AUG.
2023

ARPA CANADA'S LEGAL ARGUMENTS

IN

VABUOLAS ET AL. V. BRITISH COLUMBIA

THE CASE TO PROTECT CHURCH MEETING MINUTES AND OTHER RELIGIOUS RECORDS FROM UNNECESSARY GOVERNMENT OVERSIGHT

ARPA CANADA

NO. S226203
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, C. 241.

BETWEEN:

JOHN VABUOLAS, PAUL SIDHU, GRAND FORKS CONGREGATION OF JEHOVAH'S WITNESSES, COLDSTREAM CONGREGATION OF JEHOVAH'S WITNESSES AND WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA

Petitioners

AND:

INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA, GABRIEL-LIBERTY WALL AND GREGORY WESTGARDE, and THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondents

AND:

THE HUMANIST ASSOCIATION OF BRITISH COLUMBIA

Intervener

AND:

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

Intervener

WRITTEN SUBMISSIONS OF THE INTERVENER ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

John Sikkema
André Schutten
Association for Reformed Political Action (ARPA) Canada
130 Albert Street, Suite 1705, Ottawa, ON K1P 5G4
Phone: 289-228-8775
Fax: 613-249-3238
John@ARPACanada.ca
André@ARPACanada.ca
Counsel for the Intervener, ARPA Canada

TABLE OF CONTENTS

I. Overview

1. Deciding who may become or remain a member of a religious community is at the core of a religious association's autonomy. The state must not only refrain from reviewing or overturning such decisions, it must also avoid interfering in the religious practices through which such decisions are made unless it has a demonstrable and pressing justification for doing so.

2. ARPA Canada's submissions herein set the issues raised in this case in a broader historical and constitutional context, highlighting the importance of independent civil society associations to a free society. PIPA[1] gives the Commissioner the authority to review the internal practices and policies of religious associations related to records created for exclusively religious purposes. It also grants the Commissioner the authority to order that such records be corrected or that the association's religious record-keeping practices or policies be changed. This threatens state entanglement with religion and the undue burdening of religious practices.

3. PIPA limits its scope to allow individuals to use information about others for personal purposes and to allow organizations to use personal information for journalistic, artistic, or literary purposes.[2] This preserves *Charter* freedoms of expression and association. Yet PIPA contains no such accommodation for records created for exclusively religious purposes. PIPA also preserves the integrity and confidentiality of the deliberations of civil judges, adjudicators, and legislators by excluding personal information contained in related records.[3] But PIPA does not exclude from its reach the confidential deliberations of religious authorities or ecclesiastical courts. PIPA thus fails to respect the freedom of religious associations to effectively self-govern their internal religious affairs without undue interference from the state.

4. The purported justification for the order to disclose religious records (and for the statutory provisions that grant the authority to make such an order) is not to prevent an identifiable threat to the applicants' privacy, but to supposedly advance a broad, vague interest in maintaining control over information about oneself. Conversely, disclosing the records in question to the Commissioner, a state actor, would be a clear and direct breach of the Petitioners' privacy.

---

[1] *Personal Information Protection Act*, SBC 2003, c 63 [**PIPA**].

[2] Written Submissions of the Information and Privacy Commissioner for British Columbia, at para 22, explains that section 3 of PIPA sets out "certain enumerated categories of records to which PIPA does not apply."

[3] At section 3(2)(e)-(f). Similarly, the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, excludes court and tribunal records in section 3(3).

II. Argument

A. Church-state relations and the origins of institutional pluralism

5. According to the legal historian Harold Berman, the rule of law and constitutionalism originate "in the differentiation of the ecclesiastical polity from secular polities."[4] Historian Rémi Brague explains that while the early Christian church had "little need to assert its difference from a civil power that persecuted it," risk of confusion arose with Constantine and the collaboration of Christianity and the Roman Empire.[5] Early in this collaborative period,

> Something like a transparent membrane was formed to render the church distinct from the civil power and prevent the one from absorbing the other. This first occurred on the juridical level. The privileges accorded to the bishops and the emergence of a canon law prepared the constitution of the church as a society endowed with its own rules; in particular, the church became capable of controlling its conditions of access [...].[6]

