

# THE MEANING OF “RELIGION” AND THE ROLE OF THE COURTS IN THE ADJUDICATION OF RELIGIOUS MATTERS: AN ENGLISH AND CANADIAN COMPARISON

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*The recent decisions from the UK Supreme Court, R (Hodkin) v Registrar General and Shergill v Khaira, considered questions with which Canadian courts continue to wrestle about the meaning of “religion” and the extent to which courts should become involved in adjudicating matters which are “religious” in the context of internal disputes. This article compares and contrasts both British and Canadian cases and suggests some general principles for adjudication flowing from them.*

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*Les arrêts R (Hodkin) v Registrar General et Shergill v Khaira rendus récemment par la Cour suprême du Royaume-Uni examinent des questions qui continuent de préoccuper les tribunaux canadiens, à savoir la notion même de « religion » et la mesure avec laquelle les tribunaux devraient statuer sur des questions de nature « religieuse » dans le cadre de disputes internes au sein des établissements religieux. Le présent article compare les décisions des tribunaux canadiens britanniques et propose, en se fondant sur celles-ci, quelques principes généraux pour trancher les litiges de cette nature.*

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## 1. Introduction

Two of the most difficult, and likely insoluble, issues relating to religion and religious institutions were tackled recently by the UK Supreme Court, the definition of “religion” for legal purposes and the extent to which the courts should become involved in the adjudication of matters which are “religious” in nature in the context of internal disputes within religious institutions. In the earlier case, *R (Hodkin) v Registrar General*,<sup>1</sup> the Law Lords offered a definition of “religion,” and in *Shergill v Khaira*,<sup>2</sup> a differently-constituted bench offered some guidelines for the adjudication of internal disputes. Each case has an approximate Canadian counterpart, and for that reason alone, it is salutary to consider the relative merits of the

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<sup>1</sup> [2013] UKSC 77, [2014] AC 610 [*Hodkin*]; see also Russell Sandberg, “Defining the Divine” (2014) 16 Eccl LJ 198.

<sup>2</sup> [2014] UKSC 33, [2014] 3 All ER 243 [*Shergill*].

UK Supreme Court decisions because consideration of both issues is an on-going matter for the courts. The approximate counterpart to *Hodkin* is *Syndicat Northcrest v Amselem*,<sup>3</sup> and the approximate counterparts to *Shergill* are *Bruker v Marcovitz*<sup>4</sup> and *Bentley v Anglican Synod of the Diocese of New Westminster*.<sup>5</sup> In relation to each issue, there are similarities and differences in approaches which will be set out and analysed in this paper. Some conclusions will be offered as to a way ahead when Canadian courts consider these matters again, as they surely will, given the continuing increase in religious matters coming before the courts.

## 2. *R (Hodkin) v Registrar General*

In *Hodkin*, the Court revisited an issue which had been considered some 40 years earlier in *R v Registrar General, Ex p Segerdal*,<sup>6</sup> that is, whether a church within the Church of Scientology is “a place of religious worship” within the *Places of Worship Registration Act, 1855*, section 2 (*PWRA*).<sup>7</sup> In *Hodkin*, a couple who were members of the church wished to marry there but because the church was not registered as a place of religious worship, a legally valid marriage ceremony could not be conducted. An application for registration had been rejected pursuant to *Segerdal* and a lower court had upheld that decision as correct.<sup>8</sup>

Speaking for the Court on appeal to the UK Supreme Court, Lord Toulson reviewed the history of English marriage legislation,<sup>9</sup> the beliefs of Scientologists,<sup>10</sup> and the *Segerdal* decision.<sup>11</sup> In the context of the *Segerdal* discussion, Lord Toulson confirmed that the Registrar General had the discretion to decide whether a church was a place of religious worship and that the function was not purely ministerial, granting a certificate to every applicant.<sup>12</sup> He further confirmed the correctness in interpretation of Lord Denning’s well-known definition of religion in the case:

<sup>3</sup> 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

<sup>4</sup> 2007 SCC 54, [2007] 3 SCR 607 [*Bruker*].

<sup>5</sup> 2010 BCCA 506, (2010), 11 BCLR (5th) 209 [*Bentley*]; leave to appeal to SCC refused [2003] SCCA No 195.

<sup>6</sup> [1970] 2 QB 697, [1970] 3 All ER 886 [*Segerdal*].

<sup>7</sup> (1855) 18 & 19 Vict c 81.

<sup>8</sup> [2012] EWHC 3635 (Admin). There was no Court of Appeal decision because the trial judge certified the case as raising an issue of general public importance satisfying the leapfrog appeal criteria to the UK Supreme Court.

<sup>9</sup> *Hodkin*, *supra* note 1 at paras 6-14.

<sup>10</sup> *Ibid* at paras 15-22.

<sup>11</sup> *Ibid* at paras 23-30.

<sup>12</sup> *Ibid* at paras 24-26.

<sup>13</sup> *Segerdal*, *supra* note 6 at 697.

[Section 2] ... connotes to my mind a place of which the principal use is as a place where people come together as a congregation or assembly to do reverence to God. It need not be the God which Christians worship. It may be another God, or an unknown God, but it must do reverence to a deity. There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship. But, apart from exceptional cases of that kind, it seems to me the governing idea behind the words “place of meeting for religious worship” is that it should be a place for the worship of God. I am sure that would be the meaning attached by those who framed this legislation of 1855.<sup>13</sup>

By limiting “religious worship” to “reverence or veneration of God or of a Supreme Being,”<sup>14</sup> Lord Denning MR concluded that Scientology did not include such veneration, rather was more a philosophy of the existence of man or of life, with no belief in a spirit of God, and so could not be characterized as a religion for the purposes of the *PWRA*.<sup>15</sup> Lord Toulson thought Lord Denning’s definition of religion to be implicitly theistic.<sup>16</sup>

Before attempting a new definition of “religion” for the purposes of the *PWRA*, Lord Toulson suggested several reasons why there has never been a universal definition of religion in the common law: the different contexts in which the issue may arise; the variety of religions in the world; the development of new religions and religious practices; and the evolution of understandings of the concept of religion due to cultural change.<sup>17</sup> By contrast to Lord Denning, he further thought that “religious worship” for the purposes of the legislation should be given a contemporary meaning rather than a meaning congruent with 1855 or with whether legislators in 1855 would have regarded Scientology to be a religion because it did not exist.<sup>18</sup>

After extensive consideration of two earlier cases,<sup>19</sup> in which American and Australian courts had considered the meaning of religion,<sup>20</sup> Lord Toulson concluded that the best approach to deciding the meaning of religion and whether or not Scientology was a religion was to formulate guidelines derived from empirical observation of accepted religions, acknowledging that these were not necessarily determinative but simply aids.<sup>21</sup> From his empirical observation, he noted that religion should not be

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<sup>14</sup> *Ibid* at 707.

<sup>15</sup> *Hodkin*, *supra* note 1 at para 28.

<sup>16</sup> *Ibid* at para 31.

