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THE OPPRESSION REMEDY IN RELIGIOUS ORGANIZATIONS

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I. INTRODUCTION

Abraham Mathai was a founding member of his church congregation and had served a term as its president.[1] In 2016, however, he had a falling out with the church board.[2] The board members forbade Mr. Mathai from attending annual general meetings or serving on the church board for a period of two years[3] but allowed him to attend church and partake in its spiritual activities. Mr. Mathai turned to the courts for relief. He raised concerns about the process by which he had been disciplined, arguing it was unfair, and he also alleged that the church's membership and voting rules discriminated against women.[4]

Mr. Mathai's court application is hardly unprecedented: disputes originating in religious communities are litigated with some regularity. In the cases of *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*[5] and *Ethiopian*

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1 See *Mathai v George*, 2019 ABQB 116 [*Mathai*].

2 See *ibid* at para 1.

3 See *ibid*.

4 See *ibid* at paras 3, 21, 33–36, 39.

5 2018 SCC 26 [*Wall*].

Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga,[6] the Supreme Court of Canada (SCC) circumscribed when a court can judicially review the decisions made by a religious organization. However, Mr. Mathai's claim was not decided solely on the basis of a judicial review application: the court considered if it could use the oppression remedy to intervene in the church's affairs.[7] The oppression remedy is a creature of corporate law, but it has been transplanted into other contexts including non-profit legislation. If a church is incorporated under a statute that provides for the oppression remedy, parties to religious disputes can use it to seek judicial assistance in resolving their differences.

On one hand, the use of the oppression remedy to resolve religious disputes is a logical development. The Canadian version of the oppression remedy is a powerful tool for resolving disputes that can arise when organizations are managed in ways that substantially depart from shared notions of fairness. Religious organizations, like non-profits and for-profit organizations, "require management. . . . includ[ing] refined techniques of membership and exclusion, accountability, compliance, asset control and expansion, conflict resolution, secrecy, and transparency."[8] Courts have developed principles to guide the use of the oppression remedy in the context of for-profit corporations and many of these are useful when courts intervene in the affairs of religious non-profits.

On the other hand, a person might rightly be troubled by the possibility of courts applying the oppression remedy to religious organizations. The oppression remedy empowers courts to evaluate whether parties' conduct was "fair" and grant

6 2021 SCC 22 [*Ethiopian Orthodox*].

7 See *Mathai*, *supra* note 1 at paras 19–38. For courts distinguishing cases of a statutory basis for intervening from those where the application is solely for judicial review, see *Farrish v Delta Hospice Society*, 2020 BCCA 312 at paras 82–83 [*Farrish* (CA)], aff'g 2020 BCSC 968 [*Farrish* (SC)], leave to appeal to SCC refused 39504 (8 April 2021); Patrick Hart, "Justice for (W)all: Judicial Review & Religion" (2017) 43:1 Queen's LJ 1 at 27.

8 Levi McLaughlin et al, "Why Scholars of Religion Must Investigate the Corporate Form" (2020) 88:3 J American Academy Religion 693 at 700 [citations omitted].

far-reaching remedies, including setting aside decisions, amending an organization's foundational documents and awarding compensation. The oppression remedy's broad scope for intervention sits uneasily with Canadian courts' avowed reluctance to decide matters of religious doctrine. This reluctance predates the *Charter of Rights and Freedoms* but is bolstered by the *Charter* values of religious freedom and state religious neutrality.[9] Decisions in the for-profit context provide little guidance on the extent to which a court should consider *Charter* values when applying the oppression remedy, nor on how it should proceed when a dispute implicates multiple *Charter* interests. For example, Mr. Mathai argued that his church's membership and voting rules discriminated against women, potentially implicating the *Charter* value of equality.[10]

This article advances two complementary arguments. First, the principles that courts use when applying the oppression remedy to secular, for-profit corporations can generally guide dispute resolution in religious, non-profit organizations. These principles are capable of protecting non-financial interests and are applied with careful attention to context and proportionality. Second, however, it argues that in some cases the religious, non-profit nature of these organizations raises special challenges that require a modified approach. Courts should be able to use the oppression remedy in these contexts but should be guided by *Charter* values, including religious freedom and religious neutrality. This article sets out a framework for courts to use when applying the oppression remedy to ensure that all relevant *Charter* values are taken into account.

The article proceeds as follows. Part II provides a brief history of the oppression remedy—why it was developed in the for-profit context and how it was transplanted to the non-profit sector. This part describes how the availability of the oppression remedy is uneven, depending on the legal form of a religious organization and the statute of incorporation. In some jurisdictions, legislators

9 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

10 See *Mathai*, *supra* note 1 at para 39.

have decided either not to apply the oppression remedy to non-profit organizations or to limit how it is applied to religious non-profits. This part examines the range of statutory approaches to making the oppression remedy available in the non-profit sector and the reasons given by those legislators who have limited its availability or excluded it entirely from non-profit legislation. It also describes other statutory dispute resolution tools that are included in non-profit statutes and used alongside the oppression remedy.

Part III looks at how the oppression remedy is being used to resolve religious disputes and identifies which principles from the for-profit context have proven to be most useful. These principles include (1) taking account of non-financial interests of parties; (2) assessing the fairness of any impugned conduct having regard for (a) the nature of the organization and (b) the relationships between the parties; and (3) crafting remedies that are only as interventionist as is required to be effective.

Part IV considers how the religious nature of a non-profit organization shapes the scope of the oppression remedy. Courts express reluctance to become involved in the internal decision-making processes of both secular, for-profit corporations and religious, non-profit organizations, but the justifications for their deference differ in these two contexts. This section compares these justifications, then takes up the question of how courts can factor in *Charter* values when applying the oppression remedy to religious organizations. To this end, we propose a possible approach drawing on case law in the *Charter* context and political theories of non-domination.

Part V summarizes how courts and litigants should approach the oppression remedy when applying it to religious disputes in non-profit organizations. It offers suggestions for legislators drafting or revising non-profit statutes. It highlights how the analysis in this paper might inform the use of the oppression remedy and other statutory remedies in the for-profit context and in non-religious non-profits.

II. THE OPPRESSION REMEDY

The oppression remedy is a flexible, far-reaching tool. The SCC has explained that "[i]t gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair".[11] To understand why Canadian law holds organizations to such a flexible standard of fairness, it helps to understand the oppression remedy's history and the corporate governance problem it was designed to address.

A. HISTORY

The oppression remedy was first adopted in English law in 1948 to enhance the protections available to minority shareholders in for-profit corporations.[12] Before that, English corporate law had a "strong majoritarian" thread and courts deferred to decisions made by a majority of shareholders, with few, limited exceptions.[13] The judicial deference reflected the predominant importance put on a party's freedom of contract: minority shareholders "[we]re deemed to have agreed to submit themselves to the decision of the majority at shareholders meetings."[14] The deference is also attributable, in part, to "a belief that it was business people and not courts that should be responsible for the decision in question."[15] An oft repeated maxim is that judges lack the business expertise to fairly second-guess decisions made by business people.[16] Minority shareholders upset with a corporate decision

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11 *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 58 [*BCE Inc*].

12 See *Companies Act, 1948* (UK) 11 & 12 Geo VI, c 38, s 210; Jeffrey G MacIntosh, "Minority Shareholders Rights in Canada and England: 1860–1987" 1989 27:3 Osgoode Hall LJ 561 at 623, n 222.

13 See James Farley, Roger J Chouinard & Nicholas Daube, "Expectations of Fairness: The State of The Oppression Remedy in Canada Today" (2007) 33:1 Advocates Q 261 at 263–64; Ontario, Legislative Assembly, *Interim Report of the Select Committee on Company Law* (1967) (Chair: Allan F Lawrence) at 56–58 [*Lawrence Report*]; Mary Anne Waldron, "Corporate Theory and the Oppression Remedy" (1981) 6:2 Can Bus LJ 129 at 132–34.

14 *Lawrence Report, supra* note 13 at 56–57. See also Waldron, *supra* note 13 at 150.

15 Farley, Chouinard & Daube, *supra* note 13 at 263.

16 See *ibid* at 283.

could apply to have a corporation wound up, but this was a drastic remedy and courts granted it sparingly.[17] The English oppression provision adopted in 1948 gave minority shareholders a less drastic remedy in instances where a corporate stakeholder had engaged in an oppressive course of conduct.[18]

In 1960, British Columbia adopted the English oppression provision into its corporate legislation.[19] However, this statutory remedy was too narrowly drawn to provide meaningful relief to minority shareholders. The shareholder could only succeed on an oppression claim if they could show that a winding up order was justified and that the impugned acts amounted to a course of oppressive conduct, not just an isolated event.[20] The federal government's 1971 Dickerson Report recommended broadening the language to address these shortcomings.[21] Broader versions of the oppresion remedy were added to the *British Columbia Companies Act* in 1973 and the *Canada Business Corporations Act* in 1975.[22] As of 2022, all Canadian jurisdictions had adopted an oppresion remedy into their corporate statutes.[23]

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17 See Brian Cheffins, "The Oppression Remedy in Corporate Law: The Canadian Experience" (1988) 10:3 U Pa J Intl Bus L 305 at 308–09.

18 See *Companies Act, supra* note 12; *ibid* at 310; Canada, Department of Industry, Trade and Commerce, *Proposals for a New Business Corporations Law for Canada* by Robert WV Dickerson, John L Howar & Leon Getz, vol 1 (Ottawa: Information Canada, 1971) at para 485 [*Dickerson Report*].

19 See *Companies Act,* SBC 1960 c 8, s 15, as discussed in MacIntosh, supra note 12 at 623, n 222.

20 See *Dickerson Report*, *supra* note 18 at para 485; Cheffins, *supra* note 17 at 310; Farley, Chouinard & Daube, *supra* note 13 at 265; Waldron, *supra* note 13 at 135–36.

21 See *Dickerson Report*, *supra* note 18 at para 485.

22 See *British Columbia Companies Act*, SBC 1973 c 18; *Canada Business Corporations Act*, SC 1974–75, c 33.

23 See Canada: *Canada Business Corporations Act,* RSC 1985 c C-44, s 241; Alberta: *Business Corporations Act,* RSA 2000 c B-9, s 242 [*Business Corporations Act* (AB)]; British Columbia: *Business Corporations Act*, SBC 2002, c 57, s 227 [*Business Corporations Act* (BC)]; Manitoba: *The Corporations Act*, CCSM c C225, s 234 [*The Corporations Act* (MB)]; New Brunswick: *Business Corporations Act*, SNB 1981, c B-9.1, s 166; Newfoundland and Labrador: *Corporations Act*, RSNL 1990, c C-36, s 371

The oppression provision in the *Canada Business Corporations Act* lists three types of conduct that will attract a remedy: *oppressive* conduct, conduct that causes *unfair prejudice* to a corporate stakeholder, and conduct that evidences *unfair disregard* of a corporate stakeholder's interests.[24] Legislators in most provinces have incorporated these three standards into their statutes.[25] The Dickerson Report indicated that the inclusion of three standards was intended to make it "abundantly clear that [the oppression remedy] applies where the impugned conduct is wrongful, even if it is not actually unlawful."[26] The SCC has indicated that "unfair prejudice" and "unfair disregard" capture conduct that is less serious than conduct characterized as "oppressive".[27]

The oppression remedy has "broadened judicial authority to intervene in intra-corporate affairs".[28] Yet, the court continues to defer to the business acumen of the corporate directors under the business judgment rule.[29] The rule dictates that a court should not interfere with the directors' decision "so long as it lies within a range of reasonable alternatives".[30] Courts will assess both the

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[*Corporations Act* (NL)]; Northwest Territories: *Business Corporations Act*, SNWT 1996, c 19, s 243; Nova Scotia: *Companies Act,* RSNS 1989, c 81, s 135A, Third Schedule s 5; Nunavut: *Business Corporations Act,* SNWT (Nu) 1996, c 19, s 243; Ontario: *Business Corporations Act*, RSO 1990, c B.16, s 248; Prince Edward Island: *Business Corporations Act*, RSPEI 1988, c B-6.01, s 194; Québec: *Business Corporations Act*, CQLR c S-31.1, s 450 [*Business Corporations Act* (QC)]; Saskatchewan: *Business Corporations Act*, 2021, SS 2021, c 6, s 18–4; Yukon: *Business Corporations Act*, RSY 2002, c 20, s 243.

24 See *Canada Business Corporations Act, supra* note 23.

25 The British Columbia legislation only includes the first two standards. See *Business Corporations Act* (BC), *supra* note 23, s 227.

26 *Dickerson Report, supra* note 18 at para 485. See also Farley, Chouinard & Daube, *supra* note 13 at 272–73; MacIntosh, *supra* note 12 at 632.

27 *BCE Inc, supra* note 11 at para 93.

28 Cheffins, *supra* note 17 at 314.

29 See Farley, Chouinard & Daube, *supra* note 13 at 282; David S Morritt, Sonia L Bjorkquist & Allan D Coleman, *The Oppression Remedy* (Aurora, ON: Canada Law Book, 2004) (looseleaf) at 4-24 to 4-33.

30 *BCE Inc, supra* note 11 at para 40.

reasonableness of the decision reached and the process that led to it: directors must show that they made the decision "honestly, prudently, in good faith and on reasonable grounds."[31] The rule reflects both that directors have greater business expertise than courts and that it could be unfair for courts to evaluate businesses decisions with the benefit of hindsight.[32]

B. TRANSPLANTED TO OTHER CONTEXTS

The oppression remedy is well-travelled—legislators have transplanted it into a number of other statutes that deal with legal forms other than a standard, for-profit corporation, including cooperatives, condominiums, and non-profits.[33] A question motivating this article was how much the oppression remedy might be transformed when transplanted from the context of a secular, for-profit corporation into a non-profit religious organization.[34] Of course, a for-profit organization can be guided by religious tenets and non-profit organizations are not necessarily religious, but for the purpose of analytical clarity, this

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31 *CW Shareholdings Inc v WIC Western International Communications Ltd* (1998), 39 OR (3d) 755 at 774, 160 DLR (4th) 131 (Ct J (Gen Div)), quoted in Morritt, Bjorkquist & Coleman, *supra* note 29 at 4-38.