6. Berman describes the development of the rule of law as emerging out of the historical struggle between ecclesiastical and secular authorities. Rule of law meant rule *by* law (enacting laws and establishing legal systems), rule *under* law (being bound by laws they enacted), and *limited jurisdiction*. "If the church was to have inviolable legal rights, the state had to accept those rights as a lawful limitation upon its own supremacy. Similarly, the rights of the state constituted a lawful limitation upon the supremacy of the church." The resulting *legal pluralism* – the coexistence of different jurisdictions and legal systems in the same community – Berman calls "perhaps the most distinctive characteristic of the Western legal tradition."[7]

7. Of course, the history of church-state relations in the West is long and complicated. By the Middle Ages, Roman Catholic Church courts claimed jurisdiction not only over purely ecclesiastical matters, but over marriage, family relations, wills, and various moral offences.[8] Ecclesiastical and civil jurisdiction often overlapped. Yet even in the Middle Ages, although boundaries between ecclesiastical and civil jurisdiction were badly blurred, Brague writes,

---

[4] Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) [**Berman**]., (ARPA Canada's Book of Authorities ("ARPA BoA"), Tab 1), at 10

[5] Rémi Brague, *The Law of God: The Philosophical History of an Idea* (University of Chicago Press, 2007), at 129 [**Brague**] (emphasis added) **(**ARPA BoA, Tab 2).

[6] Brague, *ibid*, emphasis added.

[7] Berman, *supra* note 4, at 292 (ARPA BoA, Tab 1).

[8] John Witte Jr., *Law and Protestantism* (Cambridge University Press, 2002), at 35-37 [**Witte 2002**] (ARPA BoA, Tab 3).

"everyone was persuaded that they exist."[9] As the medieval jurist Accursius famously declared, "Neither the pope in secular matters nor the emperor in spiritual matters has any authority."[10]

8. In the Reformation, the Church's expansive powers were challenged. Luther urged that all legal authority be consigned to the civil magistrates.[11] The Reformers would not have the church "bear the sword" – that is, exercise coercive power.[12] Yet Calvin and later Reformers also defended the *spiritual jurisdiction* of the new Protestant churches.[13] Calvin, for example, defended the Genevan church's authority to withhold the sacrament of communion against a challenge by the Genevan City Council.[14] Calvin maintained that "church discipline requires neither violence nor physical force, but is contented with the might of the word of God."[15] Our law still recognizes the independent spiritual authority of religious bodies, but only civil government has coercive power.

9. Early modern thinkers such as Hobbes and Rousseau "tried in different ways to subordinate religious claims to the sovereignty of politics," as William Galston explains.[16] They desired a return to the "civic totalism" of ancient Greece and Rome, in which "intermediate associations existed only as revocable 'concessions' of power from the sovereign political authority."[17] But "civic totalism" has not triumphed in Canada. Constitutionalism limits state power and protects institutional pluralism and a robust civil society.[18] What originated in part in the struggle between

---

[9] Brague, *supra* note 5, at 144 (ARPA BoA, Tab 2).

[10] *Ibid*, at 142.

[11] Witte 2002, *supra* note 8, at 58 (ARPA BoA, Tab 3).

[12] See e.g. John Calvin (trans. H. Beveridge), *Institutes of the Christian Religion* (Hendrickson Publishers, 2007), at 802, "For the church has not the right of the sword to punish or restrain, has no power to coerce, no prison or other punishments which the magistrate is wont to inflict." [**Calvin**] (ARPA BoA, Tab 4).

[13] John Witte Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge University Press, 2007), at 70-73 (ARPA BoA, Tab 5). See also M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed. (Toronto: Irwin Law, 2017), at 19 (ARPA BoA, Tab 6) [**Ogilvie**].

[14] Jules Bonnet, *Letters of John Calvin* (Philadelphia: Presbyterian Board of Publication, 1858) at 424 (ARPA BoA, Tab 7). For context, see Bernard Cottret (trans. M.W. Macdonalds), *Calvin: A Biography* (Grand Rapids: Wm. B. Eerdmans Publishing, 2000) at 195-197 (ARPA BoA, Tab 8).

