainly reasonable. Clearly, its aim was to affirm the existence of a type of *sine qua non*, one that required an aggrieved party to exhaust all internal processes before turning to the courts. Despite this, however, the resulting *ratio* was rather muddled, as it engendered an odd two-component framework, with both components identifying adherence to natural justice as the primary object of inquiry. Thus, while the ruling in *Hart* certainly makes some sense in its own particular context, its *ratio* only adds to the already existing ambiguity, post-*Lakeside*, on the relationship between justiciability and natural justice when it comes to reviewing a religious association's decisions. And in *Wall*, the majority unfortunately cited *Hart* reflexively, without scrutinizing either its odd construction or its misinterpretation of *Lakeside*.

A second case that warrants brief consideration is *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta* (*Sandhu*).[54] In *Sandhu*, the applicants applied to the Court to wind up, or take over the Siri Guru Nanak Sikh Gurdwara (Gurdwara Society), arguing that the Gurdwara Society was wrongfully refusing membership to qualified individuals, and was failing to hold elections for its executive committee. Yet in seeking this relief, the applicants did not frame their matter as a judicial review of a religious tribunal's decision. Rather, given that the Gurdwara Society was incorporated under the *Religious Societies' Land Act*, the applicants connected their application to a particular section of that Act, as section 25(1) explicitly permitted a court to dissolve or liquidate a society.[55] Accordingly, given that the *Religious Societies' Land Act* provided a

ecclesiastical procedure that governed the pastor's termination. Consequently, the Court in *Kong* had no difficulty treating the matter as it would a typical employment law case. *Ibid.*

54. 2015 ABCA 101, 382 DLR (4th) 150 [*Sandhu*], leave to appeal to SCC refused, 36426 (13 August 2015).

55. RSA 2000, c R–15 (for all intents and purposes, section 25(1) of this Act is analogous to the dissolution or liquidation provisions under Part 17 of the *Business Corporations Act*, RSA 2000, c B–9).

statutory grounding for the Court's interference, and given further that the dispute was not of a substantively religious character, judicial intervention was easily justified. In other words, *Sandhu* involved the consideration of two factors—the presence of a statutory context and the absence of a religious dispute—that related to the Court's determination of whether the matter was justiciable.

Unfortunately, the majority in *Wall* did not address the relevance of the underlying statutory framework in *Sandhu*. Justice Wakeling's dissent, in contrast, considered this very type of distinguishing feature:

> Religious associations with the legal status attributable to an enactment that itself allows for enforcement of its terms by court order presents different questions. While the same religious freedom and associational values are at play, it may be difficult to conclude that the incorporated religious association has not made legally binding promises to its members to utilize a stipulated procedure before depriving a person of membership in the incorporated religious association.[56]

Accordingly, Wakeling JA recognized that in some circumstances, a statutory framework could explicitly authorize, and in some cases even mandate, judicial intervention in the affairs of a religious association. This was precisely what occurred in *Sandhu*, where the application of the *Religious Societies' Land Act* permitted the Court to resolve what was importantly characterized as a purely "temporal" dispute.[57]

II. The Majority's Conclusions in *Wall*: Lowering the Threshold

Following from its rather perfunctory review of the aforementioned jurisprudence, the majority in *Wall* affirmed that: "[A] court has jurisdiction to review the decision of a religious organization when a breach of the rules of natural justice is alleged".[58] In articulating the issue of jurisdiction in this man-

56. *Wall*, *supra* note 6 at para 114, Wakeling JA, dissenting. In a related footnote, Wakeling JA specifically referenced *Sandhu*, as well as *Lutz v Faith Lutheran Church of Kelowna*. *Lutz* involved the expulsion of several members from Faith Lutheran Church, four of whom essentially applied for a judicial review of the decision to expel them. On its face, the matter would appear similar to the one before the Court in *Wall* (or even *Lakeside*). Yet in a critical respect, the circumstances differed. Given that Faith Lutheran was a registered society under British Columbia's *Society Act*, the church was bound by its provisions, and the expelled members brought their application with specific reference to section 85 of the *Society Act*. See *Lutz v Faith Lutheran Church of Kelowna*, 2009 BCSC 59, 2009 CarswellBC 93 (WL Can) [*Lutz*].

57. *Sandhu*, *supra* note 54 at para 23.

58. *Supra* note 6 at para 22.

ner, the majority actually broadened the gamut of situations that would fall within the purview of the Court—for according to the majority ruling, it would seem that a matter becomes justiciable as soon as a breach of natural justice is merely *alleged*.[59]

The majority's ruling in *Wall* is troubling, for two very significant reasons. First and perhaps foremost, it is inimical to the general judicial comportment towards religion reflected in *Amselem*, i.e., that: "Secular judicial determinations of theological or religious disputes . . . unjustifiably entangle the court in the affairs of religion."[60] A similar sentiment was echoed in the dissent of Wakeling JA, who addressed the matter in terms of "judicial neutrality": "[J]udicial neutrality in religious matters is essential in a liberal democracy. This is compromised any time a court adjudicates a religious controversy."[61] Indeed, the Supreme Court has recently stressed this very same principle in *Mouvement laïque québécois v Saguenay (City)* (*Saguenay*), in which Gascon J affirmed that: "[T]he evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard."[62] In *Wall*, the majority's ruling is rather incongruous with this "neutral" comportment towards religion.