<sup>17</sup> *Ibid* at para 34.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Malnak v Yogi*, 592 F 2d 197 (1979); *Church of the New Faith v Cmr of Pay-Roll Tax (Victoria)*, (1981) 154 CLR (HC Aust).

<sup>20</sup> *Hodkin*, *supra* note 1 at paras 35-49.

<sup>21</sup> *Ibid* at para 49.

confined to recognition of a supreme deity because this would constitute religious discrimination against faiths such as Buddhism, Jainism, Taoism, Hinduism. It would also lead a court into difficult theological territory because, on the evidence, Scientologists believe in a deity of an abstract and impersonal nature, but courts should not become involved in speculation about the nature of God.<sup>22</sup> He then offered the following definition of “religion” for the purposes of the *PWRA*:

... I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word “supernatural” to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind’s nature and relationship to the universe than can be gained from the senses or from science. I emphasize that this is intended to be a description and not a definitive formula.<sup>23</sup>

Lord Toulson further added that the definition deliberately excluded secular belief systems from religion for the purposes of the *PWRA* because the act permits legally valid marriages in registered buildings according to any form or ceremony the parties use. The legislation makes separate provision for religious weddings at registered premises and secular weddings at approved premises.<sup>24</sup>

On the basis of this definition of “religion” Lord Toulson concluded that Scientology falls within it,<sup>25</sup> although he did not state precisely why. Turning next to the question whether the church at issue was a place of “religious worship” within the Act, Lord Toulson gave a wide interpretation to the phrase to include religious services meaning religious rites and ceremonies. Again, he confirmed that these services need not depend on fine theological or liturgical niceties about the infinite because such speculation is more fitting for theologians.<sup>26</sup> To hold otherwise would place Scientologists at a double disability not shared by atheists, agnostics or other religious groups, because they could neither conduct valid marriages

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<sup>22</sup> *Ibid* at paras 51-54.

<sup>23</sup> *Ibid* at para 57. Although Lord Toulson eschewed the idea that his definition is a definition rather than a description, it reads like a definition and will likely be treated as one.

<sup>24</sup> *Ibid* at paras 58-59.

<sup>25</sup> *Ibid* at para 60.

<sup>26</sup> *Ibid* at paras 62-64.

in their own churches nor have religious marriages in other facilities approved for civil marriages pursuant to the applicable legislation.<sup>27</sup> Lord Toulson concluded by overriding *Segerdal* and declaring the Scientology facility as a place of meeting of religious worship within the *PWRA*.<sup>28</sup>

Lord Toulson framed his definition of “religion” within the caveat that a definition excluding secular belief systems was required for the purposes of the legislation. Whether he meant that a definition of religion ought to exclude secular belief systems generally is uncertain, so that litigants who claim religious beliefs relating to such matters as environmentalism, exercise, diet, health and so on may be left without judicial guidance as to whether their belief systems would enjoy protection under freedom of religion provisions in constitutional or human rights legislation. Nor did Lord Toulson state that his definition of religion was applicable in all legal contexts, including constitutional or human rights contexts, or only in the context of the legislation at issue. On the other hand, the definition is framed in such broad and definitive terms, that it is not unreasonable to suspect that he meant it to be applicable broadly in the law.

On the admittedly unverifiable assumption that the UK Supreme Court meant to provide a definition of “religion” for legal purposes wider than the *PWRA*, it may be said to comprise six parts for the purposes of further discussion: (1) the belief system must be held by a group of adherents and not a single individual; (2) the belief system must be a belief *system* and not a collection of stray propositions; (3) the belief system must be a spiritual belief system explaining, (a) the place of humanity in the universe, (b) humanity’s relationship to the infinite, and (c) how humanity should live in conformity with the belief system; (4) the system must go beyond what can be perceived by the senses or by science; (5) there need not be a belief in a supreme being; and (6) the belief system assumes there is more to be understood about the world than can be obtained by the senses or by science.

A number of observations may be made about this definition of “religion.” First, a group must adhere to the belief system although the size of the group is unstated. This would appear to exclude individuals who devise their own belief systems about the world as well as individuals who are adherents of collectively held belief systems but who also entertain some beliefs which differ from the mainstream of that belief system. Secondly, that a system of beliefs is required raises the questions of how many beliefs and how systematically arranged those beliefs are required to

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<sup>27</sup> *Ibid* at para 64.

<sup>28</sup> *Ibid* at para 65. Lord Wilson agreed but delivered a judgment further explaining the function of the Registrar General pursuant to the *PWRA*.

be before there will be a belief system within the definition of religion. Lord Toulson does not say. Thirdly, it is unclear whether senses and science are assimilable; while conceptually distinguishable, the contrast between sense and science on the one hand and spirituality on the other suggests that sense and science mean largely the same thing, that is, something or some proposition provable by scientific or external standards of proof. "Spiritual" means, therefore, something unprovable and separate from the world of nature. Fourthly, the belief system must be spiritual, that is, not scientifically or externally provable. Fifthly, the belief system must speak to the big questions about the meaning of life and how life ought to be lived – questions which are not as prominent in Western societies as they once were, at least among the educated classes. Sixthly, not only does the belief system not require a supreme being – God – but by virtue of that fact, a supreme being need not be a part of the meaning of human life. Seventhly, the definition assumes that there is a deep mystery at the heart of the universe which science cannot explain but which humanity yearns for because it is in some way associated with the meaning of the existence of the world and of humanity.

This last characteristic underpins the other six elements in Lord Toulson's definition of "religion" for legal purposes: to be a "religion" for legal purposes, a belief system must attempt to explain the deep mystery of existence which science and external observation cannot. Although Lord Toulson did not say, presumably the reason religion merits special consideration is because it is associated with this question of ultimate meaning, a question which invokes awe and wonder in most people. Because the belief system need not posit a supreme being at its heart, however, there is the possibility of a vacuum at the heart of a belief system that is also to be protected by the law under the rubric of religion. Lord Toulson's definition of religion could then mean a belief system shared by an indeterminate number of people which posits a vacuum, that is, nothing or meaninglessness, at its heart. It might be wondered whether the law should protect a meaningless belief system no matter how many people say it gives meaning to their lives! In the final analysis, what is being protected may be a group of people with a vacuous belief system. What is being protected is a set of opinions of human origin. Thus, secular belief systems, including the most virulent, would fall to be protected under this definition of religion, with no obvious reason why given.

This is quite different from the traditional and common understanding of religion which posits meaning in the sense of truth – the truth about the world and human existence. This is what invokes awe in humanity, even when the truth is that there is no truth beyond utter meaninglessness. Such a definition would require courts to do what Lord Toulson readily admitted

they are incapable of doing, that is, engaging in theological speculation in order to discern the truth. But religion, like truth, requires an external standard from which to determine the truth about the world,<sup>29</sup> and without that external source or perspective, whether derived from a divinely revealed text or person, all other beliefs are merely human opinions among which a modern court will not likely sift. Indeed, human opinions differ over which texts or persons are divinely inspired or not. Thus, two contradictory answers are possible to the question of whether the law should treat religion in some special way: either it should not because it cannot discern the belief system(s) which are truly true or it should give up and protect all belief systems no matter how vacuous, and occasionally bizarre, to contemporaries, because some people derive meaning from those belief systems. Even if courts were to restrict protection to one, some, but not all belief systems, as has been past practice, a belief system could evolve to embrace the requisite belief to satisfy a legal test, as Scientology apparently did. In *Segerdal*, the Court of Appeal found that it did not have the then legal requisite for a religion of a belief in an infinite being, but 43 years later, in *Hodkin*, the UK Supreme Court found that it did. Litigation-savvy groups desiring the legal mantle and protection of “religion” could do likewise.

