Justiciability in Private Law: Religion and Politics

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This paper is about whether private law disputes are ever non-justiciable. I argue that, as a general rule, a private law dispute is justiciable if and only if the claim asserts that the plaintiff's legal rights have been breached by the defendant. Contrary to recent suggestions, there is no rule that renders disputes non-justiciable because they involve religion. Rather, the only private law disputes that may be non-justiciable despite asserting the breach of a private right are those which would require a court to exceed its role under the separation of powers.

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1 Introduction

To say that an issue is justiciable is to say that it is appropriate for a court to determine.[1] Problems of justiciability often arise in public law where an official may have violated a legal rule, but determining whether they did, or ordering a remedy, would take the court outside its role under the separation of powers. In such situations, the court may refuse to decide the issue. In this paper, I ask whether disputes in private law, such as property, contract and tort law, are ever non-justiciable. I will argue that private law does have a general rule of justiciability, but it is a trivial one:

> **Private Law Justiciability Rule** A court ought to decide a claim if, and only if, the claim asserts that a legal right of the plaintiff was breached by the defendant.

In other words, courts hearing private law disputes typically don't need to address justiciability; they can simply address whether the plaintiff has a cause of action.[2]

It may seem odd to spend time on a trivial rule. There are two reasons why this is worth doing. First, certain authors have proposed an approach to private law that is inconsistent with this rule: namely, that private law disputes should be presumptively non-justiciable if they would involve a court in deciding matters of religious doctrine.[3] If this were right, then in addition to asking whether there is a cause of action, a court would also have to ask whether the dispute is non-justiciable because of its religious content. Courts, too, have occasionally taken this approach.[4] I will argue that it is wrong. Plaintiffs who have a cause of action should not be denied remedies because of the religious nature of their dispute. Making religion a private-law-free zone would render people more vulnerable in religious settings. It would also undermine basic legal principles.

Second, stating the rule allows us to recognize exceptions to it. I will suggest that there are arguable exceptions, although they do not involve religion. The only arguable exceptions to the above rule are cases which would require a court to exceed its role under the separation of powers. In particular, courts have refrained from deciding disputes which would require commenting on matters of foreign relations that are for the executive to decide. Courts have also immunized public authorities from private liability in making policy decisions. While both doctrines have been questioned in Canadian law, I will suggest that, to the extent that they are correct, they can be usefully understood as exceptions to the Private

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[1] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 32.

[2] The idea of a cause of action is broader than the idea of a legal right being breached, because a plaintiff may have a cause of action when they anticipate that their legal right is going to be breached and take pre-emptive legal action to prevent the breach. Such situations may be dealt with by seeking declaratory relief; for general discussion see Malcolm Rowe & Diane Shnier, "The Limits of the Declaratory Judgment" (2022) 67:3 McGill LJ 295 at 310. I will bracket this complication for purposes of this paper and will proceed as though all causes of action involve the breach of legal rights.

[3] Gerard Kennedy & Kristopher Kinsinger, "Justiciability, Religious Tenets, and Private Law Causes of Action: Towards a Predictable Framework" (2024) SCLR (3d) 301; Lorne Sossin & Gerard Kennedy, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2024) Thomson Reuters.

[4] See for example *Levitts Kosher Foods Inc v Levin et al* (1999), 45 OR (3d) 147 (Sup Ct) and *Khaira & Ors v Shergill & Ors* [2012] EWCA Civ 983, rev'd [2014] UKSC 33. I discuss both cases below in section 3.3.

Law Justiciability Rule grounded in the separation of powers. Understanding this should help in deciding how these doctrines work and whether additional exceptions should be recognized.

The paper goes as follows. I begin by briefly reviewing justiciability in public law. Next, I consider and respond to the proposed justiciability rule for religious disputes. Responding to this proposal leads me to the above-stated rule of justiciability in private law, which I articulate by drawing on recent work on standing.[5] After discussing this principle, I address exceptions to the rule.

My topic is justiciability in Canadian common law. I will discuss cases from Quebec or from other common-law jurisdictions, particularly the United Kingdom, where they shed light on the position in common-law Canada or indicate how the law might develop.

2 Justiciability in public law

In public law, the doctrine of justiciability rules out certain questions from judicial determination independently of their first-order legal merits on the basis that they are inappropriate for a court to determine. For example, suppose that A brings a judicial review application, challenging a decision made by the legal official B. If the court rejects the application as non-justiciable, this does not mean that B's decision was correct, reasonable or lawful. It only means that the court will not determine whether the challenge to that decision succeeds on the merits.

There are broad and narrow senses in which this might be so. In the broad sense, non-justiciability covers any reason why a court might refuse to decide a claim on its merits: the plaintiff might lack standing (an issue of *who* brings the claim); the claim might be premature, moot or time-barred (an issue of *when* the claim is brought); or the content of the claim might be inappropriate for a court to determine (an issue of *what* the claim is).[6] In the narrow sense, non-justiciability covers the last category: claims which are rejected because their content is inappropriate for a court to determine.[7] I will focus on justiciability in the narrow sense.

Why might a claim be non-justiciable in public law? In some cases, this is because the plaintiff's application does not have enough legal content for a court to decide it. In *Black v Canada*,[8] Conrad Black was to be appointed a peer in the United Kingdom. Prime Minister Jean Chrétien asked the Queen not to grant the peerage, and she agreed. When Black applied for judicial review of the Prime Minister's action, the court held that the claim was not justiciable. In particular, the decision whether to grant an honour did not engage with any

[5] Timothy Liau, *Standing in Private Law* (2024) Oxford University Press.
[6] The who-when-what categorization is from Russell W Galloway, "Basic Justiciability Analysis" (1990), 30 Santa Clara L Rev 911.
[7] See *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62, at para 34; *Shergill v Khaira*, [2014] UKSC 33 at para 41 ("unsuitable for judicial determination by reason only of its subject-matter").
[8] (2001), 54 OR (3d) 215 (CA)

substantive or procedural rights; it was purely a favour at the Queen's discretion and "[did] not have a sufficient legal component to warrant the court's intervention".[9]