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59. This same point is noted by Kirk Lambrecht, who notes that:

> The strict *ratio decidendi* of the majority decision . . . is that 'a court has jurisdiction to review the decision of a religious organization when a breach of the rules of natural justice is alleged.' . . . It follows from this that, in Alberta, the capacity to bring judicial review from decisions of religious tribunals is not limited to cases in which property or civil rights are at stake, but now extends at least to situations in which it is alleged that the decision of the religious organization breached the rules of natural justice.

Kirk N Lambrecht, "Breaking Case Law: Rules of Natural Justice Apply to Religious Organizations in Alberta" (20 September 2016), *Shores Jardine LLP* (blog) at 2, online: <shoresjardine.com/website/wp-content/uploads/2016/09/2016-09-20-Rules-of-Natural-Justice-Apply-to-Religious-Organizations-in-Alberta.pdf>. See also Shaun Fluker, "Does Judicial Review Apply to Decisions Made by Religious Groups?" (15 September 2016), *ABlawg* (blog), online: <ablawg.ca/2016/09/15/does-judicial-review-apply-to-religious-groups/>. As Fluker stated when interviewed for a story on the decision, it is on this issue "where the majority sticks its neck out . . . the majority decides [the case] on the pure basis that there's an allegation that natural justice has not been followed." Jillian Kestler-D'Mours, "Court Backs Judicial Review of Church Ruling" *The Lawyer's Daily* (6 October 2016), online: <www.thelawyersdaily.ca/articles/1725/court-backs-judicial-review-of-church-ruling> (quoting Fluker).

60. *Supra* note 1 at para 50.

61. *Wall*, *supra* note 6 at para 122, Wakeling JA, dissenting.

62. 2015 SCC 16 at para 72, [2015] 2 SCR 3 [*Saguenay*] (Gascon J's remarks here build upon Lebel J's dissent in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*. 2004 SCC 48 at paras 66–67, [2004] 2 SCR 650). See also Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012) 45:2 UBC L Rev 495.

To be sure, the concept of neutrality articulated in *Saguenay* related specifically to the position of law, or the state, vis-à-vis religious beliefs. As Gascon J went on to note, this notion of neutrality "requires that the state abstain from taking any position and . . . avoid adhering to a particular belief".[63]

Yet broadly speaking, neutrality can manifest itself in conceptually distinct forms, depending on the context. In some instances, for example, the issue of neutrality can require the judiciary to analyze, manage, and curate competing positions between religious associations, or rather voluntary associations generally.[64] Such is certainly the case in *Trinity Western University v The Law Society of British Columbia* (*TWU*), where the Supreme Court is faced with a multitude of intervenors, each claiming a particular stake in the case, largely in connection to constitutional principles of equality and freedom of conscience and religion.[65] In cases such as *TWU*, then, judicial neutrality might be seen conceptually as involving a type of interfaith, or rather inter-association neutrality.[66]

While *Wall* also involves a number of intervenors at the Supreme Court level,[67] the form of neutrality in that case takes on a slightly different theoretical complexion. In *Wall*, the particular circumstances demand attention to the

63. *Supra* note 62 at para 72.

64. See Benjamin L Berger, "Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed" (2011) 19:2 Const Forum Const 41 [Berger, "Theoretical Issues"]. By using the term "curate", I would here invoke the words of Berger, who notes that: "[Law's] role is to sit above the realm of the cultural, curating but not itself participating in the world of vying ontologies, epistemologies, and metaphysics that is incumbent in a society marked by deep cultural and religious difference." *Ibid* at 49–50.

65. 2016 BCCA 423, 405 DLR (4th) 16, leave to appeal to SCC granted, 37318 (23 February 2017). See Paula Kulig, "Chief Justice's Rare Order in Trinity Western Case Ensures 'All Voices Could be Heard'", *The Lawyer's Daily* (9 August 2017), online: <www.thelawyersdaily.ca/articles/4375/chief-justice-s-rare-order-in-trinity-western-case-ensures-all-voices-could-be-heard> (even prior to the hearing of the appeal, the Supreme Court's procedural tack has generated significant attention, as McLachlin CJC varied an earlier order by Wagner J, increasing the number of intervenors from nine to twenty-six).

66. The phrase "inter-association" is more apt, given that some intervenors have interests that differ from those who have some form of a "religious" interest.

67. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, (24 August 2017), SCC 37273, (order) online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37273> (order granting the following organizations leave to intervene: the Canadian Council of Christian Charities; the Association for Reformed Political Action Canada; the British Columbia Civil Liberties Association; the Canadian Constitution Foundation; the Christian Legal Fellowship; the Evangelical Fellowship of Canada and the Catholic Civil Rights League (jointly); the Seventh-Day Adventist Church in Canada, the Church of Jesus Christ of Latter-Day Saints in Canada; the World Sikh Organization of Canada; and the Justice Centre for Constitutional Freedoms).

issue of *intra*-association neutrality on the part of the judiciary. In other words, the particular form of neutrality here does not relate fundamentally to the judiciary's proper comportment to the claims of various religious or other voluntary associations (regardless of the number of intervenors with varying claims). Rather, the form of neutrality in *Wall* is one in which the judiciary is required to "abstain from taking a position" in an *intra-faith* dispute.[68]

