

GENDER DISCRIMINATION FORBIDDEN: FROM THE GLENS OF ANGUS TO A CHURCH NEAR YOU

M.H. Ogilvie*

The relationship of Christian clergy to their respective denominations for the purposes of “employment” is uncertain in Canadian law. However, a recent decision of the House of Lords, Percy v. Church of Scotland, has clarified the relationship considerably within the context of U.K. law, and offers possibilities for clarifying the situation in Canada. The House of Lords decided that clergy were employees rather than office-holders with the result that public law of general application should apply to the employment relationship in the absence of express provision to the contrary. This outcome may prove significant in relation to denial of employment on grounds of gender and sexual orientation and constitute a challenge to courts defining the operation of section 2(a) of the Charter in any future cases in this area.

En droit canadien, le lien entre les membres du clergé chrétien et leur confession respective aux fins d’« emploi » est nébuleux. Toutefois, une décision récente rendue par la Chambre des Lords dans l’affaire Percy c. Church of Scotland a clarifié ce lien de façon importante dans le contexte du droit applicable au Royaume-Uni et constitue également une occasion de clarifier cette même situation au Canada. La Chambre des Lords a décidé que les membres du clergé sont des employés plutôt que des titulaires d’une fonction et, par conséquent, le droit public d’application générale devrait s’appliquer à la relation d’emploi, en l’absence de dispositions contraires expresses. Cette conclusion, qui peut s’avérer importante dans le cas d’un refus d’engager quelqu’un au motif de son sexe ou de son orientation sexuelle, présente néanmoins certaines difficultés pour les tribunaux qui devront définir l’application de l’alinéa 2a) de la Charte dans le cadre d’affaires ultérieures en la matière.

1. Introduction

Although *Percy v. Church of Scotland*¹ was concerned primarily with a complaint of sexual discrimination by a female minister in the context of a

* Chancellor’s Professor and Professor of Law, Carleton University, of the Bars of Ontario and Nova Scotia

¹ [2006] 2 A.C. 28 (H.L. Scot.) [*Percy*]; see also Frank Cranmer and Scot Peterson,

disciplinary proceeding, the decision of the House of Lords casts considerable light on the nature of the relationship in the common law between a member of the clergy and a church, as well as on the conflicting jurisdictional claims of church and state in relation to the employment of clergy. The decision should be of interest in Canada where these issues occasionally arise in the civil courts, and frequently cause considerable difficulties on a routine basis especially within Protestant denominations. Conflict between clergy and their denominations has increased over the past twenty years, to the extent that the clergy of the United Church of Canada are currently in the process of unionization, something unthinkable a generation ago. The case law in Canada is, frankly, confused,² so it may be that the *Percy* case will prove helpful beyond the hills and glens of Angus in Scotland where it began.

2. *Percy v. Church of Scotland*

The facts were very simple. Helen Percy was ordained as a minister in the Church of Scotland in 1991, appointed as the associate minister of a five-point rural charge in Angus in 1994 and accused of having an improper relationship with a married male elder of the parish in 1997. She had been appointed by the Church's Board of National Mission for a five-year term and was subject, like all ministers in a presbyterian system of church government, to the local presbytery for the conduct of her duties. The presbytery investigated the allegations, found a case to answer and began preparations for an ecclesiastical trial. The Church arranged mediation, at which she was advised to resign; she did resign her appointment and demitted her status as minister. Subsequently regretting this decision, she commenced an action before an Employment Tribunal³ alleging unfair dismissal and sexual discrimination on the ground that the Church had not taken similar action against male ministers known to have had adulterous relationships.

The Employment Tribunal dismissed her application on the ground that it was without jurisdiction by virtue of the *Church of Scotland Act, 1921*,⁴

"Employment, Sex Discrimination and the Churches: The Percy Case" (2006) 8 Eccl. L.J. 392.