In other cases, the question does have legal content, but is held non-justiciable because deciding it would lead the court into the sphere left to the legislature. In *Temple v Bulmer*,[10] a statute provided that if a seat in the Ontario legislature had been vacant for three months, the legislative clerk would issue a writ. Despite this, the Supreme Court declined to grant an order of mandamus directing the clerk to issue the writ, holding that the clerk's duty was owed to, and enforceable by, the legislature, such that court enforcement would intrude into the privileges of the legislature. In *Friends of the Earth*,[11] an environmental organization sought to hold the Minister of the Environment accountable for failing to prepare a climate change plan that fulfilled Canada's obligations under the Kyoto Protocol, as required by statute. Although the statute did impose a duty on the Minister, the court held that assessing compliance with this duty involved policy-laden considerations which were not justiciable. In both *Temple* and *Friends of the Earth*, it seems likely that the legal officials had violated statutory duties, but to say so would have taken the court out of its proper sphere.

There is no precise test for whether a claim is justiciable. An often-quoted passage from Lorne Sossin's *Boundaries of Judicial Review: The Law of Justiciability in Canada* states: "While it is helpful to develop the criteria for a determination of justiciability, including factors such as institutional capacity and institutional legitimacy, it is necessary to leave the content of justiciability open-ended. We cannot state all the reasons why a matter may be non-justiciable."[12] In *Reference re Canada Assistance Plan*, the court held that "[i]n exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government".[13] As this suggests, concerns about justiciability often reflect the separation of powers. This is why justiciability often arises as an issue in public law cases, which by definition involve interactions between at least two branches of the state.

3 Justiciability in private law: the case of religion

In this section, I consider a proposal by Gerard Kennedy and Kristopher Kinsinger about the justiciability of religious disputes. I'll explain how the proposal departs from settled law, and

[9] Para 62. By contrast, in *Chauvin v Canada*, 2009 FC 1202, a challenge to the appointment of Dr Morgentaler to the Order of Canada was held to be justiciable because, unlike the peerage, there were legal criteria for such an appointment.

[10] [1943] SCR 265. Similarly, in *Canada (Auditor General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49 at para 77 the court declined to grant an order in support of the Auditor General's right to information from the government under a statute, holding that granting such a remedy "would result in a de facto shift in the constitutional balance of powers".

[11] *Friends of the Earth – Les Ami(e)s de la Terre v Canada (Governor in Council)*, 2008 FC 1183, aff'd 2009 FCA 297. There is some indication that such claims are now justiciable: *Mathur v Ontario*, 2024 ONCA 762.

[12] Sossin (1999) at 5, quoted in *Friends of the Earth* at para 25

[13] *Reference re Canada Assistance Plan (Canada)*, [1991] 2 SCR 525; see also *Operation Dismantle* at para 38; *Doucet-Boudreau* at para 34l.

why the rule proposed is unnecessary, as private law itself already excludes the claims which should be excluded.

My goal here is a limited one. There is an enormous literature on how law and religion relate in Canada and elsewhere. Kennedy and Kinsinger's proposal falls into a broader class of arguments that can be found in that literature, and that are often raised in litigation by religious groups: that the state lacks sovereignty or jurisdiction over religious issues and should not intervene.[14] I am not aiming to give a comprehensive account of the state's jurisdiction over religious issues. My focus is on a specific instance of that jurisdiction, namely the justiciability of private law disputes involving religion.

3.1 Kennedy and Kinsinger's proposal

Kennedy and Kinsinger argue that religious disputes are presumptively non-justiciable in private law. This goes beyond observing that many such disputes do not involve legal rights.[15] It means that an otherwise valid claim may be non-justiciable because it involves religion.

Kennedy and Kinsinger are concerned with situations in which resolving a private dispute would involve courts in dealing with religious doctrine. Their claim is that "there should be an absolute bar on courts making determinations on religious doctrine".[16] For example, in deciding whether a member of a church should have been expelled, whether some religious property should be sold, or who is the leader of a religious organization, a court might end up having to decide questions with religious content. In such cases, Kennedy and Kinsinger argue, courts should decline to intervene. They allow that causes of action that touch on religion are enforceable if they are merely procedural (such as an arbitration agreement), involve employment or property, or involve statutory rights, and suggest that otherwise enforcement should be rare.

The proposal is worth engaging with not only for its intrinsic interest, but also because it is taken up in the new edition of *Boundaries of Judicial Review: The Law of Justiciability in Canada*, which is co-authored by Kennedy and Lorne Sossin, and which contains a section on "Disputes Involving Religion". This section claims that "true theological matters" are non-justiciable, adding that "even in the presence of a contract for membership in a religious organization … if membership is revokable because that one has 'sinned', courts cannot adjudicate on what a 'sin' is."[17] This means that "even where there is an underlying legal

[14] See for example Iain T Benson, "The Limits of Law and the Liberty of Religious Associations" (2017), 79 S.C.L.R. (2d) xxi – xlvi at para 10; for discussion, see Kathryn Chan, "Lakeside Colony of Hutterian Brethren 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* (2022) Hart Publishing.

[15] Kennedy & Kinsinger refer to this as the idea that "religious disputes are only deemed to be injusticiable so long as they fail to meet the procedural requirements for courts to adjudicate such matters" ("Towards a Predictable Framework" at 317). The requirements they have in mind, however, are not procedural but substantive: requirements such as consideration, certainty of terms, and contractual intention.

[16] Kennedy & Kinsinger, "Towards a Predictable Framework" at 318.