None of this discussion on neutrality, however, is intended to suggest that the presence of any religious component is, in itself, sufficient to automatically render the matter immune to judicial adjudication. On the contrary, as Abella J noted in *Bruker v Marcovitz*: "The fact that a dispute has a religious aspect does not by itself make it non-justiciable."[69] Nonetheless, recognizing that the judicial ethos reflected in cases such as *Amselem* and *Saguenay* aligns with Canada's commitment to liberal democracy, the law must be circumspect when it comes to involving itself in the affairs of religion. As McLachlin CJC has noted, the law's relationship with religion involves a balancing act:

> The struggle faced by the courts is one of balancing. On the one hand stands society's need for adherence to the rule of law . . . For society to function properly it must be able to depend on some general consensus with respect to the norms that should be manifested in the law. The authority of the rule of law depends upon this. On the other hand, in Canadian society there is the value that we place upon multiculturalism and diversity, which brings with it a commitment to freedom of religion.[70]

The majority ruling in *Wall* ultimately fails to perform this task of balancing. In part, this failure is a predictable consequence of some confounding case law on judicial interference in religious affairs. But the majority's failure goes even further. For in lowering the threshold needed for a religious matter to be rendered justiciable, the majority undermined *Saguenay*'s clarion call on judicial neutrality, and failed to give due consideration to the "struggle" referenced by McLachlin CJC.[71]

The second major critique of the majority's ruling relates to their failure to consider or apply general principles relating to judicial review, or more precisely, the *applicability* of judicial review. The lack of discussion in this regard

68. *Saguenay*, *supra* note 62 at para 72. Understood as an intra-faith dispute, *Wall* is in this regard akin to *Lakeside*. Indeed, this is precisely how McLachlin CJC described the underlying issue in *Lakeside*. See *Lakeside*, *supra* note 7 at 233.

69. *Supra* note 34 at para 41.

70. McLachlin, *supra* note 2 at 22.

71. *Ibid*.

is curious, given that these principles had previously been addressed thoroughly by the Court of Appeal in *Knox v Conservative Party of Canada* (*Knox*):

> Judicial review is a feature of public law whereby the superior courts under s. 96 of the *Constitution Act 1867* engage in surveillance of lower tribunals to ensure that the fundamentals of legality and jurisdiction are respected by those tribunals. The tribunals which are subject to judicial review are, for the most part, those which are court-like in their nature, or administer a function for the benefit of the public on behalf of a level of government. Those which are empowered by legislation to supervise and regulate a trade, profession, industry or employment, those which are empowered by legislation to supervise an element of commerce, business, finance, property or legal rights for the benefit of the public generally, or which set standards for the benefit of the public may also be subject to judicial review. Issues of contractual or property rights as between individuals or as between individuals and organizations, are generally addressed through ordinary court processes at common law, or by statute or through arbitration or alternative dispute resolution as agreed by the parties.
>
> The difficult question is deciding whether a particular body is public or private. The distinction between a public and a private tribunal is whether the tribunal exercises powers and duties of a public nature[.]
>
> . . .
>
> If a tribunal is exercising powers that do not accrue to private organizations, and that are only vested on the tribunal by statute for the benefit of the public, then it is subject to judicial review. Otherwise it is a private consensual tribunal and *prima facie* subject only to private law remedies.[72]

To some extent, this principle from *Knox* is embedded in rule 3.15(1), which references remedies "against a person or body whose decision, act or omission *is subject to judicial review*."[73] Put differently, rule 3.15(1) essentially codifies the issue of whether or not a matter is justiciable.[74]

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72. 2007 ABCA 295 at paras 14–20, 286 DLR (4th) 129.

73. *Rules of Court*, *supra* note 21 [emphasis added]. It should be noted that the *Knox* ruling pre-dated the new *Rules of Court*, which were overhauled in 2010. *Cf Alberta Rules of Court*, AR 390/1968. Nevertheless, r 753.01 was substantially similar to its 2010 successor. It stated: "In this Part, 'person' includes a board, commission, tribunal or other body whose decision, act or omission is subject to judicial review, whether comprised of 1 person or of 2 or more persons acting together and whether or not styled by a collective title." *Ibid*, r 753.01.

74. In stating this, I part slightly from Wakeling JA's dissenting opinion in *Wall*, where he severs the issue of whether the Highwood Congregation is subject to judicial review from the issue of whether the matter was justiciable. In short, Wakeling JA determined that "[p]rivate actors are not subject to judicial review", giving consideration to the requirement in rule 3.15(1) that judicial review must involve "a person or body whose decision, act or omission is subject to judicial review". *Wall*, *supra* note 6 at paras 34–39, Wakeling JA, dissenting. While I certainly believe that there is merit to the assertion that private actors are not, or *should* not be subject to judicial review, I do not view the matter in precisely the same fashion as Wakeling JA. In my reading of rule 3.15(1), it does not appear that the nature of the person or body is, in isolation, determinative of whether or not the matter is subject to judicial review. Rather, the question is whether the matter involves a person or body *whose decision, act or omission is subject to judicial review*. Accordingly, my view is that the legislation reflects an intention to take into consideration *both* the person or body *and* the nature of the decision, act, or omission when determining whether

This underlying issue of justiciability, or the applicability of judicial review, was a critical issue that the majority failed to analyze, particularly as it relates to situations such as *Wall*, where courts are faced with the possibility of becoming embroiled in the affairs of religion. Unfortunately, some of the case law in this area conflates any notion of justiciability with the concept of natural justice, or at the very least obfuscates any distinction between them (e.g., *Hart*). This only compounds the confusion.