[15] Calvin, *supra* note 12, at 803 (ARPA BoA, Tab 4).

[16] William Galston, "Religion and the Limits of Liberal Democracy" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society* (McGill-Queen's U.P., 2004) (ARPA BoA, Tab 9).

[17] *Ibid*, at 44.

[18] Ogilvie, *supra* note 13, at 95, observes that Christian notions of "independence of spiritual authority […] have enjoyed tacit acceptance" in Canadian law. (ARPA BoA, Tab 6).

churches and civil authorities now extends to protect not just Christian churches, but a wide variety of religious institutions and other voluntary associations.[19]

B. The *Charter* preamble and section 1 support institutional pluralism

10. The *Charter* preamble says Canada is "founded upon principles that recognize the supremacy of God and the rule of law." As the Supreme Court of Canada said in *Saguenay*, "The preamble, including its reference to God, articulates the 'political theory' on which the *Charter's* protections are based."[20] Professor Bruce Ryder suggests the preamble signals "a kind of secular humility, a recognition that there are other truths, other sources of competing worldviews, of normative and authoritative communities that are profound sources of meaning in people's lives that ought to be nurtured as a counter-balance to state authority."[21]

11. The political theory underlying the *Charter* views state authority as structurally limited vis-à-vis both individuals and civil society associations or institutions.[22] What the *Charter* calls a "free and democratic society" rejects majoritarian discrimination and protects minority communities.[23] The Supreme Court highlighted this in the *Quebec Secession Reference*: "[O]ne of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities […]."[24] The Court also noted that legal protections for religious minorities long precede the *Charter* and were "clearly an essential consideration in the design of our constitutional structure even at […] Confederation."[25] The Court also highlighted the importance of institutional pluralism: "[A] constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."[26]

---

[19] *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, 2015 SCC 1, ¶49, 56 [***Mounted Police***].

[20] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, ¶147 [***Saguenay***].

[21] Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005), 29 SCLR (2d), ¶17 (ARPA BoA, Tab 10).

[22] See John Sikkema, "The First Division of Power: State Authority and the Preamble to the Charter," (2022) 105 SCLR (2d) 67-93 (ARPA BoA, Tab 11).

[23] *Andrews v. Law Society (British Columbia)*, [1989] 1 SCR 143, at 157; *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, ¶92; *Reference re Secession of Québec*, [1998] 2 SCR 217, at ¶32, 49-52, 79-82 .

[24] *Reference re Secession of Québec, ibid*, at ¶81.

[25] *Ibid*.

[26] *Ibid*, at ¶74 [emphasis added].

12. In *Oakes*, Dickson C.J.C. identified the "principles essential to a free and democratic society" as including "accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[27] The *Charter* only permits limits on fundamental freedoms that can be demonstrably justified in a free and democratic society. This restrains both the objectives that the state may pursue and the way it may pursue them. Any interference with or significant burdening of religious practices are legitimate only to the extent it is demonstrably justified, which requires evidence that the limit is necessary to achieve a pressing civil objective.

C. The *Charter* fundamental freedoms support institutional pluralism

13. Dickson C.J.C. writes in *Big M* that a uniting feature of the fundamental freedoms is "the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation."[28] The Supreme Court of Canada has also found that these individual rights are exercised and manifest through religious communities and institutions.[29] The Court in *Loyola* emphasized the "socially embedded nature of religious belief."[30] Freedom of religion protects the "right to establish communities of faith, the autonomous existence of which is indispensable for pluralism in a democratic society."[31] Justice Rand in *Saumur* asserted "that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable."[32]

14. "Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live."[33] Freedom of association "recognize[s] the profoundly social nature of human endeavours and protect[s] the individual from state-enforced

---

[27] *R. v. Oakes*, [1986] 1 SCR 103, at ¶64. See also Dickson, C.J. in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, at ¶94: a "free society" is "one which can accommodate a wide variety of beliefs ... and codes of conducts". [***Big M***].

[28] *Big M, ibid,* at ¶121 - ¶122.