[17] Lorne Sossin & Gerard Kennedy, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Thomson Reuters, 2024) at s 8.14. The two cases centrally relied on for these claims are *Wall* and *Amselem*, neither of which are private law cases. The other cases relied on are trial-level decisions. I deal with some of these below in section 3.3.

right], courts will decline to interfere in a dispute if the underlying subject matter is inherently non-justiciable". The section then reiterates that private law claims are likely to be justiciable despite involving religion if they are merely procedural, involve employment or property, or involve statutory rights, and outside these categories, likely not.[18]

While both the article and the treatise chapter raise interpretive difficulties, the most straightforward reading is that there is a distinct justiciability rule for religion which renders some disputes non-justiciable despite involving private rights. This claim, I will argue, is wrong. There is no distinctive justiciability rule for private law disputes involving religion. When confronted with such disputes, courts proceed not by addressing justiciability but by addressing whether rights are at issue, just as with disputes that do not involve religion. Ordinary private law doctrines already rule out the types of claims we might be concerned about. Thus, even if we interpret the proposal as offering a new rule, it is an unnecessary one — a solution without a problem.

I will argue for these points in several steps. In the next subsection, I show that courts dealing with private law claims involving religion decide those claims when, and only when, a private right is raised. In the following subsection, I discuss cases that appear to address justiciability, showing that the appeal to justiciability in these cases is either misguided or downstream of the existence of a private right.

3.2 How private law resolves religious claims

In this subsection, I review cases in which courts deal with private law claims involving religion (for short, I will sometimes call these 'religious claims'). I will begin by discussing cases in which there is no private right at issue, before turning to cases where there is one. The rule that emerges is simple, indeed trivial: if there is a private right at issue, courts will decide the claim, and if there is no private right at issue, they will not.

Let me begin with cases in which a claim is rejected because it raises no private right. In *Forbes v Eden*,[19] a minister of the Scotch Episcopal Church brought an action against the church's bishops on the basis that the church's new Code of Canons departed from its normal practice. The minister had not suffered any civil consequences, but brought the action in case he might suffer such consequences later.[20] Lord Cranworth set out the basic principles clearly:

> Save for the due disposal and administration of property, there is no authority in the Courts either of *England* or *Scotland* to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs.
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> If funds are settled to be disposed of amongst members of a voluntary association according to their rules and regulations, the Court must necessarily take cognizance of those rules and regulations for the purpose of satisfying itself as to who is entitled to

[18] Sossin & Kennedy, *Boundaries of Judicial Review* at s 8.15.
[19] (1867), LR 1 ScDiv 568 (HL)
[20] *Forbes*, at 575.

> the funds. So, likewise, if the rules of a religious association prescribe who shall be entitled to occupy a house, or to have the use of a chapel or other building.
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> This is the principle on which the Courts have administered funds held in trust for dissenting bodies. There is no direct power in the Courts to decide whether *A*. or *B*. holds a particular station according to the rules of a voluntary association. But if a fund held in trust has to be paid over to the person who, according to the rules of the society, fills that character, then the Court must make itself master of the questions necessary to enable it to decide whether *A*. or *B*. is the party so entitled. …
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> There is no jurisdiction in the Court of Session to reduce the rules of a voluntary society, or, indeed, to inquire into them at all, except so far as may be necessary for some collateral purpose. The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it. If, connected with any office in a voluntary association, there is the right to the enjoyment of any pecuniary benefit, including under that term the right to the use of a house or land, or a chapel, or a school, then, incidentally, the Court may have imposed on it the duty of inquiring as to the regularity of the proceedings affecting the *status* in the society of any individual member of it.[21]

Given that the plaintiff had not alleged any violation of his private rights — for example, there was as yet no threat to his job as a clergyman — there was no legal basis for the court's intervention.

The approach in *Forbes* was followed by the Ontario Court of Chancery in *Dunnet v Forneri*,[22] where the plaintiff sued the minister of his church for excommunicating him and refusing to allow him to take communion. The court held that as a general rule,

> All religious bodies are here considered as voluntary associations; the law recognizes their existence, and protects them in their enjoyment of property, but unless civil rights are in question it does not interfere with their organization or with questions of religious faith. When these rights come into question, however, it may often be necessary to investigate what tenets are held, and whether fundamental rules of the Church have been invaded.

In the case at issue, the right to be a member of the church was "purely ecclesiastical": it might have been a right under the rules of the church, but was not a legal right.

The same approach was applied in *Ukrainian Greek Orthodox Church of Canada v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*,[23] where an incorporated church body sued to prohibit a priest from conducting services at a congregation whose members were largely happy with the priest. The claim was dismissed on the basis that the congregation had no legal relationship with the church corporation (it had never agreed to be

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[21] *Forbes*, at 581-582.
[22] (1877), 25 Gr 199 (Ontario Court of Chancery). See similarly *Pinke v Bornhold* (1904), 8 OLR 575 (HCJ).
[23] [1940] SCR 586.

part of the corporation or subject to its authority) and therefore the corporation had no basis for interfering with the priest's ability to conduct services there. Most recently, in *Ethiopian Orthodox Tewahedo Church v Aga*,[24] the plaintiffs had been expelled from their church after they vocally disagreed with a decision made by church leadership. The court held that there was jurisdiction to intervene in voluntary associations only where a legal right was affected, typically a private right or statutory right. Given that there was no contract between the plaintiffs and the church, the claim was dismissed.

All of these cases show that as far as private law is concerned, where there is no private right at issue, courts will not intervene in a religious association. This approach differs from that in certain English cases, where the establishment of the Anglican Church means that some of its decisions may be legally enforceable, and some of its activities subject to judicial oversight, even where they do not involve private rights.[25] This enforcement and oversight is carried out by ecclesiastical rather than civil courts.[26] The difference between Canadian and English law on this point is recognized in *Dunnet*:

> Rights of the nature of those asserted in the bill may very well be the subject of adjudication in the appropriate Courts in England, where the Church of England is by law established. But the decisions in such cases are not precedents determining what ought to be done when disputes arise where the Church is not established and Ecclesiastical Courts do not exist.

After listing various legislative enactments which recognized legal equality among religious denominations in Canada, Proudfoot V-C held that "[t]he effect of these enactments is to place all religious bodies upon a footing of equality before the law", such that the close relation between the state and the Anglican church which exists in England could not exist in Canada. Instead, "spiritual causes" which do not involve legal rights are outside the courts' purview.