Yet the distinction is very much an important one in a case like *Wall*. Indeed, it is this distinction that sets *Wall* apart from other recent forays by the Supreme Court into the area of judicial review. For in cases such as *Doré v Barreau du Québec* (*Doré*), *Loyola High School v Quebec (Attorney General)* (*Loyola*), and *Saguenay*, there was no question that the administrative decisions in question were subject to judicial review.[75] Those cases related largely to the proper methodological approach, or standard of review, applicable in certain circumstances, particularly in relation to the *Canadian Charter of Rights and Freedoms*, or *Charter* values.[76] *Wall* poses a different question altogether: in the context of religious affairs, when is judicial review even appropriate? In other words, when does the decision of a religious tribunal become justiciable? The majority's ruling did not formulate the problem in such terms, and thus failed to address the question of justiciability altogether.

III. Reassessing Judicial Review of Religious Decisions

While the majority ruling in *Wall* is certainly problematic on account of the reasons described above, the ruling was not produced in a vacuum. On the

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the matter is subject to judicial review. Understood in this fashion, rule 3.15(1) contains a very generic codification of the issue of justiciability—for what the rule carries with it is the possibility that there will be certain situations in which a decision, act or omission is *not* subject to judicial review. Recognizing that this conclusion involves a hermeneutic that to my knowledge has not been articulated in relation to rule 3.15(1), I do not think that the language in the rule in any way precludes such an interpretation. On the contrary, as Cameron Hutchison notes: "Superficially, statutes are threadbare vessels of communication. They attempt to regulate complex areas of human activity with relative linguistic brevity. Rules may be vaguely worded so as to encompass, in an abstract sense, a broad range of subject matter." Cameron J Hutchison, "Which *Kraft* of Statutory Interpretation?: A Supreme Court of Canada Trilogy on Intellectual Property Law" (2008) 46:1 Alta L Rev 1 at 2.

75. *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*]; *Saguenay*, *supra* note 62.

76. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. For a discussion of this issue in the wake of *Doré*, see Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 SCLR (2d) 391.

contrary, there has been long-existing (though perhaps unidentified) irregularity and confusion in this area of the law, and the case law in this particular area cannot be harmoniously assembled in a logical manner. Rather, the jurisprudence forms a patchwork, comprised of the arguably obsolescent and overemphasized principle in *St Mary*, various misinterpretations of *Lakeside*, and the well-intentioned but poorly formulated *ratio* in *Hart*.

Thus, to a certain extent at least, *Wall* is simply the product—and perhaps culmination—of this confusing state of affairs. Yet *Wall* also presents an occasion to analyze and reassess the relevant factors involved in justifying judicial interference in religious matters, and in particular, the appropriateness of judicial review with respect to religious decisions. For there is no doubt that the law in this area is in need of recalibration. Accordingly, the remaining parts of this article are aimed at developing a more robust analytical framework applicable to cases such as *Wall*. To this end, I will address two key issues: the impact of the *Charter*, and some of the factors relevant to determining the issue of justiciability.[77]

A. The Relevance and Irrelevance of the Charter

Bearing in mind that the majority in *Wall* made no mention whatsoever of the *Charter*, one might be inclined to view its relevance with skepticism. To a certain extent, this skepticism is warranted—strictly speaking, the *Charter* itself has no applicability to private disputes such as *Wall*. This notion has been axiomatic since *RWDSU v Dolphin Delivery Ltd* (*Dolphin Delivery*):

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77. While I will not explore them here, there are two additional issues worth noting. The first of these is the relevance of contractual obligations in the context of religious disputes. In this regard, Ogilvie argues that:

> Religious associations have long been regarded by the common law to be voluntary associations and the relationships among members to be a multilateral contract. Thus, it is arguable that the "civil right" which provides the allegedly necessary legal nexus for the intervention of civil courts is this contract. If this is so . . . all members of religious organizations are *ipso facto* contractual parties with a contractual right of enforcement of all aspects of the contract, including its doctrinal or procedural provisions, or a remedy in lieu . . . Contractual enforcement not only obviates judicial self-justification but also should quell the fear underlying judicial reluctance to become involved.

Ogilvie, "Ecclesiastical Law", *supra* note 48 at 247–48. Arguing in the opposite direction, Wakeling JA references the following principle in *Cameron v Hogan*: "[Voluntary associations] are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract". *Wall*, *supra* note 6 at n 35, citing *Cameron v Hogan* (1934), 51 CLR 358 at 371 (HCA). The second issue concerns a deeper discussion on the relationship between "natural justice" and the adjudication, or review, of religious decisions. Both of these are topics that warrant further investigation.