² See generally M.H. Ogilvie, "Ecclesiastical Law – Jurisdiction of Civil Courts – Status of Clergy: *McCaw v. United Church of Canada*" (1992) 71 Can. Bar Rev. 597 at 610-15 [Ogilvie, "*McCaw*"]; M.H. Ogilvie, "Christian Clergy and the Law of Employment: Office-Holders, Employees or Outlaws?" (1999) 3 J.C.L.A.C. 2 [Ogilvie, "Christian Clergy"].

³ Employment Tribunals are statutory adjudicative bodies in the United Kingdom which consider disputes between employers and employees arising from the employment relationship.

⁴ (U.K.), 11 & 12 Geo. V, c. 29, s. 3; Schedule 1, Declaratory Articles, art. IV.

which gave exclusive jurisdiction over “matters spiritual” to the courts of the Church of Scotland. The Employment Appeal Tribunal dismissed her appeal and the Court of Session⁵ dismissed Percy’s further appeal, on the ground that she had no contract of employment within the meaning of the *Sex Discrimination Act*.⁶ Percy appealed successfully to the House of Lords.

The Appellate Committee of the House of Lords considered two questions: (1) Was Percy’s relationship with the Church “employment” for the purposes of the *Sex Discrimination Act*? and (2) Was Percy’s claim a “spiritual matter” within the *Church of Scotland Act, 1921*, and therefore within the exclusive jurisdiction of the courts of the Church of Scotland? In a four to one decision, the Law Lords answered the first question affirmatively; all five delivered speeches. It was unnecessary to answer the second question. Lord Nicholls canvassed the earlier case law⁷ in which the courts had consistently found that a minister of religion is not an employee of that minister’s denomination and identified several strands of reasoning in these cases. In some cases,⁸ the court found that the claimant was appointed to an ecclesiastical office, rather than entering into a contract of service as an employee. Lord Nicholls noted that this distinction lost much of its legal significance once the law protected employees from unfair dismissal.⁹ He further noted the ambiguity in the word “office,” which may refer to a position of ancient common law origin such as the office of constable, or to holding a position in an organization such as president or chairman. A further ambiguity in the word is that an office-holder may also be an employee and merely describing the position as an office does not preclude finding a contract of employment once all the circumstances are considered.¹⁰

A second strand of reasoning in the cases according to Lord Nicholls is a presumption against an intention to create legal relations,¹¹ but this finding is doubtful in light of the fact that most church appointments look like employment contracts with terms covering duties, salary, holidays and

⁵ 2001 S.C. 757 (IH).

⁶ (U.K.), 1975, c. 65, s. 82(1).

⁷ See *infra* note 8.

⁸ *In re National Insurance Act 1911*; *In re Employment of Church of England Curates*, [1912] 2 Ch. 563; *Scottish Insurance Commissioners v. Church of Scotland* 1914 S.C. 16 [*Church of Scotland*]; *President of the Methodist Conference v. Parfitt*, [1983] 3 All E.R. 747 (C.A.) [*Parfitt*]; *Davies v. Presbyterian Church of Wales*, [1986] 1 All E.R. 705 (H.L.) [*Davies*]; *Diocese of Southwark v. Coker*, [1998] I.C.R. 140 [*Coker*].

⁹ It is uncertain if this is the case in Canada; see Geoffrey England and Innis Christie, *Employment Law in Canada*, 4th ed. (Toronto: Butterworths, 2005) at c. 2.

¹⁰ *Percy*, *supra* note 1 at 39-40.