There is one major case that appears to be in tension with this point. In *Brown v Les Curé et Marguilliers de l'Œuvre et de la Fabrique de la Paroisse de Montréal*,[27] otherwise known as the Guibord case, Henriette Brown went to court to have her recently deceased husband, Joseph Guibord, buried in the Catholic section of the parish cemetery. Local church officials had refused because Guibord had been a member of the Institut Canadien, a literary and scientific society whose library contained books prohibited by the Catholic Church. The Privy Council held that if the act of a church official depriving a subject of his rights was

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[24] *Ethiopian Orthodox Tewahedo Church of Canada v Aga*, 2020 SCC 22

[25] On the effects of establishment in law, see *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank & Anor* [2003] UKHL 37 at paras 58-61.

[26] On the relation between ecclesiastical courts and common law courts, see *Attorney-General v Dean and Chapter of Ripon Cathedral*, [1945] Ch 239, where the court held at 245 that "[t]he law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts. … The unity and coherence of the law is not affected by the division of jurisdiction as to its enforcement." See also *R v Chancellor of St Edmundsbury and Ipswich Diocese, Ex Parte White*, [1947] KB 263, which held at 274 that ecclesiastical courts "are not inferior courts; they are as unfettered in spiritual causes as is the Supreme Court in temporal causes". For an overview, see Mark Hill, *Ecclesiastical Law*, 3rd ed (2007) Oxford University Press at ch 1.

[27] (1874), LR 6 PC 157.

questioned in court, "that Court has a right to inquire, and is bound to inquire, whether that act was in accordance with the laws and rules of discipline of the Roman Catholic Church which obtain in Lower Canada". It considered those rules as set out in church documents, and, having concluded that the refusal of burial was not justified by them, ordered the burial.

Is the Guibord case consistent with the rule from *Dunnet*? If the case involves an intervention into a religious organization ungrounded in any legal right, it is not. It falls within the rule only if Guibord had a legal right to an ecclesiastical burial. But why would he have such a right? In fact, the case suggests that he did. The court holds that church officials "are only proprietors of the parochial cemetery, in the sense in which a Parson in England is the owner of the freehold of the churchyard, that is to say, subject to the right of the parishioner to be buried therein." In English common law, every parishioner has the right to be buried in the parish churchyard.[28] On the assumption that such a right existed in Lower Canada at the time, the Church had interfered with Guibord's legal right to burial, a right to which the court was giving effect.

So much for cases in which there is no private right at issue. The other side of the rule in *Dunnet* is that if there is a private right at issue, courts will decide whether it has been breached, even in a religious context.[29] As I noted earlier, courts have decided religious claims involving employment — for example, when a church terminates the employment of a minister. In such cases, deciding whether the employee's contractual rights were violated may involve interpreting religious terms, if the employee's obligations were framed in such terms. In *McCaw v United Church of Canada*, the church removed a minister's name from its rolls, which meant he could no longer make his living as a minister.[30] The court held that this removal required "strict adherence to the law of the church as laid out in the provisions of the Manual" and concluded that the proceeding that had taken place was an unauthorized attempt to circumvent the Manual's provisions for church discipline. Other contractual claims involve membership in an association to which property rights are attached. In *Lakeside Colony of Hutterian Brethren*,[31] the plaintiffs' expulsion from a religious community brought with it eviction from their homes, as their right to live on the colony's land depended on being

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[28] *In re West Pennard Churchyard*, [1991] 1 WLR 2 (Const Ct); *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank & Anor* [2003] UKHL 37 at para 130 (Lord Scott of Foscote, dissenting but not on this point); *Re St. Thomas à Becket and St. Thomas the Apostle Heptonstall* [2021] ECC Lee 2.

[29] See *Tully v Farrell* (1876), 23 Gr 49 (Ont Ct Chancery). As MH Ogilvie argues, "there can be little doubt, from the perspective of [the] civil authorities, that they enjoy as much civil jurisdiction over religious institutions as over any other individual or group of individuals": *The Law of Religious Institutions in Canada* (Irwin, 2017) at 228.

[30] *McCaw v United Church of Canada* (1991), 4 OR (3d) 481 (CA); see also *Davis v. United Church of Canada* (1992), 8 OR (3d) 75 (Sup Ct). In *Pederson v Fulton* (1994), 111 DLR (4th) 367 (Sup Ct) and *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728, actions by Roman Catholic priests were stayed given their failure to exhaust their internal remedies under canon law. In such cases, the relation between priest and church is contractual, and the rules of canon law are terms of that contract. In *Anozie v McGrattan*, 2017 HRTO 1208 and *Elamplakatt v Roman Catholic Diocese of London*, 2022 HRTO 411, disputes subject to canon law were held to be outside the jurisdiction of the Human Rights Tribunal of Ontario.

[31] [1992] 3 SCR 165

a member. The court had to determine whether the expulsion was valid under the rules and traditions of the community.

Private rights are also at issue in church property disputes. In such disputes, courts may need to consider church documents, rules and even religious doctrine in order to decide who is entitled to church property. In *Jones v Dorland*,[32] property was held in trust for a Quaker society. A dissentient group set up their own society and claimed rights over the trust property. The Supreme Court held that, given differences of belief and practice, the dissentient group could not claim to be the trust beneficiary, and thus had no right to the property. Again, in *General Assembly of Free Church of Scotland v Lord Overtoun*,[33] the House of Lords had to decide who was entitled to the property of the Free Church of Scotland after the majority had voted to merge with another church, while a minority rejected the merger. The Earl of Halsbury LC held that "the identity of a religious community described as a Church must consist in the unity of its doctrines".[34] Given that the majority group had rejected a core doctrine of the church, the minority group was entitled to the property.