> Where . . . private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of *Charter* causes of action or *Charter* defences between individuals.[78]

In *Wall*, there was of course no government action involved, and thus no *Charter* rights were in play. Yet as pointed to in *Dolphin Delivery*, that does not end the matter. In a case such as *Wall*, a *Charter* related inquiry into relevant common law principles may nonetheless be warranted. Building on *Dolphin Delivery*, this notion was addressed by Cory J in *Hill v Church of Scientology of Toronto*:

> The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.[79]

This has led the courts, in limited instances, to "make incremental changes to the common law to bring legal rules into step with a changing society".[80] Thus, shifting back to *Wall*, it is worth noting, as Wakeling JA points out, that: "A court's jurisdiction to interfere may be abridged by the values on which s. 2(a) of the *Charter* is based."[81] In stating this, Wakeling JA is pointing to an

78. *Dolphin Delivery*, *supra* note 27 at 603. See Esau, "Living by Different Law", *supra* note 2 at 123. In the context of religious disputes, Esau puts it thus: "[M]ost of the legal issues . . . that threaten freedom of religion in the sphere of church affairs, such as the judicial review of private associations . . . are areas of law that do not deal with *Charter* guarantees of freedom of religion because the *Charter* simply does not apply to these private disputes". *Ibid.*

79. [1995] 2 SCR 1130 at para 95, 24 OR (3d) 865 [emphasis in original].

80. *R v Salituro*, [1991] 3 SCR 654 at 666, 131 NR 161. In *Salituro*, the Court determined that the common law rule relating to the invalidity of spousal testimony in certain circumstances was inconsistent with *Charter* values. Consequently, that common law rule was changed. *Ibid.* See also Mayo Moran, "Authority, Influence, and Persuasion: Baker, *Charter* values and the Puzzle of Method" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland: Hart, 2004) 389.

81. *Supra* note 6 at para 114, Wakeling JA, dissenting. Notably, it is not only section 2(a) of the *Charter* that is relevant in this regard, but also section 2(d), i.e., freedom of association.

inquiry concerning the consistency between the *Charter* values and the common law principles relevant to the judicial review of religious decisions.

What, then, are the particular *Charter* values espoused by the courts? While there is clearly no exhaustive list, McLachlin CJC identified a number of these in *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia* (*Health Services*): "Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter*."[82] These values have been addressed further by the Supreme Court in a number of cases since *Health Services*, some of which have involved matters of religious belief.[83] Further, in cases such as *Doré* and *Loyola*, *Charter* values have been discussed in connection to the operation of administrative tribunals. In *Wall*, however, that particular type of analysis on *Charter* values is premature, given the preliminary issue of justiciability. Thus, the relevance of *Charter* values in *Wall* involves a different type of inquiry, one that considers the relationship between *Charter* values and the common law principles concerning judicial interference in religious affairs.

In this regard, there is one particular common law principle of note. As indicated earlier, an entrenched principle concerning judicial intervention in religious affairs is derived from *St Mary*: "[I]t is well settled that, unless some property or civil right is affected . . . the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order".[84]

While this principle has been routinely cited in jurisprudence, Wakeling JA rightly noted in *Wall* that: "The decisions which prompted this observation [in *St Mary*] were issued before April 17, 1982, the date the *Charter* came into force."[85] Consequently, it is worth asking whether this principle sufficiently

82. 2007 SCC 27 at para 81, [2007] 2 SCR 391. See also *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 40, [2009] 2 SCR 567 [*Wilson Colony*].

83. See *Doré*, *supra* note 75. See also *Loyola*, *supra* note 75; *Saguenay*, *supra* note 62. For a detailed discussion on the issue of *Charter* values in connection to *Loyola*, see Howard Kislowicz, "Loyola High School v Attorney General of Quebec: On Non-triviality and the Charter Value of Religious Freedom" (2015) 71 SCLR 331.

84. *Supra* note 34 at 591. See also *Lakeside*, *supra* note 7 at 173–74; *Bruker v Marcovitz*, *supra* note 34 at para 128.

85. *Wall*, *supra* note 6 at n 62.

aligns with the values of the *Charter*, particularly in connection to the values of liberty and the enhancement of democracy. For when a court intervenes in the decisions of a religious tribunal, the law certainly encroaches upon the liberty of the religious organization affected, as well as that organization's internal, and most often democratically regulated institutional structure.[86] Accordingly, from the religious organization's perspective, at least, the application of this common law principle does not fully align with *Charter* values.[87] With this in mind, it may be the case that the principle from *St Mary* is somewhat ill-suited, analytically, to the *Charter*-era climate, and ought to be brought "into step with a changing society".[88]

This is not to suggest, of course, that the ability of the courts to exercise their jurisdiction to adjudicate private disputes (such as *Wall*) is suspended on account of common law principles aligning imperfectly with *Charter* values. Nonetheless, to the degree that common law principles are discordant with *Charter* values, the law should be loath to instinctively or reflexively apply these principles as justifications for judicial interference. In other words, given the importance in ensuring that the common law reflects *Charter* values, courts might refrain from overemphasizing the relevance of antiquated principles that are not entirely harmonious with *Charter* values. This does not necessarily mean that the principle from *St Mary* should be altogether ignored or abandoned. But at the very least, my suggestion is that in a case such as *Wall*, the principle

86. In referencing the impact of *Charter* values on a religious organization as a *collective*, I recognize that this outlook strays from the notion that "law shapes religion in its own ideological image and likeness and conceptually confines it to the *individual*". Berger, *Law's Religion*, *supra* note 1 at 100 [emphasis added]. The law's view of individual versus communal elements of religion is a matter that is far from settled. See e.g. *Amselem*, *supra* note 1; *Wilson Colony*, *supra* note 82; *Loyola*, *supra* note 75. For helpful academic commentary on this topic, see Berger, *Law's Religion*, *supra* note 1; Kislowicz, *supra* note 83. This issue will also surely face the Supreme Court again in *TWU*.