¹¹ *Parfitt*, *supra* note 8; *Davies*, *supra* note 8; *Coker*, *supra* note 8.

in some instances accommodation, set out in writing.¹² A final strand is the difficulty in these cases in identifying the “employer” because in many complex church organizations a different body may be responsible for appointment, discipline and dismissal, or payment; moreover, the “church” may not even be an entity capable of making a contract or of suing or being sued, but rather an umbrella organization fragmented into numerous jurisdictions, boards and committees.¹³

Once these doubts were cast on the earlier case law, the outcome in *Percy* was clear for Lord Nicholls. Section 82 (1) of the *Sex Discrimination Act* defines employment as a contract of service or “a contract personally to execute any work or labour;” Lord Nicholls concluded that Percy’s relationship was one of employment under either branch of the definition. He then made shorter work of the second issue. While acknowledging that the *Church of Scotland Act, 1921*, recognized that in spiritual matters the courts of the Church have exclusive jurisdiction, Lord Nicholls asserted that contracts of employment were not a spiritual matter, nor was a sex discrimination claim which is founded on a contractual relationship.¹⁴ He distinguished the Church’s exercise of discipline over clergy, upheld in *Logan v. Presbytery of Dumbarton*,¹⁵ on the ground that once a civil law contract of employment is entered, the parties have relinquished the authority of church courts in favour of civil jurisdiction.¹⁶ Thus Percy’s claim in contract should proceed before an Employment Tribunal for adjudication.

Lord Hope also spoke extensively for the majority, beginning by stating his agreement with the earlier law holding that clergy are office-holders and not necessarily governed by contracts of employment. He agreed with Lord Nicholls, however, that a person could both hold an office and be an employee by virtue of a contract setting out the duties of the office. None of this ultimately mattered for Lord Hope because he found that it was not possible to contract out of the *Sex Discrimination Act*,¹⁷ and by arguing that the Act was not applicable, the Church was effectively attempting to contract out.¹⁸ Moreover, in his view there was a contract because all the legal indices of a contract

¹² *Percy*, *supra* note 1 at 40-41.

¹³ *Ibid.* at 41.

¹⁴ *Ibid.* at 42-43.

¹⁵ 1995 S.L.T. 1228 (S.C.). See also M.H. Ogilvie, “Ecclesiastical Law – Strict Separation of Church and State – Parliamentary Sovereignty: *Logan v. Presbytery of Dumbarton*” (1997) 76 Can. Bar Rev. 529 [Ogilvie, “*Logan*”].

¹⁶ *Percy*, *supra* note 1 at 43-44.

¹⁷ *Supra* note 6, ss. 6(2)(b), 77.

¹⁸ *Percy*, *supra* note 1 at 60.

were present and the contract fell within the definition of employment under the Act because Percy undertook personally to execute a work or labour.¹⁹ Lord Hope added that the contract was with the Church of Scotland Board of National Mission and not the presbytery or the parish. Although the Church of Scotland is an unincorporated association, it operates through various bodies and the body which enters into agreements may sue or be sued.²⁰ Turning to the jurisdictional issue, Lord Hope concluded, after a circuitous peregrination through the European Union (E.U.) *Equal Treatment Directive*,²¹ by agreeing with Lord Nicholls that a claim of unlawful discrimination is a civil matter not a spiritual one, and therefore within the competence of an Employment Tribunal.

Lord Scott briefly agreed with the other Law Lords speaking for the majority,²² but Baroness Hale added to those reasons. In her view, the common law distinction of servant and office-holder was of no utility in deciding Percy's case, since an office-holder could also be an employee in appropriate circumstances. Percy was probably not an office-holder in the classic common law sense because her position was not independent from the person who filled it; rather she was an employee with a written contract made with legal intention. She could have sued had she not been paid or been wrongly deprived of her manse. She was an employee for the purposes of the Act and the E.U. *Equal Treatment Directive*.²³ There should be no general presumption in the law against finding contracts for professionals who also serve higher principles and values than those determined by their employers; it is difficult to discern any difference in principle between clergy employed to minister to spiritual needs and doctors employed to minister to bodily needs, or judges appointed to administer the law.²⁴

Baroness Hale had even sharper words for the jurisdictional argument. While she conceded that the Church of Scotland was free to decide belief, worship, polity and qualifications for ministry, the processes by which it decides membership and office are subject to the law.²⁵ In her view, it would have been surprising that the Church of Scotland alone was exempt from the *Sex Discrimination Act*, particularly in light of the fact that it already admitted women as ministers on the same terms as men prior to

¹⁹ *Ibid.* at 62.