32 See Wayne D Gray, "A Solicitor's Perspective of *Peoples v Wise*" (2005) 41 Can Bus LJ 184 at 195–96.

33 See e.g. *Canada Cooperatives Act*, SC 1998, c 1, s 340; *Cooperative Association Act*, SBC 1999, c 28, s 156; *Condominium Property Act*, RSA 2000, c C-22, s 67; *Strata Property Act*, SBC 1998, c 43, s 164; *Condominium Act, 1998*, SO 1998, c 19, s 135.

34 Our thinking on legal transplants was enriched by the work on this concept by scholars of comparative law. See Mathias Reimann, "Comparative Law and Neighbouring Disciplines" in Mauro Bussani & Ugo Mattei, eds, *The Cambridge Companion to Comparative Law* (Cambridge, UK: Cambridge University Press, 2021) 13 at 22. The idea of a legal transplant is closely associated with the work of Alan Watson, especially, *Legal Transplants: An Approach to Comparative Law* (Charlottesville: University Press of Virginia, 1974); however, the scholarly interest in the borrowing of ideas between legal cultures has a longer history. See John W Cairns, "Watson, Walton and the History of Legal Transplants" (2013) 41 Ga J Intl & Comp L 637 at 643 (referencing work by Montesquieu), 688 (referencing work by Frederick P Walton).

article considers how a remedy developed for secular, for-profit companies operates in the context of religious, non-profit organizations.[35]

Understanding how ideas developed in the for-profit context operate in the non-profit sector is important because of the legislative trend towards harmonizing non-profit statutes with for-profit ones.[36] Harmonization has been justified on several different grounds. One is that for-profit corporate statutes are updated more frequently than non-profit ones and thus contain more "streamlined and modern" provisions: legislatures are wise to make use of these provisions in non-profit legislation.[37] Another is that people are more familiar with for-profit corporations and thus will better understand non-profits if they operate according to similar rules.[38] Relatedly, for-profit corporations are involved in more litigation and there will be more certainty in how these cases apply to non-profit corporations if both are governed by similar statutes.[39]

Harmonization does not mean uniformity and commentators have recognized that differences between statutes governing for-profit and non-profit organizations will be necessary given key differences between the two types of organizations.[40] British

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35 See Howard Kislowicz, "Business Corporations as Religious Freedom Claimants in Canada" (2017) 51:2/3 RJTUM 337 (discussing religious, for-profit corporations).

36 For a discussion, see Alberta Law Reform Institute, *Non-Profit Corporations*, Report 26 (Edmonton: Alberta Law Reform Institute, 2015) at para 12.

37 British Columbia Law Institute, *Report on Proposals for a New Society Act*, Report 51 (Vancouver: British Columbia Law Institute, 2008) at 12.

38 See David G Roberts, "Charitable and Non-Profit Corporations in Alberta: An Update on Legal and Tax Issues" (1989) 27:3 Alta L Rev 476 at 480–81.

39 See British Columbia Law Institute, *Report on Proposals for a New Society Act, supra* note 37 at 12; Corporate and Insolvency Law Policy Directorate, *Reform of the Canada Corporations Act: Discussion Issues for a New* Not-for-Profit Corporations Act*: A Supplement to the Draft Framework for a* New Not-for-Profit Corporations Act (Ottawa: Industry Canada, 2002) at 16 [Corporate and Insolvency Law Policy Directorate, *A Supplement to the Draft Framework*].

40 See Ontario Law Reform Commission, "The Nonprofit Corporation: Current Law and Proposals for Reform," in *Report on the Law of Charities*, vol 2

Columbia's Ministry of Finance described the approach in that province as "[h]armonization . . . unless there are good reasons for a departure."[41] Applying principles developed in corporate law to organizations operating in different contexts raises the risk of unintended consequences. The risk of unintended consequences is heightened when the non-profit is religious because an organizational dispute with religious overtones engages areas of legal doctrine not usually applicable when the oppression remedy is applied to a for-profit corporation.

This section examines the extent to which the oppression remedy has been transplanted into the law governing religious, non-profit organizations. Whether a religious organization is subject to the oppression remedy depends on how it is structured and the content of any applicable legislation. Part II.B.1 highlights the inconsistent coverage of the oppression remedy depending on the legal form adopted by the religious organizations, that is, how it is structured and what statute applies. Part II.B.2 surveys the variant approaches to the oppression remedy in jurisdictions that have updated their non-profit legislation: Canada, British Columbia, Ontario, and Saskatchewan. In these jurisdictions, legislators have grappled with whether the oppression remedy should be incorporated into non-profit legislation and whether the oppression remedy should exclude religious disputes from its scope. Jurisdictions that have updated their non-profit legislation have also made other statutory remedies available to resolve disputes. Courts and litigants may prefer these tools because they focus on narrow issues of non-compliance with corporate documents, rather than contextual notions of fairness, and thus provide a more straightforward path to remedy than an oppression claim. Part II.B.3 describes some of these other statutory tools.

(Toronto: Ontario Law Reform Commission, 1996) 451 at 452–53; British Columbia Law Institute, *Report on Proposals for a New Society Act, supra* note 37 at 16.

41 British Columbia, Ministry of Finance, *Society Act Review—Discussion Paper* (Victoria, BC: Ministry of Finance, December 2011) at 3.

I. THE IMPORTANCE OF LEGAL FORM

The oppression remedy applies to some—but not all—religious organizations, depending on their legal form.

Some legal forms are not subject to an oppression remedy. This category includes religious organizations that are unincorporated associations, where property is held by a separate legal entity such as a corporation or a trust.[42] It would also include religious organizations incorporated pursuant to private acts, which lack the detailed remedial provisions of general incorporation statutes.[43]

Amongst religious organizations that are incorporated pursuant to general non-profit legislation, the variety of statutes complicates the seemingly straightforward question of whether the oppression remedy is available to resolve disputes.[44] In Alberta, for example, a religious non-profit may incorporate under three statutes: the *Religious Societies' Land Act,*[45] the *Societies Act,*[46] or Part 9 of the *Companies Act*.[47] The *Religious Societies' Land Act*[48] and the *Societies Act*[49] both include an oppression remedy by reference to the province's *Business Corporations Act*,[50] whereas no

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42 See Baz Edmeades, "Formulating a Strategy for the Reform of Non-Profit Corporation Law—An Alberta Perspective" (1984) 22:3 Alta L Rev 417 at 449; *Ethiopian Orthodox, supra* note 6 at paras 4–5.

43 See MH Ogilvie, "The Legal Status of Ecclesiastical Corporations" (1989) 15:1 Can Bus LJ 74 at 76. Of course, a short private act could be drafted to explicitly include an oppression remedy or to incorporate the remedial provisions of general corporate legislation.

44 See Roberts, *supra* note 38 at 477.

45 RSA 2000, c R-15 [*RSLA*]. On the historical precedents of this legislation from other Canadian jurisdictions, see AH Oosterhoff, "Religious Institutions and the Law in Ontario: A Historical Study of the Laws Enabling Religious Organizations to Hold Land" (1981) 13:3 Ottawa L Rev 441 at 453; Ogilvie, *supra* note 43 at 83–84.

46 RSA 2000 c S-14 [*Societies Act* (AB)].

47 RSA 2000 c C-21.

48 *RSLA*, *supra* note 45, s 25(1).

49 *Societies Act* (AB), *supra* note 46, s 35.

50 *Business Corporations Act* (AB), *supra* note 23, ss 215, 242. See also *The Canadian Islamic Trust Foundation v The Muslim Community of Edmonton*

oppression remedy is available to non-profits incorporated under the *Companies Act*. In Québec, the oppression remedy is not available with respect to non-profits incorporated under that province's *Companies Act*,[51] but parties may access comparable remedies under the superior court's inherent jurisdiction, as set out in the *Code of Civil Procedure.*[52] In Manitoba and Newfoundland and Labrador, non-profit organizations are incorporated under the general *Corporations Act* and thus are subject to the oppression remedy, unless a court were to decide that the oppression provision was "repugnant" or "inconsistent" with the specific rules governing non-profit organizations.[53] In some jurisdictions, legislators have grappled specifically with whether to include an oppression remedy in their non-profit legislation. The next section surveys their various answers to this question. As a result of the variety of legal forms available and uneven incorporation of the oppression remedy into non-profit statutes, religious organizations may be able to choose to adopt a legal form that is subject to the oppression remedy over one that is not.

Mosque and Muslim House, 2019 ABQB 872 (the court held that the oppression remedy was not available as a standalone remedy to organizations incorporated under the *Religious Societies' Land Act* but rather was only available when an application was made to wind-up the organization at para 49).

51 CQLR c C-38, Part III.

52 CQLR c C-25.01, s 33. For a discussion of the oppression like remedy available under the *Code of Civil Procedure* in the context of for-profit companies, see *Lauzon c Marcotte,* 2005 CanLII 20586 at paras 16–18, 2005 CarswellQue 3580 (WL) (Qc Sup Ct); *Côté c Côté*, 2014 QCCA 388 at paras 77–80. For-profit companies now have direct recourse to the oppression remedy in *Business Corporations Act* (QC), *supra* note 23, s 450.

53 *The Corporations Act* (MB), *supra* note 23, ss 2(2), 234, Part XXII; *Corporations Act* (NL), *supra* note 23, ss 4(3), 371, Part XXI; Karen J Cooper & Jane Burke-Robertson, "A Comparison of Corporate Jurisdictions for Charitable Organizations" (Paper delivered at The Canadian Bar Association Canadian Legal Conference and Expo, Niagara 16 August 2010) at 13, 17, online (pdf): *Carters* <carters.ca/pub/article/charity/2010/kjc0816.pdf>.

II. Debate on the Application of the Oppression Remedy to Non-Profits and Religious Organizations

Jurisdictions that have updated their non-profit legislation have considered whether the oppression remedy should be available to non-profits, generally, and religious non-profits specifically. Saskatchewan, Canada, Ontario, and British Columbia have each answered this question differently.

Saskatchewan adopted a new *Non-profit Corporations Act* in 1995,[54] which explicitly includes an oppression remedy. The drafters of the provision expanded the scope of the remedy in a novel way—if the non-profit in question is a charity, the court can grant relief where the corporation, its affiliates or its directors have acted unfairly or oppressively *towards the public.*[55] This broad power for courts to address unfair treatment of the public has resulted in little case law or commentary.[56]

In 2009, Parliament enacted a new *Canada Not-for-profit Corporations Act*,[57] modelled on the *Canada Business Corporations Act*.[58] In 2002, the Corporate and Insolvency Law Policy Directorate published a pair of reports outlining what should be included in the new statute.[59] These reports recommended against including an oppression remedy for two reasons. First, the reports' authors noted that oppressive conduct in the context of a

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54 *The Non-profit Corporations Act*, 1995, SS 1995, c N-4.2 [*The Non-profit Corporations Act* (SK)].

55 See *ibid,* s 225(1).

56 One exception is the British Columbia Law Institute's report on revising that province's *Societies Act*. The institute considered and rejected Saskatchewan's approach, see *infra* note 77. For extended analysis of how charities law straddles public and private spheres, see Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016).

57 SC 2009, c 23.

58 *Supra* note 23. See Jennifer Bird & Julian Walker, *Bill C-4: Canada Not-For Profit Corporations Act* (Ottawa: Library of Parliament, 2009) at 2.

59 See Corporate and Insolvency Law Policy Directorate, *Reform of the* Canada Corporations Act*: Draft Framework for a New* Not-for-Profit Corporations Act (Ottawa: Industry Canada, 2002); Corporate and Insolvency Law Policy Directorate, *A Supplement to the Draft Framework, supra* note 39.

non-profit would rarely result in direct financial loss to a member but was more likely to impact their ability to exercise their rights as members. The reports' authors felt that such conduct could be addressed using other remedies.[60] Second, they were concerned that disgruntled members might use the oppression remedy abusively, tying "organizations up in court as a way of challenging the corporation's decisions," including "ecclesiastical religious decisions."[61] The stakeholders consulted by the federal government reiterated these sentiments.[62]

The federal statute that was eventually passed includes an oppression remedy.[63] To address concerns regarding religious organizations, the legislation provides a faith-based defence. The court is precluded from granting an oppression remedy against a religious corporation if the oppressive conduct "is based on a tenet of faith held by the members of the corporation" and "it was reasonable to base the [oppressive conduct] on the tenet of faith."[64] A similar faith-based defence is available if a member applies to wind-up the corporation because of oppressive conduct or to bring a derivative action on behalf of a religious corporation.[65] At the time that the bill underwent a second reading, the sponsoring Minister indicated that the inclusion of these faith-based defences was intended to prevent the courts from becoming "a battleground where their tenets of faith can be challenged."[66]

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60 See Corporate and Insolvency Law Policy Directorate, *A Supplement to the Draft Framework, supra* note 39 at 36–37.

61 *Ibid* at 37.

62 See *Reform of the Canada Corporations Act: The Federal Not-for-Profit Framework Law: Thematic Summary of the Consultations May 9 to June 19, 2002* (Ottawa: Industry Canada, 2002) at 9.

63 See *Canada Not-For-Profit Corporations Act, supra* note 57, s 253.

64 *Ibid,* s 253(2).

65 See *ibid, ss* 224, 251(2).

66 See *House of Commons Debates*, 40-2, No 8 (4 February 2009) at 1810 (Hon Diane Ablonczy). See also Wayne D Gray, "A Practitioner's Guide to the New Canada Not-For-Profit Corporations Act" (2010) 89 Can Bar Rev 141 at 147–48.

Ontario enacted the *Not-For-Profit Corporations Act, 2010*,[67] but it only came into force in 2021. It does not contain an oppression provision. In a consultation paper, the Ontario government considered both the possibilities of including the oppression remedy and of exempting religious organizations from its application. The authors of the consultation paper cited the availability of other remedies and the potential for costly litigation as reasons not to incorporate the oppression remedy into the statute.[68] They noted that by excluding religious organizations from the oppression remedy, members of these organizations would have fewer protections but the statute would prevent religious claims from being challenged in court and would "accommodate the unique nature of religious corporations, which are accustomed to external control and special rules that may not be consistent with conventional law."[69]

The Ontario statute makes other remedies available to the members of a non-profit organization, including a derivative action, with a faith-based defence.[70] The statute directs that a court shall not grant leave to a member to bring a derivative claim on behalf of an organization if the court is satisfied that the organization is religious.[71] Unlike the federal legislation, the court need not be satisfied that the impugned conduct was reasonably based on tenets of faith; the corporation being religious is sufficient to bar a derivative action. Neither the federal nor the Ontario legislation defines what makes an organization "religious".[72]

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67 SO 2010, c 15.