87. From Wall's perspective, a counter argument would likely insist that the principle from *St Mary* is consistent with the maintenance of his own *Charter* values. However, it is important to keep in mind that the issue here relates solely to judicial review. Nothing in this analysis adversely impacts Wall's ability to pursue a remedy through a civil action. For example, without commenting on the merits of such a claim, Wall could hypothetically advance a civil action against the respondents, alleging that the membership decision of the tribunal (or its aftermath) interfered with his economic relations.

88. *Salituro*, *supra* note 80 at 666. Further, it bears noting that the principle from *St Mary* (and also *Forbes v Eden*) is largely premised on a concern over civil or proprietary interests arising by virtue of an individual's particular ecclesiastical position or office (e.g., the financial or proprietary benefits accruing to a priest). For all intents and purposes, that same concern can be addressed through the application of contemporary employment law principles, as evidenced in *Kong*. *Supra* note 53. I am skeptical of whether the *St Mary*'s principle was intended to have any tertiary application to ordinary members at large of a voluntary association.

should not be viewed as an independent threshold that prescriptively dictates when a court will intervene. In other words, it should not be treated as the sole measure in determining justiciability. Rather, bearing in mind the relationship of this principle with *Charter* values, it may best be viewed as but one factor relevant to the issue of justiciability, or the question of whether a court *should* intervene.

B. Factors in Determining Justiciability

Building on the above, cases such as *Wall* might well benefit from the application of a broader analytical model, one that considers a variety of factors relevant to the issue of justiciability. And, while recognizing that "it is necessary to leave the content of justiciability open-ended",[89] there are in my view five important factors that should, where applicable, be taken into consideration in cases involving the prospect of reviewing the decision of a religious association.

First, it is in some cases necessary to ask whether there is a statutory framework in place that independently renders the matter justiciable. In *Sandhu*, for example, it was clear that the Gurdwara Society was incorporated under Alberta's *Religious Societies Land Act*, which consequently allowed the Court to intervene in the Gurdwara Society's affairs.[90] In cases such as this, where statutory authority clearly opens the door for judicial intervention, then for better or worse, religious associations are exposed to the possibility of judicial interference in their affairs, at least to the extent permitted by the applicable legislation. In these instances, the issue of justiciability is fairly readily resolved, as judicial intervention may well be easily justified.[91]

A second question relevant to disputes involving religious associations is whether the aggrieved party has exhausted all of the internal appeal mechanisms available. Generally speaking, this is a threshold that must routinely be met in cases of judicial review, as an applicant must demonstrate that "he or she has exhausted all other adequate means of recourse for challenging the

89. Sossin, *supra* note 39 at 9.

90. See also *Lutz*, *supra* note 56.

91. Even where a statutory ground permits courts to intervene without any significant debate, it would be prudent for courts to analyze the issue in terms of justiciability. For in so doing, any justification for judicial interference is explicitly and transparently accounted for.

tribunal's actions."[92] Sossin frames this same point in terms of the "ripeness doctrine": "Absent exceptional circumstances, courts will assume jurisdiction of a matter only when it becomes 'ripe' for judicial determination, in the sense that there is a live controversy, with a sufficient factual foundation, and no other prior, procedural avenues to exhaust."[93] In the context of judicial intervention in the decisions of religious associations, this principle was manifested in *Hart*, where the court affirmed that an aggrieved party must typically exhaust the organization's internal processes before the court will intervene.[94] Consequently, if a party has not availed him or herself to all internal appeal mechanisms, then generally speaking, courts should refrain from finding the matter justiciable.

A third area of inquiry involves determining the essential character of the dispute. In part, this relates to the rather reflexive and frequently asked question in cases involving judicial intervention in the affairs of religious associations: has a property or civil right been engaged? As discussed earlier, *St Mary* set out the well-entrenched principle in this regard, and when cited, this principle has been typically viewed as an independent threshold for determining judicial intervention.

Yet following from the foregoing discussion, the application of this principle clearly requires careful consideration, and would more effectively be identified as one factor among others when it comes to determining a matter's justiciability. I say this for three reasons. First, given the above discussion concerning the relevance of the *Charter*, it is important to consider this pre-*Charter* principle in relation to its consistency with *Charter* values. This is something that courts must remain attuned to. The second reason for treating this factor with some care is that in some cases, a matter involving property or civil rights could be more properly litigated through a different type of action, e.g., a civil claim for wrongful dismissal, or unlawful interference in economic relations.[95]

92. Cristie Ford, "Dogs and Tails: Remedies in Administrative Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2012) 85 at 114. See also *Harelkin v University of Regina*, [1979] 2 SCR 561, 96 DLR (3d) 14.

93. Sossin, *supra* note 39 at 32. See also *R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706, 38 OR (3d) 576 at 720.

94. See *Zebroski v Jehovah's Witnesses*, 87 AR 229, 30 CPC (2d) 197 (CA) [cited to AR]. Similar to *Wall*, *Zebroski v Jehovah's Witnesses* involved the disfellowshipping of certain members, and their subsequent attempt to obtain relief from the court (though in *Zebroski v Jehovah's Witnesses*, an action was commenced by way of a statement of claim, alleging—among other things—a breach of contract and loss of property rights). The defendants in that case succeeded in having certain elements of the claim summarily dismissed, and the plaintiffs appealed. In denying the appeal, the Court of Appeal's rationale was in part based on the fact that the plaintiffs, "knowing about the purpose of the [judicial committee's hearing to have them disfellowshipped], purposely boycotted the hearing, and knowing of their right to a hearing de novo through an appeal, took no appeal". *Ibid* at para 18.