The dilemma, then, in the definition of religion for legal purposes proposed by the UK Supreme Court, is that of deciding whether religion merits any legal protection or privilege at all. For the narrow purposes of the legislation at issue in *Hodkin*, the Law Lords had to give a definition of religion, but that definition leads logically in other legal contexts to the conclusion that either all belief systems be protected or none. Lord Toulson’s definition flows over into defining religion as vacuous once it is reduced to a belief system about the universe indulged in by an indeterminately-sized group. On the assumption that all belief systems merit initial protection, this distinction between those that may be subject to legal protection and those that may not will be determined by how much offence they give to society generally when their views are publicly expressed. Thus, in the context of constitutional and human rights law, free expression, and by relationship free association, become the tests for socially permissible and protectable religious belief. Whether public opinion expressed by the law is an appropriate test for religious truth is another discussion! Whether future courts will follow the logic of the *Hodkin* decision or backtrack to some position in which some belief systems will be protected but not others is a question for the future in

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<sup>29</sup> For a further exploration, see MH Ogilvie, “The Strange Gospel and a Common Law: The Reconciling Word to a Fragmented World” in Logan Atkinson and Diana Majury (eds), *Law, Mystery and the Humanities: Collected Essays*, (Toronto: University of Toronto Press, 2008) at 305-46.

contexts where either there is no express constitutional or human rights protection for “religion” or where courts give such a broad content to “religion” as to vacate it of religious content in any traditional sense.

### 3. *Shergill v Khaira*

The more recent UK Supreme Court religion decision, *Shergill*, was concerned with a widely recognized world religion, Sikhism, and in particular, the role of a civil court in an internal dispute within a religious organization. The facts were slightly complex and concerned a dispute within a Sikh sect associated with three temples in Bradford, Birmingham and High Wycombe.

In April 1987, fourteen men decided to establish a new temple under the direction of a leader known as the “First Holy Saint” (FHS). A further meeting decided that the temple to be established in Birmingham was to be similar to one already established in Bradford, and a memorandum was drawn up to that effect. In September 1987, a property was purchased, and the FHS gave responsibility for its management to four trustees (the “original trustees”), including the first, second and third respondents, and transferred title to them. In January 1991, the original trustees executed a trust deed (the 1991 deed) in which they declared themselves to be the trustees of a religious organization following the teachings of the FHS. Clause 5 of this deed empowered the FHS or his successor to remove the trustees and appoint new trustees. A month later, a constitution for the organization was drawn up which also provided that only the FHS or his successor could make changes to the management committee. In September 1993, a property at High Wycombe was purchased and transferred to four different trustees who were to hold it in accordance with the 1991 constitution.

In November 2001, the FHS died and was succeeded by the “Second Holy Saint” (SHS), who also died within a few months. In July 2003, the “Third Holy Saint” (THS) was recognized by a joint meeting of the management committees of the three temples as their leader. In December 2003, a revised constitution was agreed, similar to the earlier one, but it referred to the consent of the THS or his successor to changes in personnel at the three temples. New trust deeds were subsequently prepared for each of the three temples but three of the four Birmingham trustees refused to execute the Birmingham trust deed and the THS purported to remove and replace them. The THS further purported to remove and replace two of the four High Wycombe trustees. The three Birmingham trustees purported to remove and replace a fourth Birmingham trustee. The trustees newly



appointed by the THS started legal proceedings to remove the original trustees who argued that the matter was an unjusticiable religious matter.

The trial judge dismissed the application to strike out the application but the Court of Appeal allowed the appeal on the non-justiciable argument.<sup>30</sup> The UK Supreme Court unanimously allowed the appeal and identified four issues as likely to emerge should the case go to trial: (1) whether clause 5 was valid in granting power to appoint and dismiss trustees as successors to the FHS; (2) whether a successor to the FHS in clause 5 was limited to the immediate successor or extended to subsequent successors; (3) whether the THS is the legitimate successor of the FHS; and (4) whether the THS is unfit to be successor because he has departed from the tenets of mainstream Sikhism and is unfit also on character grounds.<sup>31</sup>

Before addressing these issues, the Law Lords made clear at the outset that the first and second issue would be treated solely in English law, the law of trusts relating to the powers of trustees and the interpretation of trust deeds executed in England relating to property in England.<sup>32</sup> They further acknowledged in respect to the third and fourth issues, that it was understandable why some people might regard them as non-justiciable because they related to religion, although they did not initially concede the point.<sup>33</sup> Nevertheless, the Court declined to resolve the first issue as to the validity of clause 5 in the 1991 deed, which had extended the power to appoint and dismiss trustees to the successor(s) of the FHS, on the grounds that the matter had only been raised at the interlocutory stage, was not fully pleaded, and that the parties' argument had changed as the proceedings progressed.<sup>34</sup> They noted that the resolution of the issue was fact-sensitive, but also suggested that the correct approach was set out in *Attorney-General v Matheson*,<sup>35</sup> that trustees had implied power to execute a more specific deed where the original trust was in general or vague terms, provided the deed did not conflict with the original trust; they thought it arguable that clause 5 would pass muster.<sup>36</sup> Again, the Law Lords declined to resolve the second issue of the meaning of successors in clause 5 because both immediate successor and future successors were plausible interpretations in the absence of further factual background and legal argument.<sup>37</sup>

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<sup>30</sup> [2011] EWHC 2442 (Ch.); [2012] PTSR 1697 (CA).

<sup>31</sup> *Shergill*, *supra* note 2 at para 19.

<sup>32</sup> *Ibid* at para 20.

<sup>33</sup> *Ibid* at para 21.

<sup>34</sup> *Ibid* at paras 33-34.

<sup>35</sup> [1907] 2 Ch 343 (CA).

<sup>36</sup> *Shergill*, *supra* note 2 at paras 33-34.

<sup>37</sup> *Ibid* at para 36.