In a recent Australian case, the court explained how determining property rights may require engagement with religious doctrine:

> In this case, the Court is asked to enforce the terms of a charitable trust for religious purposes. This Court does not regulate the practice of religions, nor enforce church law. However, it enforces trusts, and in particular the application of trust property in accordance with the terms of the trust. Where property is given on trust for the purposes of a particular church, there may be a breach of trust if it is applied to a purpose inconsistent with the law of that church.[35]

Similarly, the Ontario Court of Appeal has confirmed that the correct approach in such disputes is "considering the deeds, the applicable legislation, the canons or church law promulgated by each diocese and, to some extent, the doctrinal context".[36] Where a religious organization has rules that constitute authority to modify church doctrine and practice, courts will recognize that authority. Thus, in *Bentley v Anglican Synod of the Diocese of New*

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[32] (1887), 14 SCR 39.
[33] [1904] AC 515.
[34] *Free Church* at 612-613.
[35] *Metropolitan Petar v Mitreski* [2012] NSWSC 16 at para 34.
[36] *Pankerichan v. Djokic*, 2014 ONCA 709 at paras 63, 86. See also *Itter v Howe* (1896), 23 OAR 256 (CA). I don't mean to suggest that these rules are beyond criticism. In particular, the courts' focus on doctrine in church property disputes can have the effect of freezing a church in the past, preventing its views from evolving over time. This seems inconsistent with the autonomy of voluntary associations, as noted by Lord Cranworth in *Forbes* at 584: "A religious body… forms an *imperium in imperio*, of which the Synod is the supreme body… If this is so, I feel it impossible to say that any canons which they establish can be treated as being *ultrà vires*." Similarly, JN Figgis criticized the *Free Church* case on the basis that it failed to treat the church as a living organization, capable of developing over time: see David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997) at 135 and John Neville Figgis, *Churches in the Modern State* (London: Longmans, Green and Co, 1913) at 18-22. These issues are discussed with greater legal detail, and an alternative proposed, in Alvin J Esau, "The Judicial Resolution of Church Property Disputes: Canadian and American Models" (2021) 40:4 Alberta L Rev 767.

Westminster,[37] a claim by dissident Anglican parishes, purporting to be more true to Anglican doctrine than the majority, was rejected on the basis that "in Canada, the General Synod has the final word on doctrinal matters… The plaintiffs cannot in my respectful opinion remove themselves from their bishop's oversight and the diocesan structure and retain the right to use properties that are held for purposes of Anglican ministry in Canada."[38]

Let me turn now to the practical consequences of this approach. The point is not that courts will always decide religious claims. There are many religious claims that are inappropriate for courts to decide. The point is that these claims are inappropriate because they don't involve private rights, rather than because they are religious. Moreover, even when a plaintiff does assert private rights, it does not follow that they will succeed; a court may consider a claim justiciable, but conclude upon hearing the claim that it should be dismissed. Many claims which might seem inappropriate are, in this way, ruled out using ordinary private law doctrines. The right approach for a court, as a matter of law, is simply to analyze the claim using these doctrines. Let me offer two examples.

First, where a religious agreement is said to constitute a contract, courts investigate whether the agreement satisfies the ordinary requirements of contract formation, such as intention to contract and consideration. In *Ethiopian Orthodox*, the plaintiffs had argued that their membership in the church was a contractual relation and that the church had breached it by expelling them in violation of its own rules. The court held that the interactions between the plaintiffs and the church — attending services, and perhaps having signed a membership form at one point — did not manifest any objective intention to contract, so there was no contractual right for the church to breach. This point of law is not particular to this context; it is simply an application of ordinary contract law to a voluntary association.[39] Similarly, in *Zebroski v Jehovah's Witnesses*,[40] the plaintiffs were expelled from their congregation of Jehovah's Witnesses and sued. The court concluded that the action was bound to fail, as the plaintiffs had no contract with the church. Although the court's reasoning is very brief, one can infer that the commitments made by the church in return for the plaintiffs' joining — that they would enjoy paradise and the favour of God at the time of Armageddon — did not count as consideration.

Second, trusts and gifts in wills often involve conditions in restraint of religion — clauses "that require a beneficiary to continue with, convert to, or become involved with a particular religion on threat of forfeiture of the gift".[41] Such conditions are dealt with under

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[37] 2010 BCCA 506. For discussion see MH Ogilvie, "The Meaning of Religion and the Role of the Courts in the Adjudication of Religious Matters: An English and Canadian Comparison" (2015) 93:1 Can B Rev 303 and "Three Recent Cases Confirm Canadian Approach to Church Property Disputes" (2015) 93:2 Can B Rev 537.

[38] *Bentley* at para 76. This approach aligns with certain earlier cases "where courts awarded property to the majority of a congregation in a dispute, regardless of whether the proposed changes amounted to a fundamental change of doctrine, on the basis either that the majority was empowered by the congregational constitution to make changes or that the changes had been made in accordance with the denomination's hierarchical processes for so doing": MH Ogilvie, "Church Property Disputes: Some Organizing Principles" (1992) 42:4 UTLJ 377 at 390.

[39] *Aga* at paras 39-41. For related discussion see Manish Oza, Jason Neyers (ed), *Fridman on Contracts* (Thomson Reuters, 2024), ch 3.

[40] 1988 ABCA 256

[41] Sheena Grattan & Heather Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-first Century: An Anglo-Canadian Perspective" (2005) 50:3 McGill LJ 511 at 514.

ordinary legal requirements for a valid condition, such as certainty. I'll illustrate this point by reference to English cases, as they articulate the law on this point more clearly than the Canadian cases. In *Clayton v Ramsden*,[42] a testator left property in trust for his daughter and any children she would have, subject to a provision that she would lose this entitlement if she married a man "who was not of Jewish parentage or faith". Given that the "parentage" requirement was void for uncertainty, the court did not need to decide the validity of the "faith" requirement, but Lord Romer suggested that it too was void for uncertainty, given that different people adhere to the Jewish faith to different degrees, and the provision did not specify what degree was required.[43] By contrast, in *Blaythwayt v Baron Cawley*,[44] the House of Lords held that a similar clause, disentitling a beneficiary should they "be or become a Roman Catholic", was sufficiently certain. Lord Wilberforce held that *Clayton* was "a particular decision on a condition expressed in a particular way about one kind of religious belief or profession." In short, whether a condition in restraint of religion is certain depends on the wording and context. A similar pattern is found in Canadian cases, subject to the additional point that trusts with discriminatory requirements may be found to violate public policy, like trusts that discriminate on the grounds of race, gender or sexual orientation.[45]

3.3 Religious cases discussing justiciability

In this section, I discuss cases where courts dealing with religious disputes expressly address justiciability. Some of these cases do rely on the claim that religious disputes are non-justiciable, but I'll suggest that either the result can be better justified without this claim or the claim leads the court to the wrong result. Other cases discuss justiciability, but in a way which is clearly downstream of the existence of a private right: the substance of the court's reasoning is not about justiciability but about whether there is a cause of action.