95. See e.g. *Kong*, *supra* note 53.

Finally, it is important to consider this particular factor with careful attention to whether a matter truly involves a property or civil right, or whether the reference to such rights is more of a fictive construction, functioning as a pretext for securing judicial involvement. For in some instances, such as *Lakeside*, the fundamental nature of the dispute can be difficult to ascertain.

Further, even apart from determining whether the dispute involves some sort of property or civil right, it is important to consider the essential character of the dispute on a more general level. Is it, for example, a dispute oriented towards a membership issue? Or perhaps relatedly, is it a dispute that fundamentally relates to divergent theological or doctrinal positions? This is something that also must be carefully scrutinized. If, on the one hand, there is a legal matter at stake, and the dispute is genuinely devoid of any significant theological character, then judicial intervention is more easily justified.[96] On the other hand, if proprietary elements of the dispute are not at the core of the matter, but are ultimately secondary or ancillary to what is essentially a theological or doctrinal dispute, courts should be more reluctant to intervene, giving regard to the need for judicial neutrality.

One further point is worth making in this regard. Using the case of *Wall* as an example, one should not mistake judicial neutrality for condonation of a religious tribunal's decision. As Gascon J noted in *Saguenay:* "True neutrality presupposes abstention, but it does not amount to a stand favouring one view over another. No such inference can be drawn from the state's silence."[97] Thus, in determining that the decision of a religious tribunal does not involve a justiciable issue, courts cannot be taken to endorse the perspective or procedures of the religious association. Rather, abstention, or a finding of non-justiciability, simply means that it is improper for the law to impose its own normative predilections in the circumstances.

A fourth and somewhat related consideration is whether courts possess the requisite analytic capacity to adjudicate certain matters. In instances where a statutory regime applies to a religious association, or in cases where courts are required to examine written rules that govern an organization, there is little doubt that they have the ability to take on such tasks. However, in other cases, as noted by Wakeling JA: "[C]ivil judges are unlikely to have a satisfactory understanding of the religious entities' ecclesiastical law and underlying values. This disadvantage is not ameliorated by their legal training and their experi ence as judges."[98] Accordingly, where the relevant norms or procedures of a re-

96. See e.g. *Sandhu*, *supra* note 54.

97. *Supra* note 62 at para 134. See also Berger, "Theoretical Issues", *supra* note 64.

98. *Wall*, *supra* note 6 at para 121. See also Zechariah Chafee Jr, "The Internal Affairs of Associations Not for Profit" (1930) 43:7 Harv L Rev 993. Chafee writes: "In very many instances the courts have interfered in [church controversies], and consequently have been obliged to write very long opinions on questions which they could not well understand. The result has of-

ligious association are more abstract or esoteric in character, or require hermeneutic appeals to religious texts or authorities, courts are much less suited to analyzing such matters.[99] For as Iacobucci J noted in *Amselem*: "[T]he State is in no position to be, nor should it become, the arbiter of religious dogma".[100]

The fifth and final factor that warrants consideration is whether judicial intervention will have a material effect on a given religious dispute. In other words, what will judicial adjudication ultimately achieve? *Lakeside* perhaps serves as a strong lesson in this regard. Despite Hofer's success before the Supreme Court, the end result was still the same, as Hofer and his supporters were again expelled from Lakeside Colony—the only difference with the second expulsion was that it withstood judicial scrutiny.

Accordingly, it is important that courts give careful attention to whether or not judicial intervention would substantively alter the end result. As Robert Forbes puts it:

> While . . . courts of law do exercise a considerable and increasing jurisdiction to challenge the decision made within the domestic tribunal, there are certain situations where any action that they might take would be futile. People cannot be compelled to agree or to socialize and … any attempt to adjudicate and grant a remedy where no deprivation has resulted will amount at most to a futile attempt to compel that agreement by declaring that the individual is still a member or by enjoining expulsion.[101]

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often been that the judicial review of the highest tribunal of the church is really an appeal from a learned body to an unlearned body." *Ibid* at 1023–24.

99. While there is much to be said on the issue, I believe that this particular point relates also to the curious fact that in some jurisprudence, such as *Lakeside*, religious associations are afforded special identification among other voluntary associations—"courts are slow to exercise jurisdiction over the question of membership in a voluntary association, *especially a religious one*". *Lakeside*, *supra* note 7 at 173–74 [emphasis added]. To my knowledge, the rationale for this special characterization has not been explicated by the courts. While Esau suggests that "[i]n legal terms, Canadian religious organizations are just voluntary associations like sports clubs, stamp-collecting societies, or environmental interest groups", I believe that this is not quite the case. Esau, "Living by Different Law", *supra* note 2 at 111. See also *Wall*, *supra* note 6 at para 82, Wakeling JA, dissenting (where Wakeling JA gives the example of hockey fans debating over the greatest hockey player of all time as an instance of a non-justiciable issue). While I think that there is merit to treating religious associations in the same manner as other voluntary associations from the perspective of the law, I also think that there is typically a soteriological dimension, or "aesthetic" to borrow Berger's language, that does in fact distinguish religious associations from other forms of voluntary associations. See Berger, *Law's Religion*, *supra* note 1 at 57. This, however, is an issue that warrants further discussion.