68 See Canada, Ontario Ministry of Government and Consumer Services, *Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations,* Consultation Paper No 3 (Toronto: Ontario Ministry of Government and Consumer Services, 2008) at 18 [Ontario Ministry of Government and Consumer Services, Policy and Consumer Protection Services Division, Consultation Paper No 3].

69 *Ibid* at 19.

70 See *Not-for-Profit Corporations Act, 2010, supra* note 67, s 183.

71 See *ibid,* s 183(3).

72 In providing for special treatment of religious corporations, the federal and Ontario governments were influenced by statutory developments in the

British Columbia passed a new *Societies Act* in 2015.[73] Prior to this, its *Society Act* provided members with an oppression remedy in the same way that Alberta's currently does, by referentially including the dissolution provisions from for-profit legislation.[74] The 2015 statute explicitly includes an oppression remedy, modelled on the language in the province's *Business Corporations Act*.[75] The British Columbia Law Institute recommended including the oppression remedy despite noting that other jurisdictions had questioned its relevance to non-profit corporations. The Institute reasoned that "society members should have access to sophisticated remedies" and "repealing the oppression remedy after extending it to society members for 30 years would be felt as a step backward."[76] The Institute recommended against Saskatchewan's approach of making the oppression remedy

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United States. See Ontario Ministry of Government and Consumer Services, Policy and Consumer Protection Services Division, Consultation Paper No 3, *supra* note 68 (citing California legislation and the American Bar Association model statute at 3); Corporate and Insolvency Law Policy Directorate, *A Supplement to the Draft Framework, supra* note 39 (citing California legislation and the American Bar Association model statute at 6). The Ontario Law Reform Commission also provided for a non-profit classification scheme that recognized "religious organizations" as a class of charity: Ontario Law Reform Commission, "The Nonprofit Corporation: Current Law and Proposals for Reform," in *Report on the Law of Charities,* vol 1 (Toronto: The Commission, 1996) at 234–36. The American Bar Association's model statute on non-profits has a number of special provisions that apply to religious organizations. See e.g. American Bar Association, *Final Exposure Draft Revision of the Model Nonprofit Corporation Act* (28 May 2021), s 130, online: <americanbar.org/content/dam/aba/administrative/business_law/nonprofit/mnca.pdf>. The California *Corporations Code* has a separate set of provisions governing a non-profit religious organization's corporation. See *Corporations Code,* at Divison 2, Part 4 "Nonprofit Religious Corporations", ss 9110–690.

73 See *Societies Act*, SBC 2015, c 18 [*Societies Act* (BC)].

74 See *Society Act,* RSBC 1996 c 443, s 71 [*Society Act* (RSBC)], referencing part 9 of the *Company Act,* RSBC 1996, c 62. See also British Columbia Law Institute, *Report on Proposals for a New Society Act, supra* note 37 at 208.

75 See *Societies Act* (BC), *supra* note 73, s 102; *Business Corporation Act* (BC), *supra* note 23, s 227.

76 British Columbia Law Institute, *Report on Proposals for a New Society Act, supra* note 37 at 208.

available where unfair conduct impacted the public on the basis that a "disgruntled person could brandish the oppression remedy as a weapon against the society in an unrelated dispute."[77] The 2015 statute incorporated these recommendations.

Alberta has attempted to update the statutes governing its non-profit legislation. In 1987, a bill that would have enacted new legislation to replace the *Companies Act* and the *Societies Act* passed first reading before the government abandoned it.[78] In 2015, the Alberta Law Reform Institute reinvigorated the project of updating the provincial non-profit legislation by publishing a discussion paper on the topic. It envisions passing legislation to replace the *Companies Act* and *Societies Act* and has recommended against including an oppression remedy.[79]

Despite an overall push to harmonize non-profit legislation with for-profit legislation, jurisdictions have adopted different approaches to the oppression remedy. Ontario's non-profit legislation does not incorporate it and the Alberta Law Reform Institute has recommended against incorporating it. Canada's non-profit legislation includes the oppression remedy but provides organizations with a faith-based defence if the dispute relates to religious tenets. British Columbia's non-profit legislation includes the oppression remedy and has no faith-based defence. Saskatchewan's non-profit oppression remedy is broader than the oppression remedy in its *Business Corporations Act* because it allows for courts to intervene where charitable non-profits have acted unfairly towards the public.

III. Remedies other than Oppression

In addition to the oppression remedy, members of incorporated religious organizations may have access to different statutory

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77 British Columbia Law Institute, *Supplementary Report on Proposals for a New Society Act* (Vancouver: British Columbia Law Institute, 2012) at 16.

78 See Bill 54, *Volunteer Incorporation Act*, 2nd Sess, 21st Leg, Alberta, 1987 (introduced 15 June 1987); Alberta Law Reform Institute, *Non-Profit Corporations*, Report 26, *supra* note 36 at paras 5, 12.

79 See Alberta Law Reform Institute, *Non-Profit Corporations—Discussion Paper* (Edmonton: Alberta Law Reform Institute, 2015) at paras 73–85.

dispute resolution remedies: compliance and restraining orders or, in British Columbia, a power to address irregularities. Members of religious organizations often use these remedies when they turn to the courts to resolve their disputes.

In jurisdictions where non-profit statutes have been updated, including British Columbia, Saskatchewan, Ontario, and Canada, legislators have included a compliance and restraining order provision, a remedy borrowed from corporate law.[80] Courts can use compliance and restraining orders to require organizations to conduct their affairs in accordance with their governing legislation and foundational documents (e.g., constitution, articles, bylaws, and unanimous members agreement).[81] These orders may either mandate or prohibit conduct. The British Columbia Law Institute opined that this remedy would be useful in situations where there had been non-compliance with a "fundamental corporate document" that did not "sink to the level of oppression."[82] Although the federal and Ontario statutes set out faith-based defences to some remedies, these defences do not apply to compliance and restraining orders.[83]

When British Columbia updated its non-profit legislation in 2015, it retained a provision from the old statute that empowers courts to address irregularities.[84] This provision empowers courts to intervene when there has been an irregularity in the conduct of the organization's affairs.[85] This provision overlaps with the

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80 Derivative actions have also been incorporated into non-profit legislation but are not as relevant to the types of disputes discussed in this article. See e.g. *Canada Not-For-Profit Corporations Act*, *supra* note 57, s 251; *Societies Act* (BC), *supra* note 73, s 103; *Not-for-Profit Corporations Act, 2010*, *supra* note 67, s 183; *The Non-profit Corporations Act* (SK), *supra* note 54, s 223.

81 See *Canada Not-For-Profit Corporations Act, supra* note 57, s 259; *Societies Act* (BC), *supra* note 73, s 104; *Not-for-Profit Corporations Act, 2010*, supra note 67, s 191; *The Non-profit Corporations Act,* (SK), *supra* note 54, s 231.

82 British Columbia Law Institute, *Report on Proposals for a New Society Act, supra* note 37 at 210.

83 See *Canada Not-For-Profit Corporations Act*, *supra* note 57, s 259; *Not-for-Profit Corporations Act, 2010, supra* note 67, s 183.

84 See *Society Act* (RSBC), *supra* note 74, s 85.

85 See *Societies Act* (BC), *supra* note 73, s 105.

compliance and restraining order by policing compliance with governing legislation and foundational documents, but it also allows courts to intervene where there has been irregularity in the conduct of a meeting or a resolution.

When members of a religious organization turn to the courts to resolve their disputes, courts will often use the compliance and restraining order or irregularity provisions because the unfairness complained of has flowed from an alleged breach of a constitutional document or statute governing the organization.[86] These statutory dispute resolution tools are useful in situations where there has been a clear breach, whereas the oppression remedy becomes more important in situations where an organization has acted in a technically correct, but substantively unfair manner.[87] Although each of these remedies has a different scope, the contextual sensitivity and proportionality inherent in oppression jurisprudence can usefully guide courts when they use any of these statutory tools to intervene in disputes in religious non-profits.

III. THE OPPRESSION REMEDY IN FOR-PROFIT AND NON-PROFIT CORPORATIONS: POINTS OF CONVERGENCE

To understand how the oppression remedy is being used in non-profit corporations, we searched for cases where courts have been asked to resolve disputes in religious organizations using the statutory tools described in Section 2. As mentioned previously, many of these disputes were resolved using compliance and restraining order provisions, or in British Columbia, the

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[86] See *Gill v Kalgidhar Darbar Sahib Society*, 2017 BCSC 1423 at para 31 [*Gill*]; *Bains v Khalsa Diwan Society of Abbotsford*, 2020 BCSC 181 at paras 84–85 [*Bains* (SC)], rev'd in part 2021 BCCA 159 [*Bains* (CA)]; *Farrish* (CA), *supra* note 7 at para 27.

[87] The oppression remedy is not used exclusively to remedy technically correct but unfair conduct. In *Dauphinee v White Rock Harbour Board*, 2018 BCSC 1286, the complainant used the oppression remedy to compel a society to follow its own rules. The complainant likely opted to use the oppression remedy as opposed to the compliance and restraining order or irregularity provisions of the *Societies Act* (BC), *supra* note 73, because there was some question as to the validity of the rule that the Society had allegedly breached.

irregularity provision. The situations in which courts have found oppression often involve conduct that is technically valid, but unfair.[88] For example, in *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta,* the court found it was oppressive for a Sikh organization to deny membership to people based on their affilitation with one political faction in the community.[89] In *Basra v Shiri Guru Ravidass Sabha*, the court found oppressive conduct when a Sikh organization refused a membership renewal application.[90] The organization's leaders were technically entitled to refuse the renewal application, but the court found they used this power improperly to punish a member who had criticized them. In *Chouman v Omar Al Farooq Islamic Society,* the court held it was unfair for the board chair to refuse a director's voting proxy, even though there was an error on its face.[91]

The analytical tools courts have developed in the context of for-profit oppression claims have proved useful to courts deciding oppression claims in the context of religious non-profit organizations. The SCC has articulated a two-part test for the oppression remedy in the context of for-profit corporations, and courts have applied this test to other types of organizations, including non-profits.[92] The first step asks whether the evidence

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88 See e.g. *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 [*Sandhu* (CA)], aff'g 2013 ABQB 656 [*Sandhu* (QB)], leave to appeal to SCC refused, 36426 (13 August 2015); *Basra v Shri Guru Ravidass Sabha*, 2017 BCSC 1696 [*Basra*]; *Chouman v Omar Al Farooq Islamic Society*, 2019 BCSC 754 [*Chouman*].

89 See *Sandhu* (CA), *supra* note 88 at para 51.

90 See *Basra*, *supra* note 88 at para 94.

91 See *Chouman*, *supra* note 88 (mere typographical error at paras 18, 48; statutory and bylaw requirements for notices at paras 42–43).

92 See *Sandhu* (CA), *supra* note 88 (applying the test to a religious organization incorporated under Alberta's *Religious Societies' Land Act* at para 50); *Potter v Vancouver East Cooperative Housing Association*, 2019 BCSC 871 (applying the test to a cooperative incorporated under British Columbia's legislation at para 91); *Collins Barrow Vancouver v Collins Barrow National Cooperative Incorporated*, 2015 BCSC 510 (applying the test to a cooperative incorporated under federal legislation at para 108), aff'd 2016 BCCA 60; *Sedgwick v Edmonton Real Estate Board Co-Operative Listing Bureau Limited (Realtors Association of Edmonton)*, 2022 ABCA 264 (holding that the two part test

supports the reasonable expectation asserted by the claimant.[93] The second step asks whether the evidence establishes that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest.[94] Strict adherence with a corporation's constitutional documents will not preclude a court from finding that oppression has occurred.[95]

Certain key principles that guide the court's analysis of the oppression remedy in for-profit contexts are especially relevant in not-for-profit contexts. First, commentary to the contrary notwithstanding, the oppression remedy in the for-profit arena often safeguards non-financial interests. This capability is fundamental for the remedy's operation in the not-for-profit context where disputes are generally not financial. Second, context is crucial for assessing whether oppression has occurred. In the non-profit context, courts put significant weight on the nature of the organization and the relationships amongst the parties. Third, when courts craft remedies, they often balance the desire not to intervene in the internal workings of an organization with the desire to provide effective remedies. The following three subsections explore each of these commonalities in turn and highlight how they are relevant to when courts apply the oppression remedy and other statutory tools to religious non-profits.

A. NON-FINANCIAL INTERESTS

As discussed in Section 2.2.2, one argument offered against making the oppression remedy available in the non-profit context is that the remedy is designed to "redress direct financial losses of

needs to be adapted, when applied to a cooperative incorporated under Alberta's legislation, to account for "important distinctions as to the purposes and characteristics of different corporate structures" at para 92). For analysis of the two-part test, see Jassmine Girgis, "The Oppression Remedy: Clarifying Part II of the BCE Test" (2018) 96:3 Can Bar Rev 484.

93 See *BCE Inc, supra* note 11 at para 68.

94 *Ibid*.

95 See Cheffins, *supra* note 17 at 323.

an individual," and members of societies have few financial interests at stake.[96] Yet, even in the for-profit context, courts have used the oppression remedy to vindicate non-financial interests.