²⁰ *Ibid.* at 63.

²¹ *Ibid.* at 63-69; Council Directive 76/207/EEC (OJ 1976 L 139 at 40).

²² *Percy*, *supra* note 1 at 69-70.

²³ *Ibid.* at 73.

²⁴ *Ibid.* at 74.

²⁵ *Ibid.*

that Act.²⁶ Finally, she expressed the hope that a mediated solution would be found for Percy.²⁷

In dissent, Lord Hoffmann considered the distinction between an office-holder and an employee to be well-established and understood.²⁸ Office-holders such as constables, trustees or company directors are required to render services but have no employer, although some, such as a company director, may also have an employment contract which is a separate relationship. He further accepted the earlier case law that a minister of the church is an office-holder; he attributed the difficulties in understanding what that meant to statements made in the more recent cases, such as the idea that a minister is a “servant of God”²⁹ or is appointed without legal intention.³⁰ In Lord Hoffmann’s view, such statements may be “true for a believer but superfluous metaphor for a lawyer. As Laplace told Napoleon, there is no need for such a hypothesis. It would be no more (or less) illuminating to say that a constable was the servant of the law.”³¹

Once superfluous metaphors were cast aside, Lord Hoffmann characterized the relationship as made with intention to create legal relations not in a contract of employment but in an office with well-recognized rights and duties pursuant to procedures for appointment and dismissal closely resembling those in employment.³² As an office-holder, Percy had no contract of employment and therefore was not subject to the *Sex Discrimination Act*. Moreover, while the Act made provision to bring some office-holders within its terms, no such provision was made for clergy.³³ Once Lord Hoffmann found Percy’s case to fall outside the scope of the Act, he did not have to consider the application of the *Church of Scotland Act, 1921*, although he noted that if the *Sex Discrimination Act* had applied, he thought it unlikely that it was not intended to apply to ministers of the Church of Scotland.³⁴ He would have dismissed the appeal.

²⁶ *Ibid.* at 75.

²⁷ *Ibid.*

²⁸ *Ibid.* at 46.

²⁹ *Davies*, *supra* note 8, *per* Templeman L.J., cited in *Percy*, *supra* note 1 at 48.

³⁰ *Coker*, *supra* note 8, *per* Mummery L.J., cited in *Percy*, *supra* note 1 at 48.

³¹ *Percy*, *supra* note 1 at 48.

³² *Ibid.* at 48-49.

³³ *Ibid.* at 49; Lord Hoffmann also thought that subsequent changes in the EU *Equal Treatment Directive* (Council Directive 2002/73/EC (OJ 2002 L 269 at 15)) might have impacted on the case. See also Julian Rivers, “Law, Religion and Gender Equality” (2007) 9 *Eccl. L.J.* 24.

³⁴ *Percy*, *ibid.*

Within the context of the United Kingdom, several aspects of this case are significant: (1) the assimilation of office and employment contract in the relationship between a minister and a denomination, with the result of virtually extinguishing the earlier conception of a minister as solely an office-holder; (2) the significant weakening of the constitutional position of the Church of Scotland, from the legal monopoly associated with its establishment status within the constitution of the United Kingdom since the Union of 1707³⁵ - by which it was granted exclusive power over offices within the Church, a grant reinforced by the 1921 Act³⁶ - to a status similar to a voluntary association; (3) the attack on the free exercise of religion by judicial intervention in ecclesiastical affairs, instead of allowing church members to vote with their feet when unfairness is perceived; and (4) the implicit doubts cast on the concept of a church as an autonomous bearer of rights, a concept endorsed by the *Treaty of Amsterdam*³⁷ for all churches in the E.U. The outcome in *Percy* also has significant ramifications for other churches. By providing civil redress for sex discrimination, the House of Lords implicitly stated that sex discrimination is not a religious matter, so that churches which make sexual or gender distinctions, for example in relation to ordination and employment or marriage, would by analogy be subject to civil law rather than ecclesiastical law, that is, to decisions based on equality rather than theology.