The Court considered the third and fourth issues together, first under the rubric of their justiciability, and then more specifically their religious nature. After reviewing the leading English<sup>38</sup> and American<sup>39</sup> cases on justiciability by reason of subject matter, the Law Lords stated that non-justiciable cases fell into two categories: (1) cases where the issue is beyond the constitutional competence of the courts by virtue of the separation of powers; for example, certain transactions of foreign states which fall under the executive power<sup>40</sup> or proceedings of Parliament which fall under the legislative power;<sup>41</sup> and (2) cases based neither on private legal rights nor reviewable public law matters; for example, domestic disputes or international acts of foreign sovereign states or the exercise of the crown prerogative in foreign affairs.<sup>42</sup> In the first category, a court may not adjudicate even if it is necessary to do so in order to decide an issue which is justiciable. In the second category, a court may adjudicate the issues if their resolution is necessary to decide another matter which is justiciable.<sup>43</sup> The House of Lords gave *Bruker v Marcovitz*<sup>44</sup> as an example of the second category because while the Supreme Court of Canada thought the purely religious issue of a *get* in Jewish marriage law was not justiciable, it could consider the civil law consequences of a failure to procure a *get* which could give rise to a civil remedy and provide that remedy, as the court did by awarding damages in the case.<sup>45</sup>

Turning to the justiciability of the religious elements in the case, the UK Supreme Court picked up the *Bruker* distinction between religious belief and practice and their civil law consequences:

... [T]he courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief or practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust.<sup>46</sup>

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<sup>38</sup> *Buttes Gas and Oil Co v Hammer (No 3)*, [1982] AC 888 (HL), [1981] 3 All ER 616 [Buttes].

<sup>39</sup> *Underhill v Hernandez*, (1897) 168 US 250.

<sup>40</sup> *Buttes*, *supra* note 38.

<sup>41</sup> *Prebble v Television New Zealand*, [1995] 1 AC 321 (HL), [1994] 3 WLR 970.

<sup>42</sup> *Shergill*, *supra* note 2 at para 43.

<sup>43</sup> *Ibid* at paras 42-43.

<sup>44</sup> *Supra* note 4.

<sup>45</sup> *Shergill*, *supra* note 2 at para 44.

<sup>46</sup> *Ibid* at para 45.

With respect to the first circumstance, of enforcing contractual rights, the Law Lords reiterated the well-known principle that unincorporated religious organizations are treated as voluntary associations whose contract is regarded in law like the contract of any secular association. The courts will only adjudicate if there is an infringement of a civil right, for example, the loss of a remunerative office: “But disputes about doctrine or liturgy are non-justiciable if they do not as a consequence engage civil rights or interests or reviewable questions of public law.”<sup>47</sup> The governing body of a religious organization will not be permitted to act *ultra vires* or in breach of fair procedure. Moreover, a civil court will act where the cause of a disciplinary procedure is a dispute about theology or ecclesiology, although it will not resolve the underlying religious dispute. The role of the court is to keep the parties to their contract.<sup>48</sup>

With respect to the second circumstance, the enforcement of trusts, the Court reiterated the principle, also well-known, that courts have jurisdiction to enforce trusts for religious purposes because the constitution of a trust is a civil act creating interests protected by the civil law.<sup>49</sup> The Court then reviewed the well-known English and Scottish cases,<sup>50</sup> culminating in *General Assembly of the Free Church of Scotland v Overtoun*,<sup>51</sup> in which various courts concluded that their jurisdiction extended to the ascertainment of the foundational and essential elements of a faith in order to identify who is entitled to property held in trust.<sup>52</sup> This rule meant that property would go to the part of the religious organization which adhered to its foundational principles, no matter how small, as was the case in *Overtoun*.<sup>53</sup> Where the foundational principles were no longer extant, a court has the power to make a *cy-près* application of the trust funds, but where this means of avoiding judicial determination of a religious dispute is not available, a court cannot shirk its duty to determine a matter of civil right.<sup>54</sup> In *Blake v Associated Newspapers Ltd*,<sup>55</sup> the Court could have adjudicated the ecclesiological question of whether the “bishop” in the case was a bishop or a self-styled bishop because it was

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<sup>47</sup> *Ibid* at para 46.

<sup>48</sup> *Ibid* at paras 47-48, relying on *McDonald v Burns*, 1940 SC 376 per Atchison LJ at 383-84.

<sup>49</sup> *Ibid* at para 49.

<sup>50</sup> *Craigdallie v Aikman*, (1813) 1 Dow 1 (HL Scot); *Attorney-General v Pearson*, (1817) 3 Mer 353, 36 ER 136 (HL); *Smith v Morrison*, 2011 SLJ 1213 (SC). For detailed discussion of these cases, see MH Ogilvie, “Church Property Disputes: Some Organizing Principles” (1992) 42 UTLJ 377.

<sup>51</sup> [1904] AC 515 (HL Scot) [*Overtoun*].

<sup>52</sup> *Shergill*, *supra* note 2 at para 58.

<sup>53</sup> *Ibid* at paras 50-54.

<sup>54</sup> *Ibid* at para 56.

<sup>55</sup> [2003] EWHC 1960; see also *Forbes v Eden*, (1867) LR 1 Sc & Div 568 (HL).

required to do so to deal with the claim in tort. In *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann*,<sup>56</sup> the Court could have adjudicated had the case been so framed.

Thus, the UK Supreme Court concluded that, if a matter goes to trial, the court “may have to adjudicate upon matters of religious doctrine and practice in order to determine who are the trustees entitled to administer the trusts.”<sup>57</sup> The question of whether the THS has the power to dismiss and appoint trustees may depend on the fundamental tenets of the Sikh sect, the nature of its parent organization in India, the formalities to become a successor of the FHS, and whether the teachings and personal qualities of the THS comply with the fundamental religious claims and purposes of the trust.<sup>58</sup> In allowing the appeal, the UK Supreme Court opined that there was a strong case for permitting expert evidence on these matters.<sup>59</sup>

The position taken by the UK Supreme Court on the adjudication of religious disputes in *Shergill* can be summarized as follows: (1) courts will not adjudicate on the truth or falsity of religious beliefs or practices; (2) where a religious belief underpins a civil legal dispute, a court may determine what is that under-pinning religious belief; (3) a court will only make such a determination if the religious issue is capable of objective discernment; (4) the types of civil legal issues which a court will adjudicate include acting *ultra vires* or in breach of natural justice or to determine the beneficial owner of trust property; and (5) courts may make determinations about matters of doctrine (theology), liturgy (rites), and polity (ecclesiology).

Again, a number of observations may be made about these principles. First, the UK Supreme Court honestly acknowledged that courts have to consider religious issues when they resolve civil legal disputes. This open acknowledgement contrasts with earlier courts which often simply denied outright that they need consider religious issues.<sup>60</sup> Secondly, the Court expressly eschewed judicial decisions about religious truth claims, thereby continuing to endorse the existence within the common law of a narrow autonomous zone within which religions can make truth assertions, at least internally, because the court said nothing about external or public claims, which may offend criminal or human rights law. Thirdly, nevertheless, the

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<sup>56</sup> [1992] 1 WLR 1036 (CA).

<sup>57</sup> *Shergill*, *supra* note 2 at para 59.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid* at para 61.

<sup>60</sup> *Balkou v Gouleff*, (1984) OR (2d) 574 (CA) is a particularly good example of a judicial hands-off religion approach.