Scholars have repeatedly recognized the relevance of non-financial interests to the oppression remedy. Shannon O'Byrne and Cindy Schipani argue that a central benefit to the oppression remedy in the for-profit context is that it can attend to non-financial interests that support human flourishing. They point to case law where courts have used the oppression remedy to compensate corporate stakeholders for the loss of employment and suggest that these cases show courts attending to employees' non-financial interests: their "pride of ownership, sense of autonomy and feelings of accomplishment."[97] In their empirical study of the oppression remedy in Canada, Stephanie Ben-Ishai and Poonam Puri conclude "that non-monetary interests may be reasonable expectations" capable of grounding successful oppression claims.[98] Such interests might include those of non-shareholding stakeholders, such as employees in the context of a hostile takeover.[99] On a similar note, Justice Lynn Leitch has argued that in, a family-owned for-profit company, courts should consider the family dynamics when fashioning an oppression remedy.[100] Justice Leitch cites the case of *Naneff v Con-Crete Holdings Ltd* for this proposition.[101] The case provides a window

96 Alberta Law Reform Institute, *Non-Profit Corporations—Discussion Paper*, *supra* note 79 at para 25.

97 Shannon K O'Byrne & Cindy A Schipani, "Feminism(s), Progressive Corporate Law & the Corporate Oppression Remedy: Seeking Fairness & Justice" (2018) 19:1 Geo J Gender & L 61 at 108. See also Stephanie Ben-Ishai & Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995–2001" (2004) 30:1 Queen's LJ 79 at 103.

98 Ben-Ishai & Puri, *supra* note 97 at 82.

99 See *ibid* at 97.

100 See Justice Lynne Leitch, "The Oppression Remedy: When Family Law and Corporate Law Intersect" (2010) 29 Can Fam LQ 287 at 298.

101 *Naneff v Con-Crete Holdings Ltd* (1993), 11 BLR (2d) 218, OJ No 1756 (Ct J (Gen Div)) [*Naneff* (Gen Div) cited to BLR], rev'd in part (1994), 19 OR (3d) 691, 16 BLR (2d) 169 (Div Ct), rev'd in part (1995), 23 OR (3d) 481, 23 BLR (2d) 286 (CA) [*Naneff* (CA) cited to OR].

on the types of non-financial interests that the oppression remedy can protect, even in the for-profit realm.

Naneff involved an oppression claim by the elder of two sons. The applicant's father and younger brother forced him out of the family business because the family disapproved of the elder son's partying and his girlfriend.[102] The court found that the steps taken to eject the elder son from the family business constituted oppression. The chambers judge had ordered that the corporation be put up for sale, so that it could be purchased by the elder son, his younger brother, their father, or someone else. On appeal, the Court of Appeal held that this remedy reflected an error in principle because it allowed the elder son the possibility of controlling the corporation, prior to his father's death. The understanding in the family had always been that the sons would take over when the father died or retired (voluntarily). Instead of a public sale, the Court of Appeal directed the younger son and father to purchase the elder son's shares at fair market value.[103]

The Ontario Court of Appeal in *Naneff* cautioned against using the oppression remedy to address harm caused to people in their personal as opposed to organizational capacity. The Court of Appeal held that the trial judge had erred by granting a remedy that did more than merely protect the elder son's "interest as a shareholder . . . it protects, indeed it advances, his interest as a son."[104] At first blush, one might read the Court of Appeal's reasons as suggesting that the oppression remedy should only protect a person's financial interests, but on deeper consideration, it is evident that a shareholder can have non-financial interests in a company. In choosing to revise the remedy—from a public sale to a direction that the father and younger son purchase the older son's shares—the Court of Appeal seems to be saying that the initial judge did not give sufficient weight to the non-financial interests of the father. The Court of Appeal disapproved of the public sale

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[102] See *Naneff* (Gen Div), *supra* 101. The family business was structured as a group of companies, but nothing turns on that for the purposes of the discussion in this article.

[103] See *Naneff* (CA), *supra* note 101 at 493 (also without a minority discount).

[104] *Ibid* at 492.

remedy because it put the father "in the position where he is just another person, equal to [the elder son], who is entitled to buy the business which [the father] had himself founded and built from nothing."[105] In other words, the public sale remedy did not take adequate account of the father's non-financial interests in the family business or, to borrow O'Byrne and Schipani's language, his pride of ownership and sense of accomplishment.[106] *Naneff* demonstrates that the oppression remedy can vindicate non-financial interests.

When courts resolve disputes in non-profits using statutory remedies, they recognize that important non-financial interests are at stake. Cases involving religious non-profits implicate particularly serious non-financial interests. Central to many disputes in non-profits is the individual's sense of belonging. The Alberta Law Reform Institute suggested that members in a non-profit organization can more easily "walk away" than can shareholders in a for-profit corporation because the members do not need to liquidate a financial investment in the organization.[107] This framing does not recognize the commitment, pride, and loyalty that many individuals feel towards non-profit organizations, especially when the organization is tied to an aspect of their identity.[108] Moreover, a member expelled from a religious organization loses the social relationships with other members of the community, and their expulsion may place strain on their relationships with any family members who remain part of the community.[109]

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105 *Ibid*.

106 See O'Bryne & Schipani, *supra* note 97.

107 See Alberta Law Reform Institute, *Non-Profit Corporations*, Report 26, *supra* note 36 at para 291.

108 See *Edmonton Harari Community Association (Harari Canadian Community Disputed Executive) v Edmonton Harari Community Association (Harari Canadian Community Elected Executive)*, 2015 ABQB 298 at para 47 [*Edmonton Harari Community Association*].

109 See Alvin J Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004) at 21–26 [Esau, *Courts and the Colonies*].

Disputes that arise about membership in religious organizations can escalate to litigation in part because of the fundamental importance people attach to their sense of belonging and identity.[110] As Shelly Kreiczer and Meital Pinto argue, "[t]here is a strong connection between a person's sense of identity, connectedness, and roots, and her relations with significant others".[111] We develop stories about who we are and how we fit into our world through exchanges with those close to us.[112] When we take part in identity-driven community associations, our relationships with the other members shape our identities. And when the groups to which we belong expel us or place conditions on our membership, our sense of self can be compromised.[113] We can become "deprived of the reference points and self-understandings around which [we] organize [our] everyday existence . . . [and] literally become disoriented."[114] Similarly, when communities divide into factions because of a dispute,[115] both factions can be seen as making claims about who gets to call themselves an authentic member of the community. So, when litigation is focused on the control of a community organization rather than membership, we still see the quest for belonging and identity as central to those disputes. Even with no money involved, the stakes of these disputes can be high.

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110 For a seminal work on the psychologically fundamental need to belong, see Roy F Baumeister & Mark R Leary, "The Need to belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation" (1995) 117:3 Psychological Bull 497.

111 Shelly Kreiczer Levy & Meital Pinto, "Property and Belongingness: Rethinking Gender-Based Disinheritance" (2011) 21:1 Tex J Women & L 119 at 131.

112 See Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism* (Princeton: Princeton University Press, 1992).

113 See Dwight Newman, "Exit, Voice and Exile: Rights to Exit and Rights to Eject" (2007) 57:1 UTLJ 43 at 78.

114 Daniel Weinstock, "Beyond Exit Rights: Reframing the Debate" in Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge, UK: Cambridge University Press, 2005) 227 at 235.

115 See *Edmonton Harari Community Association*, *supra* note 108.

In addition to fostering a sense of belonging and identity, religious organizations also provide members with milieux in which they can practice their faith. The loss of this collective spiritual space can be devastating. In a case involving the expulsion of members from a small, Lutheran congregation, the Court remarked:

> exclusion from membership in a church congregation is more significant than exclusion from a social club . . . . The church society does not have power over a member's livelihood in the way that a union or professional association might, but it provides a sanctuary for worship and fosters the spiritual well-being of its members.[116]

In a subsequent case involving the expulsion of members, this time from a Sikh organization, the trial judge recognized that "membership in a religious organization may be a significant aspect of a person's wellbeing."[117]

A member expelled from a religious organization may suffer an additional harm if the reason for their expulsion is a perceived deficit in their religious practice.[118] In *Basra v Shiri Guru Ravidass Sabha*, the Court suggested that it was especially significant when a society expelled a member based on "alleged flaws in his religious belief" and thus such a decision must be fully and properly considered.[119]

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116 *Lutz v Faith Lutheran Church of Kelowna*, 2009 BCSC 59 at para 89 [*Lutz*]. See also Esau, *Courts and the Colonies*, *supra* note 109 at 107.

117 *Bains* (SC), *supra* note 86 at paras 35, 42.

118 See e.g. *Gill*, *supra* note 86 (members were deemed ineligible to sit on the religious advisory committee because the executive committee reviewing their applications determined that they did not partake in the threshold religious practices at para 22). See also *Sandhu* (CA), *supra* note 88 (the purported reason for denying membership to a number of applicants was that they did not share the values of the Sikh faith at para 12).

119 *Basra*, *supra* note 88 at para 91. See also *Lutz*, *supra* note 116 (stating that "to be judged guilty of conduct grossly unbecoming a member of the body of Christ is much more significant to a Christian churchgoer than to be judged insufficiently collegial or in breach of club rules by a golf club or other social club formed to promote common social interests" at para 89).

An important interest is also at stake in cases where a member's expulsion or discipline is not justified with respect to their faith practices, but rather to their dissenting from church leadership. In cases like this, issues of membership are bound up with a member's ability to express themselves, another important non-financial interest. In a case where a congregant challenged bylaw amendments at a Korean Presbyterian church, the Court observed:

> in any group, even a Church, there will be those that do not necessarily agree with the leadership of the Church but . . . the rules that govern [the organization] must both observe freedom of expression and tolerate dissonance within the membership.[120]

In cases like this, however, courts must take care in interfering with hierarchical religious traditions, in which deference to identified religious authorities is itself part of religious practice.[121]

Disputes in a religious organization can impact other members who are not directly involved in legal proceedings. In the case above involving the Korean Presbyterian Church, the Court noted that ongoing litigation had reduced attendance from 400 to 140, and the Court's intervention in the church's affairs had caused the members to feel embarrassed and disgraced.[122] In the case of the Lutheran church noted above, the congregation had shrunk from about 110 to about 70 following the contested expulsion of members.[123] Conversely, in the case of *Farrish v Delta Hospice Society,* membership grew from 160 members to over 1400 members in less than a year.[124] The growth came as the secular society debated whether to incorporate religious principles into its constitution so as to be exempt from offering medical assistance in dying. Some long-serving members of the society

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120 *Hong and Jung v Young Kwang Presbyterian Church*, 2006 BCSC 376 at para 28 [*Hong*].

121 See Victor M Muñiz-Fraticelli & Lawrence David, "Religious Institutionalism in a Canadian Context" (2015) 52 Osgoode Hall LJ 1049 at 1109.

122 See *Hong v Young Kwang Presbyterian Church*, 2007 BCSC 502 at paras 5, 39.

123 See *Lutz*, *supra* note 116 at paras 8, 101.

124 *Farrish* (CA), *supra* note 7 at para 9.

attributed this growth to membership drives conducted by "hostile" parties that had resulted in unwanted public attention for the society.[125] In each of these cases, the drastic change in the size of the organization pointed towards a loss of social cohesion.[126]

Are these interests—a sense of belonging, spiritual well-being, freedom to dissent, and social cohesion—ones that the oppression remedy should protect? If one believes that the oppression remedy exists to protect financial interests, the answer is no. Some more libertarian articulations of liberal theory also support a negative answer. These articulations view cultural communities "as associations of individuals whose freedom to live according to communal practices each finds acceptable is of fundamental importance."[127] In this view, if people can voluntarily exit communities, then the law should respect their agency in choosing to be members of communities that might appear to compromise their interests.[128] This autonomy-based argument for judicial non-intervention echoes the justification for courts deferring to the wishes of shareholder majorities in pre-1948 English corporate law. However, exit is not always a realistic option for practical reasons and because of the deep-seated nature of many religious identities.[129] Arguably there is room for state

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125 *Ibid* at para 88.

126 See also Esau, *Courts and the Colonies*, *supra* note 109 (the description of violence that broke out on the Lakeside Hutterite Colony during the litigation over Daniel Hofer's expulsion at 122–27).

127 Chandran Kukathas, "Are There Any Cultural Rights?" (1992) 20:1 Political Theory 105 at 116.

128 See *ibid* at 116–18; Weinstock, *supra* note 114 (for an account of how autonomist, pluralist, and associationist schools of liberal thought prioritize exit rights at 228–33); Newman, *supra* note 113 (for reflections on whether exit is required to sustain autonomy).

129 See Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Contemporary Political Theory (Cambridge, UK: Cambridge University Press, 2001) at 41; Esau, *Courts and the Colonies*, *supra* note 109 at 323; Weinstock, *supra* note 114 at 237; Oonagh Reitman, "On Exit" in Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equality, RIghts and Diversity* (Cambridge, UK: Cambridge University Press, 2005) 189 at 193; Dwight Newman, "Exit, Voice, and Exile: Rights to Exit and Rights to

intervention in some cases if one is primarily concerned with promoting agency and autonomy, but contextual factors (like community norms) make it difficult for some members to live as they choose.

The availability of the oppression remedy in non-profit statutes in some jurisdictions indicates that legislators intended for the remedy to be drawn on to vindicate non-financial interests, as members are unlikely to have financial interests in such contexts unless they are employees. As discussed above, even in for-profit corporations, courts have used the oppression remedy to vindicate stakeholders' non-financial interests. *Naneff* illustrates that the oppression remedy can protect the range of financial and non-financial interests held by shareholders, and thus it can also protect the interests, financial and non-financial, of non-profit members.

B. Fairness is Contextual

When courts rely on the oppression remedy to resolve disputes in religious organizations, they sometimes explicitly recite the SCC's two-part test.[130] Other times, they are less clear. In *Mathai,* for example, the Alberta Court of Queen's Bench described the relevant test as whether there had been "'a breach of internal rules, lack of procedural fairness or bad faith'".[131] In some cases, the court does not articulate the test at all.[132] Yet, echoes of the two-part test are evident in court decisions involving religious disputes, especially in their emphasis on the "nature of the organization" and the "relationship amongst the parties", which are contextual factors the SCC has identified to assess the reasonableness of a party's expectations when analyzing an

Eject" (2007) 57:1 UTLJ 43 (for an argument that the focus on exit rights misses crucial aspects of group autonomy).

130 See *Sandhu* (CA), *supra* note 88 at para 50.

131 *Mathai, supra* note 1 at para 19.

132 See *Basra, supra* note 88 at para 94; *Chouman v Omar Al Farooq Islamic Society, supra* note 88 at paras 25, 47.

oppression claim in the for-profit world.[133] We discuss these two factors in turn.