[29] See *Loyola High School v. Quebec (AG),* 2015 SCC 12, at ¶60 [***Loyola***]; and *Mounted Police, supra* note 19, ¶64.

[30] *Loyola, ibid,* at ¶60.

[31] *Mounted Police, supra* note 19, ¶64.

[32] *Saumur v. Quebec (City)*, [1953] 2 SCR 299 (SCC), at 327 (emphasis added).

[33] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 (SCC), at ¶86 [***Reference re PSERA***], quoted with approval in *Mounted Police*, supra note 19, at ¶35.

isolation".[34] This freedom "has its roots in the protection of religious minority groups" and it "permits the growth of a sphere of civil society largely free from state interference."[35] It is therefore "essential to […] the vibrant civil society upon which our democracy rests."[36] Thus, "No legislator can attack it without impairing the foundations of society."[37]

15. *Mounted Police* rejects the argument that affirming the collective aspect of *Charter* fundmental freedoms would undermine the rights of individuals.[38] Rather, protecting the collective aspect of fundamental freedoms supports the "autonomous existence of religious communities" and other associations that people may choose to join or leave. A diversity of healthy civil society institutions enhances pluralism, democracy, and individual freedom.[39] To preserve a free and democratic society, the state must refrain from interfering with the internal affairs of religious associations (and other civil society organizations) absent a pressing civil objective.

16. The fundamental freedoms structurally limit state authority and protect social space for civil society institutions against an expanding state. As Professor Schneiderman explains, "The guarantees of freedom of conscience and religion, the freedoms of expression, assembly, and association, all speak to the aim of dispersing power to civic and religious associations while bringing groups together in the generation of public policy outcomes."[40] In this way the fundamental freedoms help to nurture and sustain a free and democratic society.

D. Freedom of religion and association protect a sphere of religious self-governance

17. As Chief Justice Hinkson said, "Religious bodies have a sphere of independent spiritual authority, at the core of which is the authority to determine their own membership, doctrines, and religious practices […]."[41] The Supreme Court of Canada has recognized this sphere of authority

---

[34] *Reference re PSERA*, *ibid*, at ¶86.

[35] *Mounted Police*, *supra* note 19, at ¶49, 56.

[36] *Ibid*, at ¶49.

[37] Dickson C.J. quoting Alexis de Tocqueville in *Reference re PSERA*, *supra* note 33, at ¶86. For further discussion of freedom of association, see André Schutten, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association", (2020) 98 SCLR (2d) 399-430 (ARPA BoA, Tab 12).

[38] *Mounted Police*, *supra* note 19, at ¶65.

[39] *Ibid*, at ¶64.

[40] David Schneiderman, "Associational Rights, Religion, and the Charter" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 73 (ARPA BoA, Tab 13).

[41] *Beaudoin v. British Columbia*, 2021 BCSC 512, ¶199.

in *Amselem*, *Wall*, and *Aga*.[42] Professor William Bassett explains:

> Organizing and administering communities of faith are as much exercises of religion as are worship and public prayer. The free exercise of religion, furthermore, is hollow and almost meaningless without the protected rights of speech and association. Only by consent or in the most exigent social circumstances can the state parse out the elements of religious organizations for what the courts may denominate "secular" as distinguished from "religious" functions, that is, acts stripped of the protected exercise afforded to faith-based motivation.[43]

18. Adjudicating a dispute about a religious body's rules or practices raises concerns regarding the religious body's identity, integrity, and freedom to govern itself. It also raises concerns about the adjudicator's competence in such matters, which may involve the interpretation of sacred texts and religious tradition.[44] As Iain Benson writes, "Law has practical and theoretical limits to its proper role and function in a society, and these limits determine its jurisdiction or proper scope."[45]

19. Thus, an Ontario court in *Dunnet* (1877)[46] declared that courts have no jurisdiction to inquire into a church's rules, "except so far as may be necessary for some collateral purpose." A "collateral purpose" could be: "If funds are settled to be disposed of amongst members," or "a right to enjoyment of any pecuniary benefit" such as "use of a house or land."[47] In such cases, courts avoid delving into doctrinal disputes or other religious questions, but defer to the relevant religious authority's decision – unless there is evidence that a purportedly religious decision was made in bad faith for the purpose of depriving someone of property or civil rights.[48]

---

[42] *Syndicat Northcrest v. Amselem*, 2004 SCC 47, ¶50; *Highwood Congregation v. Wall*, 2018 SCC 26, ¶24 [***Wall***]; *Ethiopian Orthodox Tewahedo Church v. Aga*, 2021 SCC 22, ¶23 [***Aga***].