Court asserted the right to make findings about what a religious organization believes or how it practices its beliefs, where such findings are necessary for the resolution of a civil legal dispute. Such decisions could be very controversial because no religion provides completely agreed and comprehensive statements concerning absolutely every belief and practice. There are always considerable differences of opinion among co-religionists and there will, therefore, be controversy around any future judicial decision. But fourthly, the Court acknowledged this possibility by formulating the test as one of "objective discernment." While there is really no other standard it could adopt, the ambiguity in such a test is obvious and the Court did not offer any further assistance as to sources to which a court could look to make that decision, for example, founding documents, theological statements, canonical codes, leading clergy or expert witnesses. The Court suggested that expert evidence could be heard but whether this means leading clergy, academic experts or expertise of some other sort was not stated.

Fifthly, the content of the religious issues is comprehensive, extending to doctrine, liturgy and polity; *any* religious matter is open to objective discernment by a court. Polity or governance are typically easier to determine because most religious organizations have written codes of practice or canon law, and their content is somewhat similar to the codes of practice and procedure courts are accustomed to in the civil law. But doctrine and liturgy are much more controversial and difficult to discern objectively. Sixthly, the notion that a court may objectively discern religious propositions assumes certain characteristics about "religion" for civil legal purposes: (1) the religious beliefs are held by a group; (2) there is a system of beliefs for objective discernment; (3) the belief system may or may not be "true;" (4) the belief claims very likely have a spiritual or non-scientifically provable nature so that a court ought not to opine on their truth because not scientifically provable; and (5) there is no requirement for a supreme being for the belief system to be objectively discernible. In short, the implicit understanding of "religion" in *Shergill* accords with that explicit in *Hodkin*.

Seventhly, the reluctance of the Court to express opinions about the truth of any religious beliefs or practices implicitly suggests that the Law Lords may consider religious beliefs to be about ultimate meaning, with or without a supreme being, on which a court ought not to express an opinion, but show humility. Eighthly, by pinning the determination of a civil legal issue onto a judicial determination of a religious matter, the Court demonstrated a treatment of religion as a serious matter, rather than as a factor to be discounted when making civil legal decisions. Ninthly, there is nothing in the decision to suggest either that religious organizations are to

be treated any differently from secular organizations, or that where secular organizations, for example, humanist organizations, are at issue that their secular belief systems would not be accorded similar treatment by a court, that is, an objective discernment of their beliefs would be made if this was required for a civil legal decision.

Taking *Hodkin* and *Shergill* together, it can be concluded that while the UK Supreme Court continues to take “religion” seriously for the purposes of litigation, it is unclear what “religion” might be beyond a belief system to which a group of persons adhere and whose specific beliefs can be objectively discerned. The truthfulness, and relatedly the harmfulness, of any religious beliefs will not be adjudicated beyond, presumably, the criminal or human rights law. This neutrality is, at one level, attractive, but at another, may leave religion unprotected against future judicial assault, because it is detached from ultimate meaning in life, which courts apparently will not protect. It remains to compare this new English position with Canadian approaches.

#### 4. *Some Canadian Comparisons*

While these recent English cases about the meaning of religion and the role of courts in internal religious disputes considered the nature of religion within the context of ordinary legislation, in Canada, the definition of religion has occurred within the context of section 2(a) of the *Charter of Rights and Freedoms*, “freedom of conscience and religion.” It is not obviously clear that these different contexts matter except when defining the word religion might be dependent on specific purposes in specific legislation. On the assumption that context rarely matters, it is salutary to compare how the Supreme Court of Canada’s approach compares with that of the UK Supreme Court.

Taken as a whole, the Supreme Court of Canada jurisprudence on “religion” can be said to define its content both directly and indirectly. The direct approach is found in the definition offered by Iacobucci J in *Anselem*. The indirect approach is shown in cases where the Court has examined the neutral role of the state in relation to religion; by expressing the position of neutrality, the courts eschew assessments of and decisions about the truth claims of any religious group.

Turning first to the only recent case in which any Canadian court has defined religion *qua* “religion,” in *Amselem*, the Supreme Court of Canada held that the refusal of a condominium corporation to permit Jewish owners to build succoths on their balconies at the festival of Succoth, breached their freedom of religion under the Quebec *Charter of Human*

*Rights and Freedoms*.<sup>61</sup> While various aspects of this complex ruling have been parsed elsewhere,<sup>62</sup> of particular interest for present purposes is the definition of religion given by Iacobucci J:

While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally limited to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.<sup>63</sup>

Iacobucci J supplemented this definition in several ways. First, he placed considerable emphasis on the fact that section 2(a) protects personal choice and autonomy in belief.<sup>64</sup> Secondly, he did not require that the beliefs for protection be either objectively recognized by experts as obligatory tenets of a religion, rather they need only be the beliefs of the party claiming section 2(a) protection.<sup>65</sup> Thirdly, he reiterated the position stated in *R v Jones*,<sup>66</sup> that all that is required for protection is that the claimant satisfy a court as to the sincerity with which the belief is held.<sup>67</sup> Fourthly, he found that a court is not qualified to rule on the validity or veracity of a belief or practice or to choose among various interpretations of a belief.<sup>68</sup> Fifthly, he regarded this approach the best to avoid interference by the state and the courts with religious belief, cautioning against unwarranted intrusions into religious affairs.<sup>69</sup>

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<sup>61</sup> RSQ c C-12, ss 1, 3, 4, 9.1, 10, 13 [Quebec *Charter*]. The Supreme Court considered its decision equally applicable to the Canadian *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; see *Amselem*, *supra* note 3 at para 37.

<sup>62</sup> See e.g. MH Ogilvie, “And Then There Was One: Freedom of Religion in Canada, The Incredible Shrinking Concept” (2008), 10 Eccl LJ 197 [Ogilvie, “There Was One”]; Richard Moon, “Religious Commitment and Identity: Syndicat Northcrest v Amselem (2005) 24 SCLR 201; Robert G Charney, “How Can There Be Any Sin In Sincere? State Inquiries into Sincerity of Religious Belief” (2010) 51 SCLR (2d) 47.

<sup>63</sup> *Amselem*, *supra* note 3 at para 39.

<sup>64</sup> *Ibid* at paras 40-42.

<sup>65</sup> *Ibid* at para 43.

<sup>66</sup> [1986] 2 SCR 284.

<sup>67</sup> *Amselem*, *supra* note 3 at paras 43-47.

<sup>68</sup> *Ibid* at para 51.

<sup>69</sup> *Ibid* at para 55.

The highly individualistic underpinning of the majority's definition of "religion" may be contrasted with that proposed by Bastarache J in dissent:<sup>70</sup>

... a religion is a system of beliefs and practices based on certain religious precepts. A nexus between personal beliefs and the religion's precepts must therefore be established. ... Religious precepts constitute a body of objectivity identifiable data that permits a distinction to be made between genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience. Connecting freedom of religion to precepts provides a basis for establishing objectively whether the fundamental right in issue has been violated.