I. THE NATURE OF THE ORGANIZATION

The nature of an organization can refer to its size or sophistication. Courts are attuned to the challenges facing religious organizations, which are often volunteer-run and sometimes, though not always, small.[134] There are multiple instances of courts adopting a forgiving approach to minor breaches or missteps by these organizations, such as when the minutes of the board meeting were not signed, despite a bylaw requiring them to be.[135] They have also adopted a more relaxed approach to the required neutrality of the decision maker. Courts have recognized that when members of a small organization decide matters of governance, they are generally not disinterested and may have background information about the dispute,[136] but can be "presumed to have open minds."[137] The courts' sensitivity to the nature of the organization can be important when deciding what parties can reasonably expect as part of the oppression remedy, but also when applying other statutory tools, such as determining what amounts to an *irregularity*.

The nature of the organization can also refer to its (religious) objectives, values, or principles, which courts use to evaluate the reasonableness of a party's expectations. For example, in *Sandhu*, the court identified the overall mission of the organization as being to establish an "open, public" religious and educational institution.[138] The court discerned this mission from the organization's objectives including that the society intended to

133 *BCE Inc*, *supra* note 11 at para 72.

134 See *Basra*, *supra* note 88 at para 75; *Bains* (CA), *supra* note 86 at para 34, 65 (an irregularity provision case).

135 See *Mathai*, *supra* note 1 at para 36.

136 See *Bains* (SC), *supra* note 86 para 82 (an irregularity provision case).

137 *Lutz*, *supra* note 116 at para 90 (an irregularity provision case).

138 *Sandhu* (QB), *supra* note 88 ("open, public" at para 51; "open, educational and religious institution" at para 77).

"'promote the Sikh religion' . . . 'promote goodwill and understanding' towards all Canadians . . . promote education in Panjabi to Sikhs 'and any other person' [and] 'to promote multiculturalism' via sharing of the Sikh culture'".[139] The Court held that the openness of the institution led the applicants to reasonably expect that membership applications would not be rejected for political reasons, and the Court pointed to the society's mission to justify its remedy of re-writing the organization's bylaws to empower the members to democratically elect the executive committee.[140]

Courts are justified in giving special emphasis to the object or purpose of a non-profit in their analysis when that purpose is required by statute. Some, but not all, non-profit statutes require an organization to specify a purpose or objects at the time of incorporation.[141] These organizations are statutorily required to act in accordance with the purposes, objects or restrictions in their constituting documents.[142] This state of affairs can be contrasted with for-profit corporations, which are free to pursue

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139 *Sandhu* (QB), *supra* note 88 at para 51.

140 See *ibid* (membership criteria at paras 51–52; election of directors at paras 77–78).

141 See e.g. *Societies Act* (BC), *supra* note 73, s 2, 10(1)(b); *Societies Act* (AB), *supra* note 46, s 9(2)(b), 16, *Canada Not-for-Profit Corporations*, *supra* note 57, s 7(1)(f); *Not-for-Profit Corporations Act* 2010, *supra* note 67, s 8(1); for statutes not requiring a purpose, see e.g. *The Non-profit Corporations Act* (SK), *supra* note 54, s 6; *RSLA*, *supra* note 45, s 12(2). Manitoba and Newfoundland and Labrador require non-profit corporations to include restrictions in their articles that restrict the undertaking of the corporation to one of an approved category; see *The Corporations Act* (MB), *supra* 23, s 267; *Corporations Act* (NL), *supra* note 23, s 420. For a discussion on statements of purpose, see Alberta Law Reform Institute, *Non-Profit Corporations*, Report 26, *supra* note 36 at paras 73–85.

142 See *Societies Act* (BC), *supra* note 73, s 7; *Societies Act* (AB), *supra* note 46, ss 17(2), 18, 19; *Canada Not-for-Profit Corporations*, *supra* note 57, s 17(2); *Not-for-Profit Corporations Act* (2010), *supra* note 67, s 16(2); *The Corporations Act* (MB), *supra* 23, s 16(2); *Corporations Act* (NL), *supra* note 23, s 28. The effect of inconsistent actions depends on whether the governing statute has restricted the doctrine of *ultra vires*. See Kathryn Chan, "Identifying the Institutional Religious Freedom Claimant" (2017) 95:3 Can Bar Rev 707 at 12.

profit in any lawful manner, unless their constitution specifically prohibits certain activities. Because the purpose of the organization is central to the legal form of many non-profits, it can play a fundamental role in shaping members' expectations. The purpose also properly informs the court's interpretation of the non-profit's constitutional documents when there is a dispute as to whether or not they have been contravened.

II. RELATIONSHIPS

Relationships are key to the oppression analysis.[143] A court is more likely to find that oppression has occurred in the context of a small, closely held, for-profit corporation than in a large, public one, because stakeholders in small corporations have more understandings and agreements that have not been explicitly set out in writing, and are instead shaped by the parties' relationships.[144] Recall that in *Naneff,* the relationship between the elder son and the father led the Court of Appeal to conclude that the remedy could not give the elder son control of the company while the father still wished to be active in it.[145] The fractured relationship between the elder son and his family also led the Court to conclude that the father and younger son had been motivated by an improper purpose:

> The desire . . . to chastise and correct the actual and perceived failing of a son or brother in his personal life, is not a basis for ignoring the duties and obligations which the parent and sibling owe in their corporate capacities to the son and brother in his corporate capacity . . . [i]n their corporate capacity as directors

143 See *BCE inc*, *supra* note 11 at para 75; O'Byrne & Schipani, *supra* note 97 at 98.

144 See Cheffins, *supra* note 17 at 317**;** Morritt, Bjorkquist, & Coleman*, supra* note 29 at 1–5. See also Ben-Ishai and Puri, *supra* note 97 (finding that 92% of oppression claims brought between 1995 and 2001 involved closely held corporations at 92).

145 See *Naneff* (CA)*, supra* note 101 (declined to apply a "minority discount when fixing the fair market value of his shares" at 493).

> they are required to act in good faith and in the best interests of the company, and not for some extraneous purpose.[146]

Relationships figured prominently in the classic oppression case *Ferguson v Imax Systems*. Ms. Ferguson sought the Court's assistance to prevent her husband from forcing her out of a business after she commenced divorce proceedings against him.[147] The Court concluded that the corporation's conduct was oppressive, even though the proposed actions were technically valid.[148] The ruptured relationship between Mr. and Ms. Ferguson spoke to the motive underlying the impugned course of conduct: Mr. Ferguson was acting out of spite and not because he had a valid business reason to eject Ms. Ferguson from the corporation.

Thus, in for-profit oppression cases we see courts using relationships to evaluate the motives and expectations of litigants. When corporate conduct is driven by personal animus, the court will find the conduct to be oppressive, even if it is technically valid (e.g., expelling Ms Ferguson and the elder son in *Naneff*).[149] Relationships can also shape the parties' expectations and thus inform what remedy is required when a party's expectations have been unfairly violated (e.g., the elder son did not expect to control the company until his father died and a remedy should not allow him to do so).[150]

When resolving disputes in religious organizations, courts may not explicitly state that they are taking account of the parties' relationships, but they are. Primarily, they are using the parties' relationships to understand the parties' motives. An improper

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146 *Naneff* (CA), *supra* note 101 at 486 citing *Naneff* (Gen Div), *supra* note 101 at para 116.

147 See *Ferguson v Imax Systems* (1983), 43 OR (2d) 128, 150 DLR (3d) 718 (CA) [*Ferguson* (CA) cited to OR], leave to appeal to SCC refused, 18093 (5 December 1983).

148 See *ibid* (consider relationship at 137; oppression established at 138).

149 See Jassmine Girgis, "Fairness in The Oppression Remedy: How Does Harm Become Unfair?" (28 October 2021), online (pdf): *SSRN* <ssrn.com/abstract=3952068> (Jassmine Girgis found motive to be an important factor in how courts analyze the fairness of conduct in oppression cases at 11, 24).

150 See *Naneff* (CA), *supra* note 101 at 491.

motive can render technically valid conduct oppressive. In *Sandhu*, the court concluded that the organization had rejected 80 prospective members *because* of their relationships with members of one political faction.[151] Although the organization could reject memberships, the Court held that it was oppressive to do so based on the prospective members' affiliations. In *Basra,* the Court found that the decision not to renew the applicant's membership was oppressive because it had taken place following a fracture in the relationship between the applicant and the organization's executive.[152] In *Chouman*, the fractured relationship between the board member who signed the proxy and the board chair, who rejected it, coloured the Court's view of the chair's decision.[153]

C. Balancing Non-Intervention and Effectiveness

The flexible, contextual nature of the oppression test is matched with a flexible, broad remedial power. However, courts show restraint in the remedies they grant when using the oppression remedy and other statutory tools to resolve disputes in religious non-profit organizations. At the same time, courts are alive to the danger of granting ineffective remedies and will adopt a more interventionist approach when it is required to provide continuing relief from oppression. In some cases, despite their broad jurisdiction, courts are simply unable to grant effective remedies, such as situations where a member has been expelled from a religious community. Such cases raise hard questions about the extent to which courts can protect some non-financial interests, such as one's sense of belonging.

Legislation regulating for-profit corporations grants courts far-reaching powers to craft an appropriate remedy when oppression has occurred. For example, the *Canada Business Corporations Act* enumerates 14 different types of possible remedial orders including substituting the directors of the corporation, amending the constitutional documents, granting a

151 See *Sandhu* (QB), *supra* note 88 at para 50.

152 See *Basra*, *supra* note 88 at 86–95.

153 See *Chouman*, *supra* note 88 at 48.

restraining order, or awarding compensation to an aggrieved party.[154] The list is not exhaustive and the court "may make any interim or final order it thinks fit".[155] The *Dickerson Report* explained that the breadth of remedial powers available to courts was intended "to enable the court to apply a remedy that will offer continuing relief or indemnity to the complainant and, at the same time, render unnecessary the liquidation and dissolution of the corporation".[156] One commentator suggests that the willingness of courts to "make detailed orders appropriate to the particular situation at hand" reflects a growing comfort with "the judge exercising independent business judgment of the corporation's affairs."[157] Yet, at the same time, oppression remedies should be proportionate: courts should aim to remedy the wrongful conduct, but go no further. Justice Farley of the Ontario Court of Justice described this as conducting "surgery . . . with a scalpel, and not a battle axe . . . . The job for the court is to even up the balance, not tip it in favour of the hurt party."[158]

When courts resolve disputes in religious non-profits using the oppression remedy and other statutory tools, they have broad remedial powers, but they tend towards less intrusive remedies. They may label some procedural irregularities as "mere technicalities" in order to narrow the dispute and the associated remedies.[159] Courts also prefer solutions where the disputants resolve the dispute themselves.[160] To encourage such resolutions, a

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154 See *Canada Business Corporations Act, supra* note 23, s 241(3).

155 *Ibid*, s 4.

156 *Dickerson Report, supra* note 18 at para 486.

157 Waldron, *supra* note 13 at 150.

158 *820099 Ontario Inc v Harold E Ballard Ltd* (1991), 3 BLR (2d) 113 at para 140, 25 ACWS (3d) 853 (Ont Ct J (Gen Div)). *Naneff* (CA), *supra* note 101 (the Court was guided by Justice Farley's advice when it revised the remedy at 491).

159 See *Basra*, *supra* note 88.

160 See *Atwal et al v Shoker et al*, 2005 BCSC 993 ("[a] resolution achieved by the members of the society is far more preferable . . . . That said, it is advantageous to assist the Society members in resolving their disputes" at para 22).

court may identify legally problematic issues and remain seized of a matter while the disputants attempt to fashion their own solution.[161] They may refer the disputants to a process, such as mediation or arbitration, especially if the goal is to promote community reunification.[162]

Despite its preference for parties to resolve matters on their own, courts will sometimes adopt drastic solutions. One court quashed a membership enrolment process after identifying irregularities with a large number of membership applications (502 in a list of 5838 members).[163] Another court set up a new, temporary process for admitting members and rewrote the organization's bylaws. The organization's bylaws provided that a Religious Committee would review membership applications; however, the chambers judge directed that a new membership roll should be crafted by an arbitration panel, with one member selected by each competing political faction and those two members agreeing on a third.[164] In a third case, the Court suspended the operation of the society, directed each faction to start their own spin-off society, and provided that they could be reunified in the future if 60% of the members of each spin-off society voted in favour of reunification.[165] If reunification did not occur within five years, the original society's registration would be cancelled and it would be wound up.[166]

Courts will adopt a more interventionist approach where they believe one is required because they do not want to grant ineffective remedies. Patrick Hart likens the judicial distaste for

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161 See *Basra*, *supra* note 88 at para 103; *Gill, supra* note 86 at para 61.

162 See *Edmonton Harari Community Association*, *supra* note 108 at paras 52–53.

163 See *Garcha v Khalsa Diwan Society—New Westminster*, 2006 BCCA 140 at paras 16–17, 20–21.

164 See *Sandhu* (QB), *supra* note 88 at para 64.

165 See *Edmonton Harari Community Association*, *supra* note 108 at paras 63–64. Note that the court was relying on its grant of jurisdiction under the *Judicature Act,* RSA 2000 c J-2 as well as the winding up power under the *Societies Act* (AB), *supra* note 46, s 35. See *Edmonton Harari Community Association, supra* note 108 paras 45, 65.

166 See *Edmonton Harari Community Association*, *supra* note 108 at para 65.

granting a futile remedy to their unwillingness to decide moot cases where the underlying dispute has been resolved—in both instances "the end result of the controversy is unlikely to be affected by judicial intervention."[167] When courts order ineffective remedies, they risk undermining the authority and credibility of the courts.

The risk of a court granting an ineffectual remedy is heightened in situations when an individual has been excluded from a religious community in an oppressive manner. Courts have quashed unfair expulsion decisions in religious organizations.[168] Yet, this approach is unsatisfactory for a court that wishes to avoid granting ineffectual remedies: the organization may simply run a proper process that leads to the same result.[169] Perhaps the court could use the oppression remedy to order a community to allow the member to attend meetings, vote in the proceedings of the organizations, stand for organizational elected positions, and other practical matters. But it could not effectively require the expelling members to make the expelled member feel welcome and a part of the community,[170] which may be what the expelled member truly wants.