[43] William W. Basset, "Religious organizations and the state: the laws of ecclesiastical polity and the civil courts", in *Christianity and Law: An Introduction*, John Witte Jr. and Frank Alexander, eds., (Cambridge University Press: 2008), at 295 (ARPA Boa, Tab 14).

[44] *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255, Wakeling J. in dissent, at notes 84, 90, 91, and 95 [***Wall ABCA***].

[45] Iain T Benson, "The Limits of Law and the Liberty of Religion Associations" in Iain T Benson and Barry W Bussey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis Canada Inc, 2017), at xxiii, n 5 (ARPA BoA, Tab 15).

[46] *Dunnet v. Forneri*, 1877 O.J. No 227 (Ch.), at ¶34 [***Dunnet***]. *Dunnet* was cited approvingly by the Manitoba Court of Appeal in *Re Morris and Morris*, 42 DLR (3d) 550, 1973 CanLiII1200.

[47] *Dunnet*, *ibid*.

[48] *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165 at 175 [***Lakeside Colony***]. See also *Wall ABCA*, *supra* note 44, at note 91.

20. In *Ivantchenko*, Lauwers J. cautioned that "courts must be sensitive to the interplay between civil law and the internal law of the religious organization."[49] He continued:

> [5] Courts are reluctant to become involved in the internal affairs of a religious organization. The invitation to do so comes invariably, as in this case, at the instance of a member who feels aggrieved by the actions of the organization. There are good reasons for this diffidence. First, the court recognizes that freedom of religion […] is very much implicated in such disputes and must be fulsomely respected. […]
>
> [6] Second, the court recognizes the real risk of misunderstanding the relevant tradition and culture, which could result in getting the decision wrong and saddling the religious organization with a bad decision.

21. On its own, church membership is "purely ecclesiastical"[50] and, as the Supreme Court of Canada stated in *Wall*, "mere membership in a religious association […] should remain free from court intervention."[51] Or as the United States Supreme Court explained in *Watson v. Jones* (1872):

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government […].[52]

22. This approach not only protects religious institutions' independence, it also protects courts from getting entangled in disputes they are not well suited to resolve. In *Ukrainian Greek Orthodox Church*, the Supreme Court said that "unless some property or civil right is affected […], the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order."[53] In *Cohen*, the applicants sought an injunction to prevent mixed seating of men and women as contrary to the purposes for which a synagogue was held in trust.[54] The judge concluded, "While […] courts have a role to play when congregations become

---

[49] *Ivantchenko, et al. v. The Sisters of Saint Kosmas Aitolos Greek Orthodox Monastery*, 2011 ONSC 6481, ¶4 [***Ivantchenko***].

[50] *Dunnet*, *supra* note 46.

[51] *Wall*, *supra* note 42, at ¶24.

[52] *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), at 728. See also *Wall ABCA*, *supra* note 44, at notes 91 and 95, for similar passages from other cases.

[53] *Ukrainian Greek Orthodox Church v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] SCR 586, at 591.

[54] *Cohen v. First Narayav Congregation*, [1983] O.J. No. 499 (Ct J).

dissentient in relation to property, contracts, or other civil rights, […] the issue is fundamentally an ecclesiastical issue which must be resolved outside the courts of law."[55]

23. In *Wall* and *Aga*[56] (and other cases cited in ¶19-22 herein) there was no clear civil right at stake nor any applicable statutory provisions, and thus no justiciable claim. PIPA, however, grants the Commissioner supervisory authority and various powers in relation to the Petitioners' religious records. This makes the matters addressed by the Commissioner justiciable and distinguishes this case from *Wall* and *Aga*. Justiciability often involves questions of constitutional propriety,[57] but because it is about the appropriate jurisdiction of civil courts, it is not ordinarily raised in a challenge to legislation. Yet the question of whether a given matter is suitable for legal resolution is relevant for legislatures too. The reasons the judiciary often gives for refusing to resolve disputes within religious organizations are relevant to legislatures as well. This case raises the question of whether the state is justified in assuming a general supervisory authority over record-keeping practices of religious associations for exclusively religious purposes.