100. *Supra* note 1 at para 50.

101. Robert E Forbes, "Judicial Review of the Private Decision Maker: The Domestic Tribunal (1976) 15 UWO L Rev 123 at 148. See also *Farren v Pacific Coast Amateur Hockey Association*, 2013 BCSC 498 at para 22, 53 Admin LR (5th) 339. In this case, Groves J noted that:

> [E]ven if the process has *not* been fundamentally fair, a remedy will not *necessarily* follow. The cases indicated that a finding of procedural unfairness should not result in an order for a new hearing if the order would be pointless. In other words, if the Court is confident that a new hearing would garner the same result, there is precedent that the decision should be validated and a new hearing should not be ordered.

Indeed, this same point was raised by Wakeling JA in *Wall*, as he noted that: "Members of groups like [the Highwood Association] cannot be compelled to associate with persons with whom they do not wish to worship."[102] Thus, even though a court could conceivably direct a voluntary association to reinstate a member, the judiciary possesses no practical ability to prevent members of an association from ostracizing (or "shunning") a particular individual, regardless of the individual's formal status as a member.[103]

Conceptually, this fifth factor is related to, though distinct from, the doctrine of mootness, as described by Sopinka J in *Borowski v Canada (Attorney General)*: "The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case."[104] A similar situation presents itself in a situation such as *Wall*. While the case involves a controversy which may affect the rights of the parties, the end result of the controversy is unlikely to be affected by judicial intervention.[105]

In my estimation, the above five factors should, in some combination or another, be considered in cases involving judicial intervention in the affairs or decisions of religious associations. Some of these factors may well carry more weight than others, depending on the circumstances—indeed, a determination of the first two factors may be sufficient in some cases to render a matter either justiciable or non-justiciable. On the whole, however, the question of justiciability should be approached as a type of balancing test, where the various factors are weighed carefully yet discretionally, depending on the particular facts of a case.

Ibid [emphasis in original].

102. *Supra* note 6 at para 131, Wakeling JA, dissenting (relatedly, Wakeling JA noted that in order for a matter to be justiciable, it is necessary that "the outcome of [a controversy] has practical consequences for the disputants or the community or both" at para 80).

103. This same point is expressed pithily, if perhaps flippantly, by Spencer Morrison, who notes that: "Not even the Supreme Court can force people to be friends." Spencer Morrison, "Leviathan Reborn" (18 October 2016), *Canons of Construction* (blog), online: < www.canonsonline.com/2016/10/leviathan-reborn/>.

104. [1989] 1 SCR 342 at 353, 57 DLR (4th) 231. See also Sossin, *supra* note 39 at 107–58.

105. Writing in the context of *Bruker*, Moon makes a related point, noting that members of a religious organization:

> may consider themselves bound not by secular law but by the spiritual norms of their community — by higher law — and by their commitment to each other as members of a spiritual community. And to this we might add, that the legal enforcement of . . . an agreement or undertaking (or the threat of legal enforcement) may undermine the deeper spiritual connections between community members.

Richard Moon, "*Bruker v Marcovitz*: Divorce and the Marriage of Law and Religion" (2008) 42

Further, as indicated earlier, it is important to emphasize that these factors are certainly not intended to be exhaustive. For as, Sossin notes:

> We cannot say all the reasons why a matter may be non-justiciable . . . all one can assert with certainty is that there will always be, and always should be, a boundary between what courts should and should not decide, and further, that this boundary should correspond to predictable and coherent principles.[106]

Thus, while the above noted list of factors is intended to outline some predictable and coherent principles concerning judicial interference in religious affairs, the suitability of these particular factors to all cases is by no means absolute.

Conclusion

While it is trite enough to assert that law's encounters with religion can be inconvenient, and at times even analytically perilous, there may well be instances in which judicial intervention in the decisions of religious associations, or religious tribunals, is warranted. A difficulty, however, lies in determining *when* this interference will be justified, or when a religious association's decision will be one that is justiciable. And given, as William Galston puts it, that "[a] liberal democracy is, among other things, an invitation to struggle over the control of civil associations",[107] the judiciary's challenge in this regard is bound to continue.

Recognizing the adjudicative problems that religious associations pose to the court, and recognizing also the often confusing and somewhat fragmentary nature of existing jurisprudence in the area of judicial intervention in the affairs of religious associations, the foregoing has attempted to set out a more cogent analytical model that could be utilized in this area of the law. To be sure, these recommendations relate primarily to a narrow set of circumstances, involving instances where the judiciary is called upon to examine or review the decisions of religious associations or religious tribunals. When called upon in this regard, courts must first determine whether the matter is justiciable, prior to delving into any substantive analysis. Yet ultimately, this need for greater attention to the issue of justiciability forms only a small piece of a much bigger picture—admittedly, there remains further and much broader-reaching work to be done in hopes of fostering greater analytical efficacy in matters involving law and religion in Canada.

SCLR 37 at 45–46.

106. Sossin, *supra* note 39 at 9. See also *Wall*, *supra* note 6 at para 79.

107. William Galston, "Religion and the Limits of Liberal Democracy" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen's University Press, 2004) 41 at 42.