Not all expulsion cases raise this problem. Where the decision to expel a member is close and tainted by an unfair process, a future decision may have a different outcome. In *Lutz v Faith*

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167 Hart, *supra* note 7 at 31.

168 See *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165 at 225–26, 1 WWR 113 [*Lakeside Colony of Hutterian Brethren*].

169 See Alvin J Esau, "Communal Property and Freedom of Religion: Lakeside Colony of Hutterian Brethren v. Hofer" in John McLaren & Harold G Coward, eds, *Religious Conscience, the State and the Law: Historical Contexts and Contemporary Significance* (Albany: State University of New York Press, 1999) (as occurred in the aftermath of *Lakeside Colony* at 106–07) [Esau, "Communal Property"]. See also Kathryn Chan, "*Lakeside Colony of Hutterian v Hofer*: Jurisdiction, Justiciability and Religious Law" in Renae Barker, Paul T Babie and Neil Foster, eds, *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart 2022, forthcoming) 211 [Chan, "*Lakeside Colony*"].

170 For a similar line of thought in the context of a First Nation, see *Jacobs v Mohawk Council of Kahnawake*, [1998] 3 CNLR 68 at para 37, 34 CHRR 71 (Canadian Human Rights Tribunal).

Lutheran Church of Kelowna, the congregants had voted to expel seven members of the church following tension around the church's position on sanctifying same-sex marriage. The court reinstated those members after finding significant irregularities in the expulsion process. The congregational vote had been close (46:32), and the outcome might have been different but for the irregularities. Where many individuals have been excluded, a court order requiring that they be allowed back into the community may shift the organization's dynamics in such a way that the excluded members can meaningfully rejoin the community. For example, the dispute in *Sandhu* involved 80 applicants who had been improperly denied membership in the religious organization.[171] But in cases where a religious community overwhelmingly rejects a member, the court's ability to grant a continuing remedy is limited.[172]

One remedy that courts do not appear to use in these cases is damages.[173] They have the statutory authority to do so: oppression provisions commonly specify that the court can order compensation to be paid to an aggrieved person.[174] This power has

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171 See *Sandhu* (CA), *supra* note 88 at para 7. See also *Farrish* (CA), *supra* note 7 (where the dispute involved the organizations denying membership to 310 applicants at para 12).

172 For instance, after the SCC's decision to quash a member's expulsion in *Lakeside Colony of Hutterian Brethren*, *supra* note 169, the colony conducted a procedurally fair process and expelled the member. See Esau, "Communal Property", *supra* note 169 at 106–07. See also Chan, "*Lakeside Colony*", *supra* note 169.

173 Courts have allowed damages for loss of membership in other contexts. See *Heinrich v Wiens* (1916), [1917] 1 WWR 306, 31 DLR 94 (Sask SC) (the Court granted an excommunicated Mennonite $1000 in damages for business losses resulting from his being shunned by Mennonite customers following his ex-communication. He framed his claim in conspiracy). See *Christensen v Bodner* (1975), 65 DLR (3d) 549, 1975 CarswellMan 123 (WL) (QB) (the Court refused to strike a claim for damages brought by a disfellowshipped member of a Jehovah's Witness church. The ex-member framed his claim in defamation).

174 See *Canada Not-For-Profit Corporations Act*, *supra* note 57, s 253(3)(j); *The Non-profit Corporations Act* (SK), *supra* note 54, s 225(2)(j) and Alberta's *Societies Act* and *Religious Societies Land Act* incorporate, by reference, *Business Corporations Act* (AB), *supra* note 23 s 242(3)(i). The *Societies Act*

been used to require a for-profit corporation's directors to personally pay damages where they have acted in bad faith.[175] Canada and Saskatchewan's non-profit legislation also specifically contemplate the court ordering the organization to reimburse a member any membership fee they have paid as a possible remedy to oppressive conduct.[176]

It is impossible to quantify precisely the harm done when oppressive conduct impacts a member's sense of belonging, spiritual well-being, or other intangible interests.[177] Further, awarding damages for expulsion from a religious community may seem troubling in that it risks desacralizing a religious activity by mixing the holy and the mundane. However, this concern has not prevented courts from awarding damages in analogous cases. In *Bruker v Marcovitz*, a woman sued her former spouse because he had failed for fifteen years to provide a religious divorce despite having agreed to do so in a separation agreement. The Quebec Superior Court awarded damages to the woman "[f]or having been restrained to remarry according to the Jewish faith" and for how her choice of partners was restricted because she could not have "legitimate" children under Orthodox Jewish law.[178] The SCC upheld these damages.[179] Though these damages are not related to community membership per se, they are specifically related to the woman's ability to participate in the religious community of her choice. There was no civil law restricting her ability to remarry or have children; the compensation was specifically aimed at her ability to do those things in the Orthodox Jewish community. The

(BC), uses slightly different language, the court can direct "the society to compensate an aggrieved person" and one might argue that this precludes a court from granting a compensation award personally against one of the corporate stakeholders involved in the oppressive conduct: *Supra* note 73, s 102(2)(g) (emphasis added).

175 See *Wilson v Alharayeri*, 2017 SCC 39 at paras 50–51.

176 See *Canada Not-For-Profit Corporations Act*, *supra* note 57, s 253(3)(g); *The Non-profit Corporations Act* (SK), *supra* note 54, s 225(2)(g).

177 See Weinstock, *supra* note 114 at 235.

178 *B (SB) v M (JB)*, [2003] RJQ 1189 at paras 46–52, [2003] QJ No 2896 (Sup Ct).

179 See *Bruker v Marcovitz*, 2007 SCC 54 at paras 95–97 [*Bruker*].

court treated the harm to the interests in community participation as compensable. Arguably, the same logic could apply in an oppression claim. Just as the existence of a valid civil contract gave the court jurisdiction to consider the harms to Ms. Bruker's community participation, the statute providing for the oppression remedy opens the door for courts to consider similar interests in the context of a religious organization.[180]

IV. SPECIAL CONSIDERATIONS FOR THE OPPRESSION REMEDY IN RELIGIOUS CONTEXTS

One consequence of incorporating the oppression remedy into non-profit legislation is that courts have a statutory basis for intervening to address all manner of *unfair conduct* when the underlying dispute may be religious. This possibility engages a rich body of law on religious freedoms. Courts applying the oppression remedy must be attuned to how this body of law structures their jurisdiction.

Before delving into the issues specific to religious organizations, we note that the constitutional protection of associative freedom might raise concerns for applying the oppression remedy to any voluntary association, particularly regarding issues of membership and exclusion. The right to associate must include the right to refuse association; when people organize in groups, this can take the form of revoking or denying membership.[181] The Canadian jurisprudence of associative freedom, however, has focused primarily on labour relationships and less on the rights of other kinds of voluntary associations.[182]

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180 See Michael C Jensen & William H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3:4 J Financial Economics 305 (*Bruker* is a contract decision and the analogy between it and corporate remedies may be particularly salient for those who view corporations as "a nexus for a set of contracting relationships among individuals" at 310 [emphasis removed]).

181 See Stuart White, "Freedom of Association and the Right to Exclude" (1997) 5:4 J Political Philosophy 373.

182 See André Schutten, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association" (2020) 98 SCLR (2d) 399 at 404–09.

In contrast, the jurisprudence of religious freedom is quite developed, and raises special concerns with the judicial consideration of religious doctrine. Questions of membership in religious organizations, which drive many intra-organizational disputes, often raise questions of religious doctrine. Eligibility criteria for membership in a religious community may incorporate contested religious concepts, such as in *Gill v Kalgidhar Darbar Sahib Society*, where eligibility criteria included minimum thresholds of religious practice.[183] While in that case the dispute was whether the proposed members were asked about their practices with sufficient clarity, it is not hard to imagine a case in which there is a dispute about how a practice ought to be performed.[184] Similarly, disputes about membership may be intermingled with disputes about religious doctrine. For instance, in *Lutz*, a dispute about the expulsion of members related directly to their conduct during a debate over same-sex marriages.[185] In another variation on this theme, the processes that religious organizations use around membership and expulsion may themselves contain religious content. Again, *Lutz* provides an example because its bylaws referenced the Gospel of Matthew.[186] The litigants disputed whether the expulsion process had complied with the biblical verses. The religious content of these disputes creates barriers to judicial intervention, for the reasons explored in the following section.

A. Deference on Religious Questions

It is a common principle across public and private law that, in general, courts should not attempt to interpret religious

[183] See *Gill*, *supra* note 86. See also *E, R (on the application of) v Governing Body of JFS & Anor*, 2009 UKSC 15.

[184] See e.g. *Syndicat Northcrest v Amselem*, 2004 SCC 47 (the parties disputed at trial whether Judaism required adherents to maintain their own succoth) [*Amselem*].

[185] See *Lutz*, *supra* note 116.

[186] See *ibid* at para 4.

doctrine.[187] Even where the religious practice is the focus of a legal dispute, courts should not settle matters of religious controversy. As the majority of the SCC held in *Amselem*:

> the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual.[188]

On the other hand, courts will intervene in a dispute with religious elements if there is an underlying legal right. For example, in *Lakeside Colony of Hutterian Brethren*, a member was expelled from a statutory corporation set up to mirror a religious association. The SCC held that the member's expulsion from the corporation could be adjudicated because certain property rights were contingent on membership in the group.[189] The Court enforced the member's rights of natural justice before he could be validly expelled.[190] However, once the requirements of natural justice had been met (notice, right to make submissions, unbiased decision maker), the religious principles that led to the expulsion would not be questioned.[191]

This approach—of courts vindicating underlying rights recognized by the secular legal system—has been consistent in various areas of the law, including church property disputes and

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187 See *Wall*, *supra* note 5 (the SCC has held that "courts lack the legitimacy and institutional capacity" to make such determinations, but they can enforce procedures that are spelled out in a contract at para 38). Nevertheless, there are a few cases in which courts might be seen as interpreting religious doctrine. See e.g. *Hall (Litigation guardian of) v Powers* (2002), 59 OR (3d) 423 at para 31, 213 DLR (4th) 308 (Sup Ct); *Owens v Saskatchewan (Human Rights Commission)*, 2006 SKCA 41 at paras 79–82; *Perron v School Trustees of the Municipality of Rouyn and Attorney-General of Quebec* (1955), 1 DLR (2d) 414, 1955 CarswellQue 312 (WL) (QB).

188 *Amselem*, *supra* note 184 at para 50.

189 See *Lakeside Colony of Hutterian Brethren*, *supra* note 169.

190 See *ibid*.

191 See Esau, "Communal Property", *supra* note 169 at 106–07; Chan, "*Lakeside Colony*", *supra* note 169.

employment disputes within religious organizations. A cleric who has been dismissed can claim in wrongful dismissal, and the employer will be held to the terms of its own policies, but the propriety of those religiously informed policies will not be judicially determined.[192] This approach is consistent with the *Bruker* case discussed above, in which SCC upheld a damage award for the failure to provide a religious divorce when a divorcing husband had agreed to provide one in a separation agreement: by signing the agreement, the spouses created a legal right that could be adjudicated.[193]

In the cases we reviewed, courts showed reserve in the issues they resolved. They might find that despite having statutory jurisdiction, they should not exercise their discretion to intervene.[194] Where they did intervene, they tried to resolve disputes without engaging in questions of religious doctrine. For example, one court considered whether members of a religious organization were given sufficient notice of the religious eligibility criteria to serve on the organization's executive, but stopped short of assessing whether the members satisfied the criteria.[195] Another court considered if members were given sufficient notice of the reasons for their expulsion from a religious organization but the reasons for expulsion were religious in nature (e.g., the members stood accused of violating the sanctity of a holy text) and the court did not evaluate the substantive correctness of the

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192 See *McCaw v United Church of Canada* (1999), 4 OR (3d) 481, 82 DLR (4th) 289 (CA); *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728; *Smith v Worldwide Church of God* (1980), 39 NSR (2d) 430, [1980] No. 419 NSJ; *Ash v Methodist Church* (1901), 31 SCR 497, 1901 CanLII 14 [*Ash*].

193 See *Bruker*, note 179.

194 See *Sandhu* (CA), *supra* note 88 at paras 36, 56. See Hart, *supra* note 7 (Patrick Hart argues that this judicial caution is appropriate: "[e]ven where a statutory ground permits courts to intervene without any significant debate, it would be prudent for courts to analyze the issuse in terms of justiciability. For in so doing, any justification for judicial interference is explicitly and transparently accounted for" at 27).

195 See *Gill*, *supra* note 86 at para 48.

decision.[196] In *Lutz,* discussed above, the court was presented with competing interpretations of a bylaw that required the discipline of members to be conducted in accordance with verses from the Christian Bible (Matthew 18:15–18).[197] The Court avoided resolving the question of interpretation because there had been a number of other violations of more explicit provisions.

In the for-profit context, courts often invoke the business judgment rule and defer to the business decisions of directors, in part because of the directors' superior business expertise. The reasons for deferring on religious questions partly overlap, but also draw on different considerations.

One might suppose that the courts' reluctance to answer questions of religious doctrine has something to do with the divide between public and private decisions. This explains decisions where applications for judicial review are found to lack jurisdictional foundation, as in *Wall*. But courts will not hesitate to interpret the objective meaning of a contract—an agreement between private parties—so why will they stop short of interpreting the bylaws or assessing the conduct of an organization where there are references to religious doctrine? There are several overlapping reasons found in the jurisprudence and the literature.[198]

First, courts sometimes avoid taking positions on religious matters because "[i]t is not within the expertise . . . of secular courts to adjudicate questions of religious doctrine."[199] While this is true, and resonates with the business judgment rule, it is difficult to square with the large variety of matters that courts decide on which they have limited or no expertise. There is no

196 See *Bains* (SC), *supra* note 86 at para 35.

197 See *Lutz*, *supra* note 116 at para 4. See Esau, *Courts and the Colonies*, *supra* note 109 (in the first *Lakeside* case, the court was presented with expert testimony about how to interpret this biblical verse at 129).