3. *The Canadian Cases*

The *Percy* decision also has implications for the adjudication of clergy employment matters in Canada, should Canadian courts continue to look to British jurisprudence on the subject. With the exception of one case, the Canadian cases have only considered the nature of the relationship between clergy and churches where there was legislation defining employment in general terms (requiring a court to give content to the definition), or where there was no legislation at all (requiring a court to make a common law determination of the matter).

In the exceptional case, *Salvation Army Canada East v. Ontario*,³⁸ the employment relationship was expressly characterized by the legislation at issue³⁹ as any situation in which a person receives remuneration to which

³⁵ See generally Francis Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen: Aberdeen University Press, 1980).

³⁶ See Ogilvie, "Logan," *supra* note 15.

³⁷ Declaration 11 on the status of churches and confessional organizations, Official Journal C340.

³⁸ (1992), 88 D.L.R. (4th) 238 (Ont. Gen. Div.) [*Salvation Army*]. For a fuller discussion of the following overview of the Canadian law, see Ogilvie, "Christian Clergy," *supra* note 2.

³⁹ *Pension Benefits Act*, S.O. 1987, c. 38.

a pension plan is related. The Salvation Army had refused to comply with an order from the Pension Commission of Ontario to bring the administration of its pension plan into compliance with the governing legislation on the grounds that officers were not employees and that the statute constituted an infringement of its right to freedom of religion under section 2(a) of the *Charter of Rights and Freedoms*.⁴⁰ In its view, the relationship with its officers was one of voluntarism and the internal rules expressly stated that officers voluntarily work for God, not on an employment basis, and that the Salvation Army had discretion to provide an allowance to cover basic needs during service and after retirement. The Ontario General Division dismissed the action on the grounds that the denomination had not discharged the onus of proving that its pension plan was contrary to its essential beliefs; rather, the pension plan was described as a “secular aspect of the practice of their religion,”⁴¹ with the result that the s. 2(a) rights of both the organization and the officers were not infringed. They remained free to subscribe to their doctrinal beliefs and work to advance them. Moreover, the social policy concerns about pension adequacy, especially for elderly women, which lay behind the legislative changes about which the denomination complained did not, in the opinion of the Court, impinge on religious freedom.

By contrast, other cases have been concerned with statutory definitions of employment which are not so specific and permit room for judicial interpretation. In these cases, the courts have largely looked to common law definitions of contract of employment or contract of service in order to give content to the legislation. The cases may be divided into two categories, cases where church constitutions expressly state that clergy are not in a contractual relationship and cases which implicitly exclude contract by church constitutions which characterize clergy in purely ecclesiastical terms.

The first category is concerned with cases involving the Salvation Army only, because that denomination may be unique in making explicit in its internal constitutional documents that its officers are not employed by contract, but are volunteers holding an office. The courts have accepted this characterization, and found, for example, that an officer injured in a workplace accident could not claim worker’s compensation where the legislation applied to a contract of service.⁴² Nor could an officer successfully sue for damages for wrongful dismissal as an employee when

⁴⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴¹ *Salvation Army*, *supra* note 38 at 281.

⁴² *Rogers v. Booth*, [1937] 2 All E.R. 751 (C.A.).

his position was terminated because his wife had separated from him.⁴³ In both situations courts accepted the denomination's argument that the position was a spiritual office and not one of contract, without much further consideration.