24. If religious associations have a constitutionally protected freedom to govern their internal religious affairs and decide on their membership, then they must also enjoy the freedom to design and follow certain processes for that end. It is well established that civil judges' and adjudicators' notes taken during a hearing are protected by adjudicative privilege, so that they can be "free from the fear that the notes could thereafter be subject to disclosure for purposes other than that for which they were intended."[58] Further, their independence means they "must not fear that after issuance of [a] decision, [they] may be called upon to justify it to another branch of government."[59]

25. Religious leaders adjudicating religious matters should not have to fear that their confidential notes may be disclosed to another kind of government (civil rather than ecclesiastical). At the very least, there should be a pressing legal objective, such investigating a crime or protecting a property right or other civil right – not an undefined and speculative privacy concern of a former member.

---

[55] *Ibid*, at ¶11.

[56] *Supra* note 42.

[57] *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources),* [1989] 2 SCR 49, at 90-91.

[58] *Canada (Privacy Commissioner) v. Canada (Labour Relations Board) (T.D.),* 1996 CanLII 4084 (FC) 1996 CanLII 4084 (FC), [1996] 3 FC 609, at 672-673.

[59] *Ibid* at 674.

E. Privacy laws are "quasi-constitutional" primarily as they apply to governments

26. The right to be free from unreasonable search and seizure protects persons' reasonable expectations of privacy against state intrusion. This right has been recognized in common law for centuries.[60] It also appears in the 4th Amendment to the United States Constitution, ratified in 1791, and in Article 12 of the *Universal Declaration of Human Rights* of 1948.[61] More recently, in response to the remarkable expansion of the administrative state, this fundamental right has been supplemented by statutes regulating how governments may collect and use personal information.

27. Canada's *Privacy Act*,[62] which governs the federal government's collection and use of personal information, came into force in 1983, replacing even earlier protections contained in the *Canada Human Rights Act*.[63] The *Personal Information Protection and Electronic Documents Act*,[64] the first such statute to apply to the private sector, was enacted in 2000. British Columbia's *Freedom of Information and Protection of Privacy Act* came into force in 1993,[65] whereas PIPA was passed in 2003. PIPEDA was introduced in response to growing privacy concerns related to the ubiquity of computing, electronic records, the internet, and data collection.[66]

28. In *Lavigne v. Canada (Office of the Commissioner of Official Languages)* (2002), the Supreme Court commented on the origin of the need for the Privacy Commissioner:

> Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.[67]

29. In *Local 401*, the Supreme Court noted, as earlier cases had recognized:

> [L]egislation which aims to protect control over personal information should be characterized as 'quasi-constitutional' because of the fundamental role privacy plays in

---

[60] See *Hunter v. Southam*, [1984] 2 SCR 145, at 157-159.

[61] U.S. Bill of Rights. U.S. Const. amend. I–X, amendment IV; UN General Assembly. (1948). Universal declaration of human rights (217 [III] A). Paris, Article 12.

[62] RSC 1985, c P-21.

[63] Library of Parliament, *Canada's Federal Privacy Laws*, Publication No. 2007-44-E, revised 2020-11-17.

[64] SC 2000, c 5 [**PIPEDA**].

[65] Office of the Information and Privacy Commissioner for British Columbia, "2002/2003 Annual Report", online: https://www.oipc.bc.ca/annual-reports/2162, at 1.

[66] Library of Parliament, *Canada's Federal Privacy Laws*, Publication No. 2007-44-E, revised 2020-11-17

[67] *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, at ¶39.