In the first category, consider *Levitts Kosher Foods Inc v Levin et al*,[46] where a Montreal kosher food company sued three Toronto rabbis who were part of a council responsible for certifying kosher products. The council had adopted new policies requiring more stringent observance of religious rules, which meant that the plaintiff's products would not be approved. The court held that the plaintiff's claim was an attack on policies which were religious in nature, and as a result the claim was not justiciable. But this conclusion could just as well have been arrived at on the basis that the plaintiff had not asserted a legal

[42] [1943] HL 320.
[43] *Clayton* at p 334 (Lord Romer). In Canada, *Clayton* was followed by Rand J in *Noble v Alley*, [1951] 1 DLR 321 and by Lett CJBC in *Re Schechter* (1964), 43 DLR (2d) 417 (BCCA).
[44] [1976] AC 397 (HL). In *Re Starr*, [1946] OR 252 (CA), a provision requiring a son to "rejoin" the Catholic Church was held not to be void for uncertainty. In *Re Going*, [1951] OR 147 (CA), a provision required the testator's nephews to be members "in good faith and standing" of a Protestant Church. The court held that it was unnecessary to decide whether the condition was valid, because this would make no difference. Grattan and Conway discuss several further cases at p. 525-6 and conclude that, aside from *Re Schechter*, references to other religions were found to be sufficiently certain.
[45] See *Canada Trust Co v Ontario Human Rights Commission* (1990), 69 DLR (4th) 321 (CA) and Jane Thomson, "Discrimination and the Private Law in Canada: Reflections on *Spence v. BMO Trust Co.*" (2019) 36 Windsor Yearbook of Access to Justice 137.
[46] (1999), 45 OR (3d) 147 (Sup Ct).

right. After all, the council in question was not exercising any state authority; there was no requirement for Levitts to comply with its policies, and no requirement for any store to only sell food approved by that council. (Indeed, there were multiple councils, all freely deciding what policies to require in order to certify food as kosher.) There was clearly no public law challenge available to the council's policies. Nor does it appear that any consideration flowed from Levitts to the council; there was no private law challenge available either. From a legal point of view, the council's decision not to approve Levitts' food was an instance of nonfeasance rather than misfeasance, with no more effect than the decision not to give a restaurant an award.[47] This way of arriving at the conclusion would have the additional merit of relying on settled legal rules rather than on a novel rule about the non-justiciability of religious disputes. So while the result in *Levitts Kosher Foods Inc* is correct, the court's reasoning is unpersuasive.

Also in this category is *Balkou v Gouleff*,[48] a brief endorsement by the Ontario Court of Appeal allowing an appeal from a trial decision which had held that a local parish was under the jurisdiction of the Russian Orthodox Church in Exile rather than a different church. The trial decision meant that the property of the local parish belonged to the Church in Exile and that the priest who had been officiating in the parish for the past six years had no right to do so. On appeal, the court set aside one of the trial judge's findings (that the Church in Exile's property was impressed with a trust precluding it from having relations with "atheistic or communist" organizations), as there was no basis in the trust deed for this requirement. It set aside the remainder of the relief ordered by the trial judge on the bare ground that it "involved questions of church doctrine which, in our view, were inappropriate subjects for judicial determination". As MH Ogilvie has commented, this decision "took judicial reluctance to an extreme" in a way which "appears to be novel in the Anglo-Canadian tradition".[49] Given that who owns property is clearly justiciable, the court's refusal to engage with the issue was simply incorrect.

In the second category are cases in which justiciability is downstream of the existence or lack of a private right, and therefore plays no analytical role. Consider *Bruker v Markovitz*,[50] in which a divorcing couple agreed, in a contract, that the husband would grant the wife a *get* (a Jewish religious divorce). When he refused to do this, the wife sought

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[47] Sossin and Kennedy list *Levitts Foods* as a case in which a court "declined to intervene, even when private interests are clearly affected" (*Boundaries of Judicial Review*, s. 8.14; the same proposition, supported by the same cases, occurs in Kennedy & Kinsinger, "Towards a Predictable Framework" at 304). The issue is private rights, not private interests; there can be harms to interests which are not wrongs: *D v East Berkshire*, [2005] 2 AC 373 at para 100. This point also applies to several other cases relied on by Sossin, Kennedy and Kinsinger, such as *Demiris v Hellenic Community,* 2000 BCSC 733 at para 33, where the court refused to comment on whether a church should withdraw the charter of a parish, *Mathai v George,* 2019 ABQB 116 at para 13, which concerned the removal of the right to hold office and vote in church elections, and *McTaggart v Jehovah's Witnesses*, 2019 HRTO 207, where the discrimination did not occur in an area covered by the Human Rights Code. *Sivanadian v Kanagaratnam*, 2020 ONSC 6760 was an application for judicial review, not a private law action, and in any event did not involve a religious organization. None of these cases stand for the proposition for which they are cited.

[48] (1988), 65 OR (2d) 97 (HC).

[49] Ogilvie, "Church Property Disputes: Some Organizing Principles" at 393. The use of American constitutional law in *Balkou* was questioned in *Bentley* at para 55 and in *Pankerichan* at para 81.