In the second group of cases, the courts have also shied away from characterizing clergy as employees under general legislation said to apply to contracts of service. This was the approach in early English cases where clergy failed to qualify for national insurance because the courts construed contracts of service to exclude independent contractors and found clergy to be office-holders whose rights and duties are not defined by contract.⁴⁴ These cases were not based on any spiritual characterization of the positions; the later English cases, however, introduced this characterization when deciding that clergy were not employees under contracts of service with a statutory right to proceed against their denominations in wrongful dismissal.⁴⁵ Notwithstanding the presence of detailed contracts, both the Court of Appeal and the House of Lords found the position of a minister to be outside civil law analogous to the concept of family relations as set out in *Balfour v. Balfour*.⁴⁶

Canadian courts have leaned towards this English approach when defining status at common law but are more ambiguous as to whether clergy are employees or office-holders. In *McCaw v. United Church of Canada*,⁴⁷ a minister ultimately succeeded in damages after removal from a pastoral charge for a controversial and divisive evangelical style of ministry. The minister had to argue that he was an employee in order to succeed in damages for wrongful dismissal, but the Ontario Court of Appeal resisted that characterization. Instead, the Court considered the situation to be somewhat analogous to wrongful dismissal, and awarded a remedy to the minister; they held he had been unfairly treated since the church had not complied with either its own rules of procedure or the rules of natural justice in dismissing him. He was awarded damages to compensate him for lost salary and benefits and his name was ordered to

⁴³ *Lewery v. Salvation Army in Canada* (1993), 104 D.L.R. (4th) 449 (N.B.C.A.).

⁴⁴ *Re Employment of Ministers of the United Methodist Church*, [1912] 107 L.T. 143 (Ch. D.) (probationary minister and minister of Methodist churches); *In re National Insurance Act 1911*, *supra* note 8 (Church of England curate); *Church of Scotland*, *supra* note 8 (assistant ministers of two Presbyterian denominations).

⁴⁵ *Parfitt*, *supra* note 8; *Davies*, *supra* note 8. See also *Coker*, *supra* note 8.

⁴⁶ [1919] 2 K.B. 571 (C.A.). This position has also been taken with respect to non-Christian religions; see *Santokh Singh v. Guru Nanak Gurdwara*, [1990] I.C.R. 309 (C.A.) (Sikh *granthi*) and *Birmingham Mosque Trust Ltd. v. Alavi*, [1992] I.C.R. 435 (E.A.T.) (Muslim *Khateeb*).

⁴⁷ (1991), 82 D.L.R. (4th) 289 (Ont. C.A.). See also Ogilvie, "Christian Clergy," *supra* note 2.

be restored to the church's roll of clergy eligible for pastoral appointment. In short, the Court operated as if the minister was an employee but hesitated to call him one or to consider the issue in any detail at all.

In *Brewer v. Incorporated Synod of the Diocese of Ottawa*,⁴⁸ an Anglican priest whose bishop was unsuccessful in placing him in a parish sued for wrongful dismissal after being notified that his service with the diocese was terminated. The Ontario General Division decided that he was not an employee because there was no intention to create a legal relationship. Rather, a priest, in the view of the court, holds an ecclesiastical office similar to a judicial or quasi-judicial office or an appointed head of state.⁴⁹ Nevertheless, the Court found that the priest could maintain an action in contract against a parish, although not a diocese, to enforce the terms set out in the canons of the diocese concerning the employment of priests. On the facts, the Court concluded that the priest's action against the diocese failed because there was no canonical right to employment in a parish. The implication here was that a member of the clergy is an office-holder not an employee.

4. Discussion

The court's focus in *Brewer* on the fact that the issue of status was raised within the context of an episcopal polity raises an initial question of whether the nature of an ecclesiastical polity might determine the relationship in ecclesiastical law and in civil law between a member of the clergy and a denomination. Christian denominations may be divided into three different types of polities: episcopal (Anglican, Lutheran, some Methodists, Roman Catholics); presbyterian (Presbyterian, Reformed, United Church); and congregational (Baptists, some Methodists, various evangelical congregations). Where the form of polity is congregational — where every congregation is independently self-governed and unconnected to any other in a hierarchical fashion — the relationship between the congregation (usually incorporated) and the minister is expressly one of contract. The minister is employed by a written contract, including terms for dismissal, and both parties have always understood the minister to be an employee for all purposes. Other non-Christian religious groups in Canada also organize on a congregational basis (Jewish synagogues, Muslim mosques, Sikh temples) and use contracts of employment for their leaders.⁵⁰ In these contexts, the status of the clergy is clearly one of employee not office-holder.