> the preservation of a free and democratic society: *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53, at para. 24; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.), at paras. 65-66; H.J. *Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, at para. 28.[68]

30. All the cases the Supreme Court cites in the passage above involved state agencies as the holders (and withholders) of the relevant records (although *Local 401* itself did not). As the Court explained in *Heinz* immediately before noting the *Privacy Act*'s "quasi-constitutional" importance: "[T]he purpose of the *Privacy Act* is to protect the privacy of individuals with respect to personal information about themselves that is held by a government institution."[69]

31. Similarly, the Court said in *Dagg* that privacy deserves constitutional protection "at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Charter*" and that "privacy interests may also inhere in the s. 7 right to life, liberty and security of the person".[70] The *Charter* does not use the term privacy, but a purposive interpretation of section 8 recognizes that it protects people's reasonable expectations of privacy *against unreasonable state interference*. What is unreasonable depends on the nature of the privacy interest and the strength of the competing state interest.

32. If preserving a free and democratic society depended on (a) preventing churches and other voluntary associations from collecting or using personal information without consent, and (b) giving a government agency oversight of such associations' record-keeping practices, it would be both surprising and alarming that most provinces have no such legislation and those that do adopted it only twenty years ago.[71] It is also noteworthy that control over one's personal information was not considered sufficiently important to justify extending the reach of PIPA to information collected and used for personal, domestic, journalistic, artistic, or literary purposes.

33. It would also be surprising that the Supreme Court of Canada in *Local 401* struck down Alberta's privacy statute for not allowing a labour union to video picket line crossers without

---

[68] *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, at ¶19 [***Local 401***].

[69] *Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, at ¶28 (emphasis added).

[70] *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, at ¶66 [***Dagg***].

[71] Besides B.C.'s PIPA, there is also Alberta's *Personal Information Protection Act*, SA 2003, c P-6.5, and Quebec's *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 PIPEDA, *supra* note 64, applies in provinces that lack equivalent legislation, but it only applies to commercial activities, as per s. 4.

consent had the Court considered it a "quasi-constitutional right" not to have one's privacy breached by a labour union. Rather, it is privacy law's role in protecting persons from government abuses in collecting or using their personal information and in keeping government's accountable that gives privacy law a "fundamental role" in "the preservation of a free and democratic society."

F. PIPA's limits on fundamental freedoms are not demonstrably justified

34. The Supreme Court cautions in *Dagg* that "[p]rivacy is a broad and somewhat evanescent concept" and says "[i]t is thus necessary to describe the particular privacy interests protected by the *Privacy Act* with greater precision."[72] As the Commissioner recognized, the Petitioners have a significant privacy interest in the records in question.[73] Disclosing these records to a state agent would constitute an obvious infringement of that privacy interest. Conversely, there does not appear to be any credible threat to the applicants' privacy that necessitates ordering disclosure of church records to the Commissioner. As the Supreme Court stated in *R v. Dyment*, "Quite simply, the constitution does not tolerate a 'low standard which would validate [government] intrusion on the basis of suspicion and authorize fishing expeditions of considerable latitude.'"[74]

35. Walmart, for example, likely has no *privacy* interest in records containing customers' personal information – though it may have a *commercial* interest, which PIPA protects.[75] Conversely, a church elder and the congregation have a privacy interest in a record of the kind at issue in this case, a record that contains the thoughts of a religious overseer reflecting on whether to end a person's membership in the religious community. Although the Commissioner may not be legally permitted to disclose the elders' or other congregants' personal information to anyone, the mandated disclosure of such church records to the Commissioner constitutes both a breach of the elders' and church's privacy and an infringement of their religious practices.

36. The Respondent herein has not demonstrated how its statutory objective would be undermined if records created for exclusively religious purposes were treated like records created for exclusively personal, domestic, artistic, journalistic, or literary purposes. It is simply assumed

---

[72] *Dagg*, supra note 70, at ¶67.

[73] *Order P22-03 Grand Forks Congregation of Jehovah's Witnesses and Coldstream Congregation of Jehovah's Witnesses,* 2022 BCIPC 35, at ¶154.

[74] *R v. Dyment*, [1988] 2 SCR 417, at ¶35.