[50] [2007] 3 SCR 607.

damages for breach of contract. The majority (per Abella J) held that "[t]he fact that a dispute has a religious aspect does not by itself make it non-justiciable".[51] Rather, the question was whether the agreement constituted a valid contract, and this was the kind of question a court could answer — if sometimes with difficulty in a religious context. Here, the majority held that the contract was valid, and thus damages were available for its breach. The dissent (per Deschamps J) argued that "contract law cannot be relied on to enforce religious undertakings".[52] Of course, as Deschamps J recognized, the question is whether the agreement in question was solely religious, or also legally binding; she accepted that if the agreement met the requirements of a valid contract, then the court could order a remedy for its breach.[53] In the end, then, the difference between the dissent and the majority was not about when religious disputes are justiciable: both majority and dissent agreed that a religious dispute is justiciable if, but only if, it involves legal rights. The difference was simply that according to the dissent, the agreement was not a contract, because the "object" of the agreement had no civil consequences.[54] For both the majority and the dissent, justiciability was downstream of the existence of a contract.

Bruker was followed by the UK Supreme Court in *Shergill v Khaira*,[55] which concerned Sikh temples which were held on trust. The trust deed required the consent of the "successor" of the community's religious leader for certain decisions concerning the property. In time, a dispute arose about who his true successor was. While the Court of Appeal had held that the issue was non-justiciable, the Supreme Court disagreed. It held that there are two reasons why a dispute may be non-justiciable: first, because it raises an issue beyond the competence of the courts under the separation of powers, and second, because it raises no legal issue at all — for example, "transactions not intended by the participants to affect their legal relations".[56] As to religious issues specifically, the court wrote:

> [T]he courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust.[57]

The line of cases resolving church property disputes clearly contradicted "the idea that a court can treat a religious dispute as non-justiciable where the determination of the dispute is necessary in order to decide a matter of disputed legal right".[58] In the case at issue,

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[51] *Bruker*, at para 41.
[52] *Bruker*, at para 180.
[53] *Bruker*, at paras 123, 184.
[54] *Bruker*, at paras 174-175.
[55] *Shergill & Ors v Khaira & Ors*, [2014] UKSC 33.
[56] *Shergill*, at para 43.
[57] *Shergill*, at para 45.
[58] *Shergill*, at para 53.

determining who was the true successor of the original religious leader might have been necessary for deciding whether the trust property had been used in accordance with the trust.

3.4 Conclusion on justiciability in religious cases

In this section, I've argued that courts confronted with religious disputes in private law contexts do not need to expressly address justiciability. Rather, they should (and typically do) simply address whether a private right is at issue. In most of the cases I have surveyed, courts deal with the dispute using doctrines internal to private law, asking whether a given right is a property right, or whether a purported agreement is a contract.

To be clear, my claim is not that religion is irrelevant to adjudicating a private law dispute. It is often highly relevant — but as part of the factual context to which the ordinary law is applied, not as a basis for applying different law. As factual context, religion may be relevant in several ways. For one thing, religion may be important for correctly interpreting the parties' intentions, as it was in *Ethiopian Orthodox*. Parties may refer to 'obligations', or even to 'law', without meaning to invoke the law of the state; they may be referring to religious rather than state law. For another, religions are both associations of human beings and traditions of belief and practice, and different religions manage these aspects in different ways. As a result, as shown in cases dealing with conditions in restraint of religion, it may be unclear what counts as belonging to or following a particular religion. Neither of these points, however, requires a specific legal rule for religious disputes, let alone a rule of justiciability. After all, non-religious practices may be relevant in just the same way: social clubs, political organizations and other associations may have rules which are not legally binding, and what counts as belonging or living up to their standards may be unclear.

Before moving on, let me briefly comment on Kennedy and Kinsinger's normative argument. They suggest that recognizing their presumption of non-justiciability would make the law more coherent, as public law already recognizes a principle of religious neutrality, and their presumption would extend this principle to private law. It is, in fact, not clear that Kennedy and Kinsinger's presumption would serve religious neutrality, given that it seems to favour religious traditions over secular ones. The deeper problem with their argument, however, is the background assumption that the law is more coherent to the extent that the same principles inform public and private law. While this is not the place for a detailed discussion of legal coherence, there are reasons to doubt this assumption. Public and private law are, as a general matter, informed by different principles. Public law is about the exercise of state power. It aims to ensure that the state acts only in ways that are permitted by law and justified by public reasons — reasons which should be acceptable to all, rather than only to those who accept a particular worldview. Private law, by contrast, allows persons to order their affairs as they wish: for example, if A and B want to enter a contract on certain terms, then the default is that they are allowed to do so without having to justify themselves to anyone else. Although there are exceptions, they do not undermine these generalizations.

Imposing public law principles on private law wholesale would make the law less, not more, coherent. This was recognized in early cases about whether the *Charter* applied to private transactions. In *Bhindi v BC Projectionists*, the BC Court of Appeal had to decide

whether a 'closed shop' provision in a collective agreement infringed the *Charter*.[59] After all, such a provision clearly prevents certain people from associating with certain others. The court held that the *Charter* did not apply, noting that "[i]t is a rare commercial contract which does not ex facie infringe on some freedom set out in s. 2 or some legal right under s. 7. To include such private commercial contracts under the scrutiny of the Charter could create havoc in the commercial life of the country."[60]

These points are not decisive. There might be a version of Kennedy and Kinsinger's argument which appeals to the idea that constitutional rights can have horizontal effect in private law.[61] Rather than entering those deep waters, however, I will return to the topic of justiciability, drawing a more general lesson from the example of religious disputes.

4 Justiciability and standing

In this section, I will abstract away from doctrinal details and propose a rule governing justiciability in private law. I will do this by way of an analogy with standing. Both justiciability and standing play limiting roles in public law. Justiciability rules out claims on the basis of their inappropriate content, while standing rules out claims on the basis that they were not brought by an appropriate person. Thinking about standing should, therefore, shed light on justiciability. I will begin by summarizing recent work on standing by Timothy Liau and will then draw on this work to propose a justiciability rule for private law.