⁴⁸ [1996] O.J. No. 634 (Gen. Div.) [*Brewer*].

⁴⁹ *Ibid.* at 636-37.

⁵⁰ *David v. Congregation B'Nai Israel* (1999), 99 C.L.L.C. 210 - O31 (Ont. Gen. Div.).

In episcopal and presbyterian polities, however, the issue seems more complex at first glance. At the outset, it is salutary to remember that the church establishment issues that complicate civil law analysis in the U.K. are irrelevant in Canada where all churches are on an equal and non-establishment footing in relation to the state. Arguments which surface in English and Scottish jurisprudence about Church of England and Church of Scotland clergy, respectively, as office holders within the state do not resonate in Canada.⁵¹ Rather Canadian courts are obliged to characterize their positions in civil law using the usual sources of the common law in legislation and judicial decisions.

The classic common law distinction between office-holder and employee focuses around control through dismissal. Office-holders could be dismissed only for good cause because it was thought that they should be insulated against the improper pressures which might be brought to bear on public office holding,⁵² whereas employees could be, historically, dismissed at will in the old law of master and servant. With the advent of employment protection legislation and employment law *per se*, this distinction evaporated,⁵³ leaving the clergy cases under consideration somewhat isolated until the *Percy* decision in which the House of Lords effectively rendered the characterization of clergy as office-holders irrelevant and nugatory.

This accords with the standard practice in virtually all churches today in relation to financial provision for and degree of control over the performance of clergy.⁵⁴ Although most churches will argue that their clergy are not employees but fulfill a spiritual vocation, clergy typically have contracts which contain similar provisions to standard employment contracts providing for salary (although often called a stipend), vacations, study leave, health and dental coverage, disability, pensions, duties and terms for dismissal. Depending on the polity, the contract may be with a parish or congregation, a diocese, a church board, mission, school or university. Clergy take these arrangements seriously and negotiate the terms to the full extent possible just like any other prospective employee. Indeed, a clergy contract may be virtually identical to a contract of

⁵¹ Philip Petchey, "Ministers of Religion and Employment Rights: An Examination of the Issues" (2003) 7 Eccl. L.J. 157 at 166-168. This reasoning may have confused the court somewhat in *Brewer*, *supra* note 48 where the learned judge appeared to think he was dealing with an established church.

⁵² *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.) at 65-68.

⁵³ The treatment of distinction in England and Christie, *supra* note 9, c. 17, suggests that the distinction is of little importance although there is a parallel body of law relating to the dismissal of statutory public office-holders which treats them like employees.

⁵⁴ What follows repeats my argument of 1992 in these pages that clergy are essentially employees; see Ogilvie, "McCaw," *supra* note 2 at 611-12.

employment for a lay employee working in the same job for the same unit of the church especially in non-pastoral contexts such as boards or universities. Even where their appointment involves “spiritual” functions such as leading worship or administering the sacraments, these might well be set out expressly or implicitly in the contract.

Being ordained, that is, being called to and set apart by ordination for these functions, is simply a job qualification analogous to lawyers being called to the Bar, physicians being licensed by a college of physicians or accountants receiving a professional designation. Achieving a professional qualification or status is simply a prior requirement for subsequent employment for the exercise of that profession. Indeed, churches exercise control in at least four ways analogous to the control an employer may have over a professional employee: (1) by ordination a church bestows a qualification for employment; (2) by placing an ordained person on the roll of those eligible for employment the church warrants ongoing suitability; (3) by virtue of an appointment to a specific position, a church acknowledges suitability for that position; and (4) by discipline and dismissal, a church acknowledges unsuitability for that position. While ordination may bestow a status or a professional qualification to engage in and provide “spiritual” services, the context in which these services are provided is one of a contract of employment. *Percy* clarifies this point and Canadian courts might wish to consider this precedent when next considering clergy dismissal or clergy employment issues, to avoid the hesitation shown in *McCaw*⁵⁵ and the confusion in *Brewer*⁵⁶.