198 There is rich literature on this issue. See e.g. Richard Moon, "Freedom of Religion under the Charter of Rights: The Limits of State Neutrality" (2012) 45 UBC L Rev 497; Benjamin L Berger & Richard Moon, eds, *Religion and the Exercise of Public Authority* (Oxford: Hart Publishing, 2016).

199 *Amselem*, *supra* note 184 at para 67.

requirement for judges or juries to have scientific training, but courts still routinely make determinations of scientific fact based on expert testimony. This justification for reticence on religious matters is better understood as stemming from a concern over courts' legitimate authority. The courts' authority is circumscribed by the principle of religious freedom, discussed below, and by practical considerations. The members of a religious community are not likely to see a judge as possessing the right kind of authority to settle a religious dispute, and the state would be in an awkward position if it attempted to enforce a decision in a religious dispute, potentially damaging its legitimacy in the eyes of the public.

Second, were a court to determine the "true" requirements of a religion, it would interfere with an individual's and community's ability to develop their own understanding and practice of a particular religion.[200] This is also why the SCC has held that both mandatory and optional religious practices are protected by the right to religious freedom: determining which religious practices are obligatory "would require courts to interfere with profoundly personal beliefs".[201] In the case that led to this holding, condominium co-owners and a condominium board were at odds over the installation of succoth on balconies. A succah (plural: succoth) is a hut erected by some Jews on the annual holiday of Succoth. Each side called a rabbi as an expert witness on whether there was a Jewish obligation to erect one's own succah. The SCC held that courts should not resolve such disputes; instead, the

[200] See Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005) (writing in the American context, Sullivan argues that the need to define religious practices is part of what makes the protection of religious freedom "impossible". She recounts a case in which Catholic individuals had engaged in a practice of adorning the gravestones of their family members. They argued that this was an expression of their Catholic faith. After hearing from expert witnesses, the court determined that the practices were not Catholic practices and therefore not protected. A Canadian court would likely have come to the opposite conclusion on this point).

[201] *Amselem*, *supra* note 184 at para 49.

question is whether the claimant has a subjective and sincere belief that the practice has a nexus with religion.[202]

A third and related reason for courts' reluctance to interpret religious texts or practices is the constitutional principle of the state's religious neutrality. The SCC has held that the state's duty of religious neutrality "results from an evolving interpretation of freedom of conscience and religion."[203] The duty requires "that the state neither favour nor hinder any particular belief."[204] If there is a dispute that asks a court to take a position on the *correct* interpretation of a religious matter, a determination will necessarily favour a particular religious belief and hinder another. For this reason, the SCC has held that "[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."[205] Notably, courts' reluctance to settle matters of religious dispute has roots before the *Charter*,[206] but was not consistent in that period. For a time, when a rift in a religious community led to property disputes, courts would determine which of the groups was adhering to the religious vision adopted by the founding documents.[207] The current practice, however, is for courts to enforce the procedural requirements of those documents but stop short of making religious determinations.[208]

A fourth possible reason for courts to refrain from interpreting religious doctrine is what might be termed the "autonomy of the

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202 See *ibid* at para 56.

203 *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 71 [*Saguenay*].

204 *Ibid* at para 72.

205 *Amselem*, *supra* note 184 at para 50.

206 See *Ash*, *supra* note 192.

207 See MH Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed (Toronto: Irwin Law, 2017) at 307–08.

208 See M H Ogilvie, "Three Recent Cases Confirm Canadian Approach to Church Property Disputes" (2015) 93:2 Can Bar Rev 537 at 537–38, online: <cbr.cba.org/index.php/cbr/article/view/4353>.

church". [209] Though this overlaps significantly with the duty of religious neutrality, strong arguments in favour of the "autonomy of the church" are jurisdictional in nature. [210] Proponents of this view argue that American constitutionalism is characterized by a "separationist" approach that makes religious communities independent from government oversight.[211] They claim that, unlike other sorts of voluntary associations, religious organizations play a special role in the constitutional structure, acting as counter-hegemonic forces against the powerful state, and thus protecting a particular form of freedom.[212]

While this jurisdictional argument has found some purchase in American legal scholarship,[213] it has not to date been taken up in Canadian courts and there are reasons to doubt it is consistent with Canadian constitutional law and practice. The practice of Canadian courts of intervening in religious disputes where there is an underlying legal right, and in such cases sometimes enforcing the procedural requirements of religious organizations, suggests a more flexible, rather than jurisdictional, approach. Drawing a jurisdictional line around religious matters is especially difficult because the categorization of matters into religious and secular is itself a culturally inflected exercise.[214] For some, the distinction might make little sense if they take guidance from their religious tradition in all matters. Religions might have something to say

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209 Richard Garnett, "Religious Freedom, Church Autonomy, and Constitutionalism" (2009) 57 Drake L Rev 901 at 906–07.

210 *Ibid*.

211 *Ibid*.

212 See Richard W Garnett, "'The Freedom of the Church': An Exposition, Translation, and Defense" (2013) 21 The J of Contemporary Leg Issues 33; Richard W Garnett, "Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses" (2008) 53:2 Villanova L Rev 273.

213 See e.g. Ira C Lupu & Robert W Tuttle, "Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders Church Autonomy Conference" (2009) 7:1 Georgetown JL & Public Policy 119; Paul Horwitz, "Defending (Religious) Institutionalism" (2013) 99:5 Va L Rev 1049.

214 See Esau, *Courts and the Colonies*, *supra* note 109 at 4, 31–32.

about business ethics and financial practices,[215] which many would consider secular or mundane issues.[216] Perhaps the most accurate statement is that courts can be counted on to intervene where they identify a legal right at stake and will answer all necessary questions to resolve the dispute over the legal right. Courts will avoid deciding religious questions where possible (and in this way attempt to minimally impair religious freedom) but retain the jurisdiction to do so where necessary.

B. Infusing the Oppression Remedy with Charter Values

Part II outlined how Canadian legislators have adopted three different approaches to the oppression remedy and religious organizations: (1) Ontario has not made the oppression remedy applicable to any non-profit, including religious non-profits; (2) Canada provides religious organizations with a faith-based defense to the oppression remedy, and (3) Saskatchewan and British Columbia make the oppression remedy fully available to religious non-profits and their members. This section considers how these three approaches reconcile the oppression remedy with religious freedom and other relevant *Charter* values.

Ontario's non-profit statute excludes the oppression provision and includes a blanket prohibition on derivative actions against religious organizations.[217] This approach prioritizes the value of (religious) group autonomy over other potentially conflicting values. Excluding the oppression remedy means courts may have no jurisdiction to redress oppressive conduct. The balancing among *Charter* values is done in the statute, before a court can examine specific facts, with a clear rule of priority for religious and associative freedom. This approach draws implicitly on a strong view of group autonomy. In this perspective, it is more consistent

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215 See Iyad Mohammad Jadalhaq & Luigi Russi, "Finding Direction at the Edge of Law and Life: Islamic Fiqh, Correspondence, and UAE Takāful Insurance Regulation" (2020) 35:3 CJLS 477.

216 See *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 19.

217 Notably, however, there is no such exclusion for religious organizations under the compliance and restraining order provision. See *Not-for-Profit Corporations Act, 2010*, *supra* note 67, ss 183, 191.

with liberal principles for the state to adopt a hands-off approach because groups are voluntary. This view relies heavily on the ability of individuals to exit the group, which, as discussed above, is not always a realistic option.[218]

Federal non-profit legislation adopts a more moderate approach. While the oppression remedy is available for disputes within religious organizations, the legislation prohibits courts from granting an oppression remedy where:

> the corporation is a religious corporation;
>
> (a) the act or omission, the conduct or the exercise of powers is based on a tenet of faith held by the members of the corporation; and
>
> (b) it was reasonable to base the act or omission, the conduct or the exercise of powers on the tenet of faith, having regard to the activities of the corporation.[219]

This approach balances values in a similar way to the Ontario approach, but instead of the analysis being based on the nature of the organization, it is based on the nature of the issue. The balancing therefore prioritizes religious freedom over other potentially conflicting values where a "tenet of faith" is involved. The federal statute avoids some of the challenges to religious freedom that emerge when courts engage directly with religious norms, but it has yet to be taken up by the courts and, in the meantime, leaves open several questions. While courts may rely on the sincerely held beliefs of the parties to determine if something is a "tenet of faith", on what basis can they determine whether basing actions on that tenet of faith is "reasonable"? The concept of reasonableness implies objectivity, which may require a court to determine the "objective" nature of the religious tenet. The faith-based defence may enmesh courts in the kind of religious disputes it was designed to avoid. To circumvent this problem, courts should only require that the party seeking to rely on the defence communicate to the court how the action is connected to

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218 See Reitman, *supra* note 129 at 193–96.

219 *Canada Not-For-Profit Corporations Act, supra* note 57, s 224(2).

their faith tradition,[220] but not that it is the "correct" interpretation of their faith tradition.

A third approach makes the oppression remedy fully available for disputes in religious organizations, as is the case in Saskatchewan and British Columbia.[221] A religious organization in one of these jurisdictions that is the subject of an oppression claim might argue that applying the oppression remedy to a religious organization violates the *Charter*. It is an unsettled question in Canadian law whether a corporation can make a religious freedom claim in its own right, or whether the religious freedom claimant must be a natural person.[222] But even assuming that religious organizations can make religious freedom claims, to have direct recourse to the *Charter*, the organization would need to contend with the case law establishing that while the *Charter* applies to legislation and administrative decisionmakers empowered by legislation, it does not apply directly to court orders in the context of private litigation.[223] Because the oppression remedy is applied by courts in private litigation, a party seeking to argue the unconstitutionality of the oppression remedy would need to show that the availability of the oppression remedy, rather than a particular exercise of it, infringed religious freedom.[224] The case law is stacked against such a claim. In a case involving the regulation of home schooling, the SCC did not see state oversight as a religious freedom infringement.[225] The SCC held, in another case, that a rule that might be applied in a way that restricts

220 For analogous reasoning, see *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 24 [*Commission scolaire*].

221 See *Sandhu* (CA), *supra* note 88.

222 See *Loyola High School v Quebec (AG)*, 2015 SCC 12 at para 34; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 61.

223 See *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 597–99, 33 DLR (4th) 174 [*RWDSU*]. For a very narrow exception that applied when a court acted on its own motion to enjoin picketing at courthouses, see *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214, 53 DLR (4th) 1.

224 See *Sandhu* (CA), *supra* note 88 (where the Alberta Court of Appeal noted that no direct constitutional challenge was made to the availability of the oppression remedy at para 58).

225 See *R v Jones*, [1986] 2 SCR 284, 31 DLR (4th) 569.

religious freedom was not itself unconstitutional.[226] Given that religious organizations have multiple options for their legal form and can thus avoid the potential application of the remedy, we think it unlikely that an organization could establish that the potential application of the oppression remedy to a religious organization violated the *Charter*.[227] If the statutory provision allowing for judicial oversight is not unconstitutional, this leaves open the possibility that a judicial remedy abridges religious freedom. However, given that the parties to a dispute involving the oppression remedy are not government actors, the *Charter* is unlikely to apply directly. Early in the *Charter*'s life, the court held that in a dispute between "purely private parties", the *Charter* did not apply,[228] and, in general, court orders are not subject to the *Charter*.[229]

However, the *Charter* remains relevant. The oppression remedy emerges from statutes and can be applied in a wide variety of ways; therefore, courts should be guided by *Charter* values when interpreting it.[230] Judges must be mindful of religious freedom in the context of oppression-type claims in religious organizations, but religious freedom is not the only *Charter* value that might be implicated in such disputes.

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226 In *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at paras 44–79, the Court accepted that a "no weapons" rule could be validly applied in some cases, but its particular application to exclude a kirpan from a classroom amounted to a religious freedom infringement.

227 If an organization could establish an infringement, we acknowledge that the government's justification for the availability of the remedy would be challenging, given the multiple options pursued in various Canadian jurisdictions as discussed in Part II.

228 *RWDSU*, *supra* note 223 at 603–04.

229 See *ibid*. See also *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577; *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545.

230 See *R v Rodgers*, 2006 SCC 15 at paras 18–19; *Farrish* (CA), *supra* note 7 at para 40. See also Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 309; *Lalonde v Ontario (Commission de restructuration des services de santé)* (2001), 208 DLR (4th) 577 at para 174, 56 OR (3d) 505 (CA).

In *Farrish*, discussed above, the Society explicitly raised an argument based in *Charter* values. The Society had denied memberships to people who supported medical assistance in dying and argued that the Court should not intervene, based in part on the *Charter* values of associative and conscientious freedom. The Court rejected this argument, holding that these values "do not equate to, or indeed support, a right of the Board to control the Society's membership lists on the basis of criteria not stated in the Bylaws."[231] Further, "any other disposition of this case would give the Court's imprimatur to acts of the Directors that were intended to exclude persons holding different views than theirs … [which] would be disrespectful of *Charter* values."[232] This reasoning demonstrates the centrality of the parties' reasonable expectations, even though the court decided the case on the basis of the compliance and restraining order provision and held it was unnecessary to consider the oppression remedy.[233] It was crucial in *Farrish* that the society was not initially established with any religious values in its constating documents. Further, the membership procedure did not give the directors much discretion to deny applications or set out any factors to guide that discretion. These facts tie back directly to the reasonable expectations of the society's members. But the judgment in *Farrish* also shows the challenge of balancing competing *Charter* values: the freedom of association and conscience of the Board with the freedom of conscience of the new members.

It is not hard to imagine cases where the *Charter* value of religious freedom arises alongside other *Charter* values. Recall *Mathai*, the case described in the Introduction. Mr. Mathai argued that his Church was preventing women from voting but provided no evidence to substantiate his claim.[234] If he had, we might see that the *Charter* values of religious freedom and gender equality were engaged. This creates a difficult conundrum for courts, faced

231 See *Farrish* (CA), *supra* note 7 at para 103.

232 *Ibid*.