Before further analysis of the *Amselem*, it is necessary to supplement what the Supreme Court of Canada said directly about religion there with what it has said indirectly elsewhere. By emphasis on treating religion in accordance with principles of neutrality and pluralism, the Court apparently espouses a position that will not judge the truth claims of religious groups.<sup>71</sup> Thus, in *SL v Commission scolaire des Chênes*,<sup>72</sup> Deschamps J characterized neutrality as a means for creating a free space where individuals can exercise their rights<sup>73</sup> and LeBel J further elaborated that the neutral state cannot enact legislation favouring one religion over another, nor religious beliefs over non-religious beliefs.<sup>74</sup> The Supreme Court of Canada has never comprehensively stated why the state should be neutral, treating this as a self-evident proposition. Some reasons might include pragmatic recognition that choice would be both difficult and likely bring social and political conflict; that religion has no inherent value, or conversely, that religion has inherent value in contributing to social stability when all groups are equally valued; or that there is no point in discounting religion because it is central to the identity and dignity of individuals and so is a form of equality right in that all persons are entitled to equal treatment and respect by the state.<sup>75</sup>

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<sup>70</sup> *Ibid* at para 135.

<sup>71</sup> An excellent example is *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 [*Multani*], where the Court expressed no doubt that a kirpan was solely a religious object. Compare *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, in which the Court gave no credence to the Hutterite position on the sinfulness of photographs. See also MH Ogilvie, "The Failure of Proportionality Tests to Protect Christian Minorities in Western Democracies: Alberta v Hutterian Brethren of Wilson Colony" (2010) 12 Eccl LJ 208.

<sup>72</sup> 2012 SCC 7, [2012] 1 SCR 235; see also MH Ogilvie, "What's Sincerity Got to Do With It? Freedom of Religion in Canada" (2012) 14 Eccl LR 417.

<sup>73</sup> *Ibid* at para 10.

<sup>74</sup> *Ibid* at para 54.

<sup>75</sup> Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014) at 22-23.



Another way in which the Supreme Court of Canada has underlined the neutrality of the state is by its embrace of pluralism or diversity in relation to religious and non-religious views; a neutral state will protect all views including some that are unpopular provided they do not infringe the criminal or human rights law. Thus, in *Trinity Western University v BC College of Teachers*,<sup>76</sup> the Court permitted TWU graduates to teach in the public schools, in part, because the public school system is meant to encompass all members of society, whatever their religious beliefs. That the graduates would not be able to express their beliefs was problematical, but presumably the Court would expect some self-restraint by everyone as a price for peace in a pluralistic society.<sup>77</sup>

In light of the foregoing, the definition of “religion” by the Supreme Court of Canada comprises the following characteristics: (1) religious beliefs and practices differ from secular beliefs and practices; (2) religion need not have a particular and comprehensive system of beliefs; (3) religion tends to involve a divine being; (4) religion is about deeply held personal convictions connected to self-definition and spiritual fulfilment and; (5) the nature or truth of those beliefs is irrelevant provided they are sincerely held. In summary, religion is a particular, comprehensive set of beliefs deeply and sincerely held by an individual which provides identity and spiritual fulfilment, without the necessity for a divine or supreme being. In short, religion is about whatever a litigant says it is about for them. It is a subjective not an objective phenomenon. It may not even be about anything very much in particular, if the individual cannot articulate the beliefs and practices in much detail. If the definition is meant to cover beliefs originating with and unique to the individual, there may not be a comprehensive belief system, so there is some contradiction within the definition.

The definition of “religion” by the UK Supreme Court, in contrast, is much more substantial. It requires a group of adherents, not a single individual. It requires a recognizable belief system, not a few stray beliefs held by one person. It must address the big questions of meaning and purpose in life, and not be a one-person spiritual feel-good trip. It assumes there is more to understand about the world than science can explain or that any individual can explain on the basis of introspective spiritual feelings. Both courts agree on neutrality about not deciding about the truth of any claims, but beyond that, the contrast between their respective understandings of “religion” is substantial and hinges around the radical individualism and

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<sup>76</sup> 2001 SCC 31, [2001] 1 SCR 772.

<sup>77</sup> The Court has also acknowledged the role of religion in peoples’ lives and that they should be able to bring this into their public lives; see *Chamberlain v Surrey School District No 36*, 2002 SCC 86, [2002] 4 SCR 710 at para 19.

egalitarianism inherent in the Canadian position – so radical that it amounts to gutting religion of meaning beyond “me.”

The contrast between the two positions underlines the problems associated with the definition of “religion” in *Amselem*. In that case, the Supreme Court of Canada implicitly trivialized religion by reducing it to the sincere beliefs of a single individual, and this in turn suggests both that there is no clear reason why religious beliefs should be treated differently from secular beliefs and that the section 2(a) protection thereby might well be vacuous.<sup>78</sup> Such an understanding of religion might mean that in any case where religious claims have to be balanced against competing section 15 equality claims or other public policy, that a trivialized approach to religion would mean that religious claims will never be taken seriously and will always lose. In *Amselem*, this was not the case because the Jewish festival and its associated practices were ancient and well-established, but in other contexts, the trivial perception of a religious claim could well result in an adverse result for the complainant.<sup>79</sup>

If the Supreme Court of Canada has signalled that “religion” *per se* need not be treated too, too seriously,<sup>80</sup> then it would follow that courts are more likely to interfere in internal disputes within religious organizations. There have been few recent Supreme Court of Canada decisions in this context comparable to *Shergill*, but there has been at least one appellate decision, *Bentley*, that is of interest in this context.

There is no shortage of Canadian cases reaching back into the nineteenth century where Canadian courts eschew making decisions about matters that are narrowly doctrinal in nature; nor is there any shortage of cases in which they have made decisions about property and civil rights, avoiding doctrinal issues as far as possible.<sup>81</sup> In some cases, the courts indirectly enforce doctrinal positions through enforcement of either contracts or trusts. Thus, the courts will enforce contractual relationships among members on the basis that religious organizations constitute multilateral contracts, as well as any trust on the basis of which property is held. This is not understood to be interference with the doctrine, polity or

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<sup>78</sup> For further discussion, see Ogilvie, “There Was One,” *supra* note 62.

<sup>79</sup> The definition of “religion” by Bastarache J, which is more similar to that of the UK Supreme Court, avoids these problems.

<sup>80</sup> The Supreme Court of Canada appears to take the religious claims of non-Christian minorities more seriously; see e.g. *Multani*, *supra* note 71, and *R v NS*, 2012 SCC 72, [2012] 3 SCR 726.

<sup>81</sup> For a thorough analysis of these cases, see MH Ogilvie, *Religious Institutions and the Law in Canada*, 3rd ed (Toronto: Irwin Law, 2010) chs 8 and 9 [Ogilvie, *Religious Institutions*].

discipline of these organizations but rather civil law enforcement of arrangements agreed to by the members themselves.