Whether the church in question is episcopal or presbyterian in polity becomes less problematic because a court need only look to the agreement with the member of the clergy to determine with whom the contract is being made - a congregation or parish, presbytery or diocese, board or college. As *Percy* demonstrated, even when different bodies within a hierarchical and fragmentarily governed church are present, it is still possible to determine the other contracting party who may be liable for breach of the employment contract. A court need not take seriously an argument that a member of the clergy is an office-holder to whom no person or agency of the church is liable or for whom there is no responsibility.

The more difficult question is, however, the role of a court obliged to intervene in a clergy dispute case. In *Percy*, the House of Lords intervened where there was arguably a constitutional bar to intervention in the *Church of Scotland Act, 1921*, which had previously been understood, especially

⁵⁵ *Supra* note 47.

⁵⁶ *Supra* note 48.

in light of the history of church and state relations in Scotland, as recognizing the exclusive jurisdiction of the established Church over its clergy. In Canada, most churches regard themselves as having exclusive jurisdiction over clergy and possess an array of disciplinary procedures and tribunals to deal with problems, notwithstanding the absence of constitutional provision for an establishment. In *Lakeside Colony of Hutterian Brethren v. Hofer*,⁵⁷ the Supreme Court of Canada partially acceded to this stance, on the one hand by requiring church tribunals to adopt the principles of natural justice in their proceedings, and on the other by sending the dispute back to the church for resolution. Whether or not future intervention might occur should a court choose to characterize an issue as a secular issue is unknown. Notwithstanding dicta to the contrary, Canadian courts have a record of intervention on numerous ecclesiastical issues, although not yet on issues commonly agreed to be theological.⁵⁸ Where there may be future disagreement, however, as to whether an issue should be characterized as theological or secular, it is now uncertain what the outcome might be. Such issues would include sex discrimination in employment practices (as in *Percy*), exclusion from employment on the grounds of gender or sexual orientation, engagement in practices otherwise regarded as criminal such as circumcision and so on. *Percy* suggests that judicial intervention to enforce legal norms required in non-ecclesiastical contexts should be the expected outcome in Canada unless Canadian courts voluntarily accede jurisdiction to ecclesiastical bodies, which seems unlikely. The spectre for direct church and state conflict raised by *Percy* is considerable.

5. Conclusion

Percy has significantly changed the relationship of church and state in Scotland, and presumably also by analogy in the entire United Kingdom, by overturning the centuries-old understanding that the established churches were in certain respects autonomous, by judicial intervention to ensure conformity with sex discrimination laws notwithstanding legislation of a quasi-constitutional nature. If adopted as a persuasive authority in Canada in future cases, its impact will cast doubt on continuing unequal treatment of clergy and prospective clergy on grounds of gender and sexual orientation in churches which do not follow the evolution of the civil law on these matters in their internal laws and practices. Whether an argument of freedom of religion based on section 2(a) of the Charter will prove to be an effective countervailing argument remains to be seen, especially when courts can narrow what may be treated for legal purposes

⁵⁷ (1992), 97 D.L.R. (4th) 17 (S.C.C.).

⁵⁸ M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 2d ed. (Toronto: Irwin Law, 2003) at c. 8.

to be “core doctrine” to a very small arena as happened in *Percy*,⁵⁹ thereby effectively eradicating theological claims to difference from prevailing social and legal norms.

⁵⁹ For some hints that this is already happening see *Hall v. Powers* (2002), 59 O.R. (3d) 423 (Ont. S.C.J.); *Ontario (H.R.C.) v. Brockie* (2002), 222 D.L.R. (4th) 174 (Ont. Div. Ct.).