[75] PIPA, *supra* note 1, s. 23(3)(b).

that it would. But what if subjecting such records to the access and oversight regime in PIPA would undermine not only fundamental freedoms, but also privacy – as it would in this case if the Petitioners are obliged to disclose religious records that would otherwise be kept confidential?

37. The Supreme Court in *Local 401* concluded that Alberta's PIPA did not go far enough in accommodating a labour union's freedom to engage in effective picketing by recording and publicly sharing footage of picket line crossers without consent.[76] It is difficult to see how keeping confidential records of religious deliberations is less important to freedom of religion and association than videorecording picket-line crossers is to freedom of expression. Further, the union activity in issue in *Local 401* was a clear and direct threat to individual privacy, whereas the religious practice at issue in this case is keeping religious records strictly confidential.

38. PIPA limits the right to exercise control over one's personal information in many ways. For example, an organization may collect, use, or disclose personal information without consent to determine a person's suitability "to receive an honour" or "to be selected for an athletic or artistic purpose,"[77] but not to determine whether a person may become or remain a member (or an elder or other religious office-holder) of a religious community. Yet the latter determination is protected by freedom of religion and association. Forming, maintaining, and spiritually governing a religious community often involves formal rules, practices, decision-making, and record-keeping. As LeBel J. commented in *Hutterian Brethren*, "Religion is about religious beliefs, but also about religious relationships. […] [This appeal] raises issues about belief, but also about the maintenance of communities of faith."[78] To regulate religious relationships is to regulate religion.

G. Applying PIPA to religious records may undermine privacy

39. One's interpersonal relationships shape one's identity, romantic and sexual life, family life, social life, and spiritual life. The freedom to form, maintain, and discontinue a variety of significant interpersonal relationships and associations is protected by the *Charter*. PIPA implicitly recognizes this by exempting the collection, use, or disclosure of personal information by individuals for personal or domestic purposes. PIPA allows individuals, for their own personal

---

[76] *Local 401*, *supra* note 68.

[77] PIPA, *supra* note 1, at ss. 12(1)(f), 15(1)(f), and 18(1)(f).

[78] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, at ¶183 (Lebel J. in dissent, but not on this point). Quoted approvingly in *Loyola*, *supra* note 29, at ¶93.

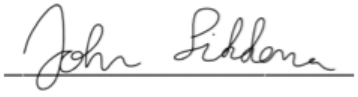
reasons, to collect, use and disclose information about other people without consent. People talk about people. Indeed, a legal right to exercise total control over information about oneself vis-à-vis fellow citizens and civil society associations in a free and democratic society is inconceivable. Even the most intrusive state agency could hardly begin to enforce it.

40. Imagine if PIPA applied to personal information recorded by individuals for personal purposes. The Commissioner would have the authority to order a person to disclose their diary at the prompting of an ex-partner so the Commissioner could examined it for information about the diarist's ex-partner and about persons with whom the diarist might have shared such information. This would be rationally connected to the broad objective of giving the ex-partner greater control over their personal information – but only at the cost of a clear, direct breach of the diarist's privacy, not to mention the likely "chilling effect" this would have on anyone who may keep a diary. Meanwhile, it raises the question of whether the ex-partner's privacy was ever at significant risk from the mere fact of the diarist having written about them in a diary.

41. Of course, that PIPA excludes such records does not mean that the ex-partner is left with no legal protections for his privacy or reputation. Depending on how personal information about the ex-partner was obtained or how it has been used, they may have a tort claim for a violation of privacy under the *Privacy Act* or a claim for defamation. Were PIPA to exclude records created for religious purposes and no other purposes, (former) church members would still be able to sue a church for defamation or under the *Privacy Act*. But PIPA goes much further in that it gives the Commissioner proactive supervisory authority over records and record-keeping practices, even where there is no reasonable allegation of a privacy breach or serious risk thereof.

42. This intervener respectfully asks this Court preserve the freedom of religious associations to effectively self-govern their internal religious affairs without interference from the state – absent a specific, pressing, and demonstrable justification for the government to intervene.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Dated August 10, 2023

John Sikkema and André Schutten
Counsel for the Intervener, ARPA Canada