This is not to say that courts have not intervened. In *Lakeside Colony of Hutterian Brethren v Hofer*,<sup>82</sup> the Supreme Court of Canada upheld the right of a Hutterite colony to expel members, pursuant to its articles of association, who were alleged to be in breach of the practices of the community. In doing so, however, the Court also required the colony to follow the rules of natural justice, for which no provision had been expressly made in the articles. While Gonthier J, for the Court, stated that a court should generally not intervene in doctrinal or spiritual matters, it could do so when property or civil rights are involved, and once a court assumes jurisdiction over cases involving religion, the court's only alternative is to come to the best understanding possible of the tradition and customs of the religion.<sup>83</sup>

The interpolation of the rules of natural justice into the procedures of religious organizations was not new in *Lakeside Colony* because lower courts had earlier done so.<sup>84</sup> While there can be a theological aspect to polity and procedure in many religious organizations, the interpolation of natural justice would not appear to most observers to be an egregious interference with doctrinal matters. In the later case of *Bruker*,<sup>85</sup> interference can be said to be more substantial, although it was with the religious nature of a private marriage relationship rather than with an institutional process *per se*.

At the time of their civil divorce, a husband and wife entered an agreement relating to various matters including an agreement to appear before a rabbinical court for a *get*, a divorce, in Jewish law. The husband was required to provide the *get* and the wife to accept it before either could legitimately marry or have children according to Jewish law. After some 15 years, the wife commenced a civil action for breach of contract and only then did the husband procure the *get*. The wife amended her action for

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<sup>82</sup> [1992] 3 SCR 165 [*Lakeside Colony*]; see also MH Ogilvie, “Comment” (1993) 72 Can Bar Rev 238.

<sup>83</sup> *Lakeside Colony*, *ibid* at para 64.

<sup>84</sup> *Lindenberger v United Church of Canada* (1997), 12 CCEL 172 (Ont CA); *McCaw v United Church of Canada* (1991), 82 DLR (4th) 289 (Ont CA); *Davis v United Church of Canada* (1992), 92 DLR (4th) 678 (Ont Gen Div).

<sup>85</sup> *Bruker*, *supra* note 4. For comments on *Bruker*, see Rosalie Jukier and Shauna Van Praagh, “Civil Law and Religion in the Supreme Court of Canada: What Should We Get Out of *Bruker v Marcovitz*” (2008) 43 SCLR (2d) 381; Richard Moon, “Divorce and the Marriage of Law and Religion: Comment on *Bruker v Marcovitz*” (2008) 42 SCLR (2d) 37; MH Ogilvie, “*Bruker v Marcovitz*: (Get)ting Over Freedoms (Like Contract and Religion) in Canada” (2009) 24 NJCL 173.

compensation for the loss she claimed to have suffered because of the long delay in procuring the *get*. The Supreme Court of Canada found the religious promise to be legally enforceable and awarded damages. Writing for the majority, Abella J found that although the foundation for the action was religious, there was no need to inquire into the religious issues, rather the Court could enforce the husband's promise as a civil promise made as part of civil divorce proceedings.<sup>86</sup> While the husband could have declined to promise to procure the *get*, once he had promised to do so, he had exercised his religious freedom. Abella J went further and opined that the husband's consent was enforceable because public policy required the removal of barriers to religious divorce, particularly so as to ensure gender equality and freedom of choice in marriage for women.<sup>87</sup> While Abella J thought the Court did not need to consider religious doctrine here, she suggested that religious agreements would not always lie beyond the jurisdiction of the civil courts and that assessment had to be made on a case-by-case basis,<sup>88</sup> the precise meaning of this assertion remains to be explored in future cases.<sup>89</sup>

Although the Supreme Court of Canada refused leave to appeal in *Bentley*,<sup>90</sup> the dispute about the ownership of church property in that case in the BC Court of Appeal raised the question of judicial intervention in internal disputes where doctrine is at the heart of the dispute. Church property disputes and clergy discipline cases have been the most extensively litigated fact situations, the former based on trust and the latter on contract.<sup>91</sup>

In *Bentley*, four parishes in the Anglican Diocese of New Westminster who had separated to join another Anglican communion argued that they were entitled to their property on the basis that they continued to subscribe to the original trusts of historic, orthodox Anglican teaching, that same-sex relationships and blessings are unscriptural and sinful. They sought a *cy-près* order to fulfil the original intention of the trust. The diocese argued that the property was vested in the diocese for the purposes of the diocese and the Anglican Church in Canada, and that the decision of the diocesan bishop to permit same-sex blessings had complied with canonical requirements for doctrinal change, so that the properties could continue to be held beneficially by the diocese. After considerable analysis of the law

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<sup>86</sup> *Ibid* at para 47.

<sup>87</sup> *Ibid* at para 92.

<sup>88</sup> *Ibid* at para 71-91.

<sup>89</sup> Deschamps J, in dissent, thought the religious aspect of the case put it entirely outside the civil law; see *ibid* at paras 120-56.

<sup>90</sup> *Bentley*, *supra* note 5.

<sup>91</sup> Ogilvie, *Religious Institutions*, *supra* note 81.

and the constitutional documents of the church, the Court held that the properties were held in trust for “Anglican ministry” in accordance with Anglican doctrine as determined by the General Synod, which<sup>92</sup> permits bishops to choose how to implement a same-sex policy.<sup>93</sup> The Court rejected the parishes’ argument that the *Overtoun* case should be applied partly because the parishes had already formally left the diocese and partly because the constitution allowed for doctrinal change; neither situation characterized the *Overtoun* case.<sup>94</sup> The Court thought that the *Overtoun* case had embedded within it an exception when internal church rules allow for doctrinal change. The Court expressly declined to determine whether either or both parties had abandoned the foundational principles of Anglicanism.<sup>95</sup>

While the Court stayed well clear of expressing an opinion on the underlying doctrinal issue of same-sex blessings, it could be further stated that of the two rules proposed from the case law to resolve the matter, the Court selected the less intrusive. It is less intrusive to inquire whether doctrinal change has properly occurred in conformity with the polity and governance principles of an organization than to decide which of two parties is more closely aligned to the original doctrine. The former requires a search for procedural compliance and the latter requires a court to determine substantive doctrine and then to declare that to be the correct doctrine for the purposes of enforcing a trust. The Court did not overrule the *Overtoun* case but implicitly limited application to cases where there are no constitutional provisions for change of doctrine within a religious organization, which is relatively rare as a matter of fact, or where there are and they have not been properly followed.

By reframing the case as one about polity or governance, the BC Court of Appeal avoided being drawn into theological debate directly. A court could, however, be drawn into debate about doctrine as happened in *Bentley* because the Court had to determine who makes theological decisions within an Anglican diocese – bishop, national synod or the world-wide Anglican Communion through its government structure. The parishes favoured the Anglican Communion, the Court favoured the national church through bishop and General Synod. The preference of the

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<sup>92</sup> *Bentley*, *supra* note 5 at para 76. For a more detailed analysis of the case, see MH Ogilvie, “Judicial Restraint and Neutral Principles in Anglican Church Property Disputes: *Bentley v Diocese of New Westminster*” (2011) 13 *Ecl LJ* 198.

<sup>93</sup> *Ibid* at para 73.