233 See *ibid* at para 66.

234 See *Mathai, supra* note 1 at para 28.

with a clash of values that each have constitutional status. We suggest that courts could integrate the oppression remedy analysis with the balancing approach that the SCC has developed for oppression remedy cases involving competing *Charter* values. This would yield the following test:

1) Does the evidence support the reasonable expectation asserted by the claimant?
2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?[235]
3) Are both values genuinely at stake?
4) Is there a remedy to the oppressive conduct such that both values are protected?
5) If such a remedy is not possible, do the salutary effects of granting a remedy outweigh its deleterious effects?[236]

Integrating the test in this way allows the court to put all the competing interests on the table before fashioning a remedy, rather than arriving at an appropriate remedy then "subtracting" the competing value. Further, the staged analysis we suggest would allow courts to avoid the thornier values questions where oppression is not proven.

This exercise will always be context specific. In applying the final step, courts might find assistance in theories of

[235] *BCE Inc*, *supra* note 11 at para 68.

[236] See *R v NS*, 2012 SCC 72 at paras 8–9 [*NS*]. *NS* was a case about whether a complainant in a sexual assault prosecution could be required to remove her niqab while testifying. The SCC framed the case as a balancing exercise between the accused's right to a fair trial and the witness's religious freedom. One might ask: against whom was NS asserting her religious freedom? The accused owed her no *Charter* obligations, so it must be the court; but, as discussed above, in general the *Charter* does not apply to judicial rulings. This, we argue, strengthens the analogy between the *NS* analysis and oppression remedy cases, in which judges must consider how their orders might engage religious freedom interests.

multiculturalism that prioritize "freedom from domination".[237] In this approach, the state can justifiably act when social relations involve domination—when someone or some group has the capacity to interfere arbitrarily in the lives of others. This approach takes a context-sensitive approach to multicultural practices, choosing the path that is most likely to reduce domination based on available information.[238] Frank Lovett demonstrates this with a hypothetical example. If a "detailed study" of a minority Muslim community reveals that patriarchal "practices of discouraging women's education, restricting women's employment opportunities . . . generate severe patriarchal domination" but the same study "reveals that the practice of wearing head scarves specifically does not", then the practice of veiling should be accommodated even if it has patriarchal implications.[239] This is especially so given the general expectation that, when a group's cultural practice is threatened by the state, the group tends to react by further entrenching its attitudes on traditional, patriarchal practices.[240] However, if the study had revealed that veiling practice was imposed by men and generated significant domination by limiting women's opportunities, the practice would not warrant accommodation.

Though the oppression remedy analysis should be bounded by the reasonable expectations of the parties (more on this below), the freedom from domination approach offers a helpful way to think about the oppression remedy by adding depth to the terms "oppression" and "unfairness" that figure in oppression remedy provisions, especially in contexts where non-financial and

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237 See Sarah Song, "Multiculturalism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Fall 2020 ed (Metaphysics Research Lab, Stanford University, 2020).

238 See Mira Bachvarova, "Multicultural Accommodation and the Ideal of Non-domination" (2014) 17:6 Critical Rev Intl Soc & Political Phil 652 at 667. See also Frank Lovett, "Cultural Accommodation and Domination" (2010) 38:2 Political Theory 243 at 258.

239 Lovett, *supra* note 238 at 257.

240 See *ibid* at 258; Cecile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy*, Oxford Political Theory (Oxford, NY: Oxford University Press, 2008) at 164; Shachar, *supra* note 129 at 33.

identity-related concerns are at stake. These theories can help focus analysis by training courts' eyes on situations where one party has *arbitrarily* affected the life of another, which ties back to the concern with arbitrariness that underlies other parts of the *Charter*.[241] As Mira Bachavarova notes, "[b]y focusing on the arbitrariness of power, a non-domination approach opens up the analysis in ways that are in fact more sensitive to internal group dynamics, because it seeks to consider wider patterns within a social practice."[242]

In the context of the oppression remedy, oppressive conduct might be equated with domination, and organizational conduct that amounts to domination might justifiably be addressed using the oppression remedy. The key debate will be about whether a party is acting *arbitrarily*. We might take guidance from the *Charter* case law, in which arbitrariness signals the absence of a rational connection between a law's purpose and the limit it places on a *Charter* right.[243] In the oppression context, we might analogously look for a rational connection between the prejudice suffered by an aggrieved party and the purposes of the organization. This is not to say that courts should inquire into the rationality of the religious belief itself, but rather into whether there is a connection between a group's purpose (including its religious beliefs or practices) and the action in dispute. Consider, for example, a religious organization that sets criteria for membership in its constating documents to include birth to parents in the community or a prescribed religious process of conversion. If a person was denied membership, a court could

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241 The rule against arbitrariness is one of three prominent "principles of fundamental justice" referred to in s 7 of the Charter. See *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*]; *Canada (Attorney General) v Bedford*, 2013 SCC 72. See also *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 (similar concerns underlie the justificatory framework that determines whether rights infringements are within the "reasonable limits of a free and democratic society" as required by s 1, as governments must always demonstrate the rational connection between their policies and a legitimate objective).

242 Bachvarova, *supra* note 238 at 668.

243 See *Carter*, *supra* note 241 at para 83.

inquire as to whether the reason for the denial was rationally connected to the group's beliefs as stated in the constating documents, but not whether the criteria of descent/conversion were themselves rational.

Caution is required here: when the state interferes in an organization, this might itself be a form of domination, and courts must be sensitive to worldviews and perspectives they may not fully understand. Courts, therefore, must avoid acting arbitrarily by ensuring that the oppression remedies they grant are tied directly to redressing arbitrary behaviour. In this way, religious organizations will not have their beliefs scrutinized by a court but will also not be able to use the label of "religion" to answer any oppression claim.[244]

Though adopting a "freedom from domination" lens is beneficial, this does not completely replace the oppression remedy analysis. Freedom from domination theories are less concerned with parties' reasonable expectations than the oppression remedy has come to be. The centrality of reasonable expectations to the oppression remedy analysis puts a limit on how far courts might be able to carry the freedom from domination approach, as these theories would not accept domination even if it is reasonably expected. We might think of the reasonable expectations requirement as a built-in protection of religious and associative freedom. Taking into account reasonable expectations can prevent courts from ordering a remedy contrary to the group's purposes, which motivated the association in the first place.[245] A woman who joined a religious congregation that had always restricted certain roles to men would not likely have a reasonable expectation that she be considered for such roles.[246] This provides a measure of

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244 See *Commission scolaire, supra* note 220 (where the basis for this reasoning is found, as with the analysis of the federal approach at para 24).

245 See Newman, *supra* note 129 at 66, 77.

246 See e.g. Esau, *Courts and the Colonies*, *supra* note 109 (in Hutterite colonies, women are not allowed to vote at 10–11). See also Kathryn Chan, "Religious Institutionalism: A Feminist Response" (2020) 71:4 UTLJ (where she notes that religious institutions frequently "construct and perpetuate gendered hierarchies that privilege men" and this sits uneasily with section 15 of the

freedom for groups to adopt illiberal practices without being subject to the state imposing its own values,[247] an approach that is arguably more consistent with a commitment to multiculturalism.[248]

Putting all this together, in situations where religious and associative freedoms are the only *Charter* values in play, courts are best advised to adopt a less interventionist approach to disputes on membership. For example, in *Mathai v George*, discussed in the Introduction, it was right for the court to err against intervention, even in the face of bylaws that disadvantaged women, because judicial intervention in a communal dispute always includes the potential for domination by the state over religious communities, and there was no evidence of the ill effects of the bylaws.[249] Moreover, the bylaws at issue in the case had not been amended in response to a particular dispute; the reasonable expectations of the members, including the aggrieved member, had remained constant. If, however, there was evidence that a woman was disadvantaged by the bylaw in an "oppressive" manner contrary to her reasonable expectations, or the bylaws had been amended specifically to work an unfairness against a member, the calculus would be different. The *Charter* value of equality might guide the court towards increased intervention in the former case; the value of fair procedures, embedded in section 7's commitment to fundamental justice, might lead to intervention in the second.

V. CONCLUSION

Parties to disputes in religious non-profits may turn to the courts for help. Depending on the legal form of the organization, its members may have recourse to the oppression remedy or other

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Charter and the unwritten principle of protection for vulnerable minorities at 465–66).

247 See Bachvarova, *supra* note 238 at 668.

248 See *Constitution Act, 1982*, s 27, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 27.

249 See Esau, *Courts and the Colonies*, *supra* note 109 (stating that "there should be compelling evidence indeed of harm done to members of the group before outside law overrules the inside law of a religious group" at 323).

statutory tools. Taken together, these tools empower courts to assist by intervening in the organization's affairs. The flexible oppression standard justifies court intervention when a party has been treated unfairly and the broad remedial provision empowers courts to craft creative, potentially far-reaching solutions. At the same time, religious organizations wishing to avoid the possibility of an oppression claim have several options of organizational forms to which the remedy does not apply or is limited in scope.

Far-reaching court interventions remain rare. Courts regularly resolve disputes using statutory remedies that are engaged by a breach of a governing document or other irregularity. Successful oppression claims are less common. When courts use any of these statutory dispute resolution tools, they draw on principles from case law involving the oppression remedy in for profit corporations: vindicating non-financial interests, being attuned to the small, voluntary nature of the organization, considering the purpose of the organization, and evidencing restraint in the issues they decide and the remedies they grant. Courts regularly intervene only so far as is necessary to effectively address the unfair treatment.

Courts may be faced with oppression claims that raise more difficult questions, including unavoidable disputes over religious doctrine. For religious organizations incorporated under the *Canada Not-For-Profit Act*, they must decide if the core of the dispute relates to conduct that was reasonably based on a tenet of faith. If so, the conduct is exempt from review under the oppression standard. For organizations incorporated under legislation without an explicit faith-based defence, courts should still avoid deciding issues of religious doctrine, where possible, for the reasons set out in part IV.A. They may also be called on to adjudicate oppression claims that implicate multiple *Charter* values. Part IV.B has suggested a framework for how courts might resolve such conflicts.

This article suggests four takeaways for legislators contemplating revisions to their non-profit statutes. First, the oppression remedy is not merely a tool for protecting financial interests, but also non-financial ones. It can thus usefully be included in non-profit legislation, where disputes are less likely to be over financial matters. Second, the relative rarity with which

the oppression remedy has been used to date should give drafters some comfort that they can include it in non-profit legislation without opening the floodgates to abusive litigation by disgruntled members. Third, the oppression remedy enables courts to grant remedies in situations where the compliance and restraining order power would not suffice, including where parties have acted in a technically valid, but unfair manner. Fourth, even where faith-based defences are not written into the legislation, courts are reticent to decide matters of religious doctrine. Codifying an explicit faith-based defence may still be beneficial because it makes the law more accessible to a person who is reading the statute and who is unaware of the jurisprudence limiting court intervention in religious matters. On the other hand, codifying a defence may raise new questions (e.g., who qualifies as a religious organization, and when can it be said that conduct is reasonably based on a tenet of faith).

For parties litigating oppression claims in the for-profit context, the cases on non-profit religious organizations further illustrate how the remedy can protect non-financial interests and how courts might consider the nature of the corporation and the parties' relationships when analyzing an oppression claim. Moreover, religion and business are not mutually exclusive undertakings; for-profit corporations may find themselves embroiled in an oppression claim where matters of religious doctrine are relevant.[250] This article provides guidance on how to approach those matters.

A final thorny question bears mentioning: how should courts approach matters of spirituality that may arise when deciding oppression claims in the context of Indigenous non-profit organizations? Courts purport to distinguish between secular and religious matters, but this article sounds a note of caution about such distinctions: they are culturally inflected. Dominant views of what is religious are tied to specific religious traditions, especially Christianity. These frameworks for thinking about the world often

[250] See e.g. Esau, *Courts and the Colonies*, *supra* note 109 (for the description of an oppression claim brought by a creditor against an incorporated Hutterite colony at 249).

fit uneasily with other religious and spiritual traditions, including Indigenous spiritual traditions.[251] Indigenous spiritual traditions may infuse Indigenous laws in ways that are not readily apparent or easily understood by legal actors with ideas of what constitutes religion shaped by the dominant Canadian culture.[252] When Indigenous non-profits turn to the oppression remedy to resolve disputes, they may rely on Indigenous law, as was done recently in the case of *Big River First Nation v Agency Chiefs Tribal Council Inc.*[253] Courts must be alive to the risk of unintentionally intruding on matters of Indigenous spirituality and replicating histories of colonial domination, but courts must also strive to take Indigenous law seriously as law and respect when Indigenous people set up organizations to be governed by Indigenous laws.[254] This article gestures towards why this task is challenging, but further consideration is warranted.

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251 For a critique of how the SCC has handled Indigenous spirituality under the Charter, see Howard Kislowicz & Senwung Luk, "Recontextualizing Ktunaxa Nation v. British Columbia: Crown Land, History and Indigenous Religious Freedom" (2019) 88:1 SCLR (2d) 205.

252 See Darcy Lindberg, "Miyo Nêhiyâwiwin (Beautiful Creeness) Ceremonial Aesthetics and Nêhiyaw Legal Pedagogy" (2018) 16/17 Indigenous LJ 51 at 62–64; Val Napoleon, "Thinking about Indigenous Legal Orders" in Renee Provost and Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (New York: Springer, 2013) at 232, 234–35; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 24–28.

253 2020 SKQB 273 at para 42, aff'd 2022 SKCA at paras 32–42 (as to result but raising question about the application of Indigenous law). The court used the term "Cree custom and tradition" rather than religion or spirituality, we note that what constitutes "religion" is controversial and—because of the colonial framing of the term—the label is especially fraught when used in context of Indigenous laws and practices: *ibid*. See Illyse Morgenstein Fuerst, "Episode 403: What Are Indigenous Religions Part I" at 00h:04m:47s, online (podcast): *Keeping it Real 101: A Killjoy's Introduction to Religion* <keepingit101.com/e403>; Megan Goodwin "Episode 104: World Religions, Shall We Not?" at 00h:06m:58s, online (podcast): *Keeping it Real 101: A Killjoy's Introduction to Religion* <keepingit101.com/about-the-killjoys>; Jonathan Z Smith "Religion, Religions, Religious" in Mark C Taylor, ed, *Critical Terms for Religious Studies* (Chicago: University of Chicago Press, 1998) 269 at 279–80.

254 With thanks to Tamara Pearl, whose input helped our thinking on this point.