<sup>94</sup> *Ibid* at paras 67-69, discussing *Overtoun*, *supra* note 51.

<sup>95</sup> *Ibid* at para 73. For a later case following *Bentley*, see *Delicata v Incorporated Synod of the Diocese of Huron*, 2013 ONCA 540, (2013), 117 OR (3d) 1, leave to appeal refused by SCC, [2013] SCCA No 439.

BC Court of Appeal for a polity approach to these disputes mirrors that found in other recent Canadian cases where courts have looked to see who is empowered to make decisions, determined whether those decisions followed procedural requirements, and then enforced those decisions.<sup>96</sup> This could amount to doing theology indirectly because most religious organizations conceptualize polity and governance as having theological dimensions as well. While a polity or governance approach is obviously more attractive for civil courts, theology is still implicated indirectly. It is rarely as simple to say that courts will not consider doctrine as courts might like. While it is undesirable for courts to make doctrinal decisions directly, it is equally desirable for them to be sensitive to the fact that they may be doing so indirectly when they re-frame cases involving doctrinal issues as cases about polity or governance.<sup>97</sup>

In light of the foregoing, the position of the Supreme Court of Canada and other Canadian appellate courts can be summarized as follows: (1) courts will not make decisions about doctrinal matters, thereby confirming an autonomous zone within which religious organizations can make truth statements as they understand the truth; (2) courts may make decisions about property and civil rights; (3) courts may make decisions enforcing internal dispute resolution procedures, that is, courts may enforce the polity and governance procedures of religious organizations; (4) courts may go further and not only interpolate civil law principles of natural justice into polity and governance procedures where they are not present but *may* be prepared to make more intrusive decisions about “religious” matters as hinted by Gonthier J in *Lakeside Colony* and Abella J in *Bruker*; and (5) while courts will not make decisions about doctrine directly, they may do so indirectly by enforcing internal decisions made in compliance with internal polity rules and also thereby make doctrinal decisions because almost all religious institutions inherently incorporate doctrinal beliefs into their rules of polity and governance. More generally, Canadian courts continue to demonstrate great sensitivity to protecting the

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<sup>96</sup> *United Church of Canada v Anderson*, (1991) 2 O.R. (2d) 304 (Ont Gen Div); *Montreal and Canadian Diocese of the Russian Orthodox Church Outside of Russia Inc v Protection of the Holy Virgin Russian Orthodox Church (Outside of Russia) in Ottawa Inc*, [2001] OJ No 438 (QL), aff’d (2002) 30 BLR (3d) 315 (Ont CA); *Ivanchenko v The Sisters of St Kosmos Aitolos Greek Orthodox Monestery*, 2011 ONSC 6481, [2011] OJ No 5228 (QL); *Diaferia v Elliott*, 2013 ONSC 1363, [2013] OJ No 1055 (QL); *Hart v Roman Catholic Episcopal Corporation of The Diocese of Kingston*, 2011 ONCA 728, (2011), 29 Admin LR (5th) 282, leave to appeal refused by SCC No 36425 (17 May 2012). See also MH Ogilvie, “Are Members of The Clergy Without the Law? *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*” (2014) 39 Queen’s LJ 441.

<sup>97</sup> For the American approach, see *Watson v Jones*, 80 US 679 (1871); *Jones v Wolf*, 443 US 595 (1979).

autonomous zone of doctrine but may occasionally tiptoe into doctrinal matters indirectly or inadvertently.

Comparison with English judicial intervention in internal disputes after *Shergill* yields some distinctions. First, English courts expressly restrain themselves from decisions about truth claims or conflicting truth claims within or between religious organizations; Canadian courts have never addressed the issue expressly but in light of their deference to claims about personal meaning in life are unlikely to do otherwise. Secondly, English courts are prepared to identify a religious belief underpinning a civil legal dispute, provided the belief can be objectively discerned, and resolve the dispute on the basis of that identification. Thirdly, English courts have long intervened when the rules of natural justice have not been followed, but, fourthly, may be prepared to go further and make decisions about doctrine, liturgy and polity. In short, English courts are prepared to be more interventionist than Canadian courts, notwithstanding their greater emphasis on ultimate meaning when defining "religion" for legal purposes. Their only self-imposed restraint is not to decide the truth of any religious claim. It can only be speculation to wonder whether the less interventionist approach of Canadian courts is related to their more individualistic basis for defining religion at civil law: Canadian courts have such a reverence and respect for individual choice in religion that this attitude extends to minimal intervention when religious issues arise.

### 5. Conclusion

Comparison of the recent top court decisions on religion and civil court intervention in the realm of religion suggests that there is now a dividing line between how English and Canadian courts deal with these matters at the outset: Canadian courts have adopted the perspective of the individual seeking their own meaning in life while English courts continue to look for collectively held systems of belief which speak to ultimate meaning. Every other distinction flows from this division at the outset of analysis. The danger for the protection of religion lurking in the Canadian approach is that religion may no longer be taken seriously in the future whereas, the danger lurking in the English approach is that the courts may tip over into defining religious truth claims in the future – that is, they may essentially regulate religion in the future. Neither outcome would be without historical precedent; from the time of the English Reformation, the Westminster Parliament has held the power to determine and has determined doctrine, liturgy and polity for the established church and could undoubtedly exercise this jurisdiction much more widely beyond the Church of England. Whether this exercise of historic sovereignty would be successful today is uncertain. The religious history of Canada is one of voluntary

adherence and freedom from state control for each individual and religious organization, from the earliest revulsion against attempts to impose a religious settlement similar to England on the Canadian colonies around the turn of the nineteenth century. Notwithstanding a shared inheritance of a sovereign state and Parliament, fundamental cultural and social attitudes toward religion may well differ between the two countries, at least, as evidenced by the recent decisions of their respective top courts.

Notwithstanding this fundamental distinction, several broad conclusions may be drawn about the approach of both English and Canadian courts to the adjudication of cases about religion:

1. Courts continue to treat religion and religiously-based claims with great deference and respect, and as different from conscientiously held claims, although how these differ remains uncertain.
2. Whether the source of the claim is an individual or a group, religion is conceptualized as about deepest meaning in life, whether or not a supreme being constitutes part of the beliefs.
3. Courts will not adjudicate the truth of any belief claim, but may decide what that claim is, that is, make findings of claims, and may make civil law decisions on the basis of a claim in relation to property and civil rights.
4. Courts will intervene in internal disputes to the extent of a) expecting religious organizations to follow their own polity and governance procedures and b) interpolating the rules of natural justice where these are not otherwise explicitly provided for in governance rules.
5. By virtue of enforcing polity and governance, courts may be indirectly enforcing doctrinal beliefs because these are often expressed in polity and governance provisions.
6. Courts should continue to exercise great sensitivity in these matters in light of the difficulty in distinguishing doctrine or theology and its practice in the realms of property and civil rights.

As stated at the outset, the issues recently reviewed by the UK Supreme Court and the Supreme Court of Canada are difficult and not likely ever to yield clear, final outcomes on which all can agree – not unlike religious claims themselves.