4.1 Standing in private law

From the fact that a legal rule has been violated, it doesn't follow that just anyone can have a court recognize that the rule has been violated. Rules of standing determine who has this power. Suppose that the Immigration and Refugee Board has rejected A's application for a visa to enter Canada, and suppose this rejection was unlawful — the Board's reasoning violates a statute. It does not follow that B can have the Board's decision set aside on judicial review. If B lacks standing to challenge the decision, then B's application will be rejected.

In public law, there are two ways a claimant might have standing to challenge a decision. First, the claimant might be someone directly affected by the decision. For example, A would have standing on this basis to challenge the decision rejecting her visa application; B might not. Second, a claimant may be granted public interest standing to challenge a decision in which they have some stake.[62]

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[59] *Re Bhindi and British Columbia Projectioniststs* (1986), 29 DLR (4th) 47 (BCCA).
[60] At p 54, cited in *McKinney v University of Guelph* [1990] 3 SCR 229 at para 30.
[61] Kennedy and Kinsinger suggest something similar at 316. In Canada, the *Charter* does have a role in informing the development of the common law, as set out in *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at para 39. For a recent discussion of horizontal effect, see Ernest Weinrib, *Reciprocal Freedom* (2022) Oxford University Press, chapters 6-7.
[62] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37.

Does private law have a doctrine of standing?[63] We do not often talk about standing in private law, and it is tempting to think that standing plays no role in it. As Liau argues, however, private law does have rules about who has the power to enforce a right. The word 'power' here is meant in Hohfeld's sense: a power-holder has a choice to exercise it or not, where exercising the power will alter existing rights and duties. Here, if a person with standing exercises their power to bring an action in court, then the court gains a new duty — to adjudicate the claim and order a remedy if the plaintiff is successful — and the plaintiff has the corresponding Hohfeldian right. By contrast, if a person without standing attempts to bring such an action, no new right-duty relation comes into existence.

Now, suppose that A has breached a contract with B. It does not follow that C can bring a breach of contract claim against A. Typically, if B is the one with the contractual right against A, then only B can sue A for its violation. Thus, as Liau argues, private law does have an implicit standing rule:

> **Private Law Standing Rule** The (apparent) right-holder, and no one else, has the power to sue to enforce their rights.

This rule applies not only in contract law, but also in tort law, where the victim of the tort is the one with standing to sue, and elsewhere in private law. (We have to add "apparent" because, if it turns out that A does not have the right they assert, this doesn't mean that A lacked standing all along.)

As Liau points out, this rule is quite different than those in public law. Private law does not allow someone to sue for a rights violation just because they were directly affected by it. If A hires B to sing a song to C, and B fails to do it, C is directly affected by the breach but has no power to enforce the contract. In private law, standing is typically parasitic on rights: the question of whether B has standing to sue A can typically be answered by asking whether B has an apparent right against A. This reflects the relational nature of private law norms. These norms relate two parties. So to identify which norm was allegedly breached (for example, a contractual provision) is already to identify who has standing to bring a claim. By contrast, public law norms — or at least certain public law norms, such as constitutional limits on the power of the legislature — relate a public authority to the members of the public broadly.[64] So to identify which norm was allegedly breached is not yet to identify who has standing to bring a claim. The fact that standing is parasitic on rights also explains why private lawyers tend not to talk about standing: we can just address whether the plaintiff holds a right against the defendant.

Still, using standing as a separate concept in private law is analytically useful, as it allows us to recognize the exceptions to the rule: cases where someone has standing to enforce someone else's right. For example, suppose that D has committed a tort against E,

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[63] Setting aside the tort of public nuisance, which does include rules of standing — indeed, these rules are the source of the rules of standing in public law. See *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607.

[64] I say 'certain norms' because administrative law contains norms that relate public authorities to the individuals affected by their decisions: see Megan Pfiffer, "Administrative Law as a Source of Rights" (2024) Modern Law Review. It would require further investigation to determine whether public law necessarily contains norms that relate public authorities to the public broadly, or whether it could be revised so that all of its norms related public authorities to affected individuals. I don't mean to take a position on this here.

but E lacks legal capacity, because they are a minor, mentally incapable or have disappeared from the jurisdiction. In such a case, F might be appointed E's litigation guardian; this would give F standing to enforce E's right against D.[65] A litigation guardian "stands in the shoes of" the person they act for; as E's litigation guardian, F can instruct counsel to pursue E's claim against D, even though F does not have a right against D.[66]

4.2 Justiciability on the model of standing

Like standing, justiciability has an uncertain status in private law.[67] As with standing, it is tempting to say that private law simply has no doctrine of justiciability. But this is too quick. I said earlier that justiciability asks whether a claim is suitable for judicial determination. Private law does have answers to this question: some claims are, and some are not, suitable for judicial determination. And private law has an implicit general rule about whether, if a claim comes to a court, the court must decide it.[68] This rule emerged in our discussion of religious cases, in which courts simply ask whether a private right is at issue.

> **Private Law Justiciability Rule** A court ought to decide a claim if, and only if, the claim asserts that a legal right of the plaintiff was breached by the defendant.

This rule applies to all private law claims.[69] It tells us that all and only those claims which appear to assert a relevant private right are justiciable. Of course, as I will discuss in the next section, there may be exceptions to the rule.

Let me make three comments on the rule. First, it makes sense of the religious cases I discussed earlier, while fitting them into a pattern that applies across private law. As we saw earlier, claims which assert property rights (like ownership of church land), contractual rights (like employment as a minister), or other private rights are justiciable, while those which do not assert any private right (like claims for mere membership in a church, or disputes over

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[65] *Rules of Civil Procedure*, RRO 1990, Reg 194, rr. 1.03(1) and 7.02(1).
[66] *Dawson v. Dawson*, 2020 ONSC 6724 at para 30.
[67] As has been noted: see David Mullan, Book Review: Boundaries of Judicial Review: The Law of Justiciability in Canada, by Lorne Sossin (2000) 38:1 Osgoode Hall Law Journal at 227.
[68] If standing is a Hohfeldian power, then justiciability might be its counterpart, a Hohfeldian liability: that if the plaintiff exercises their power to sue, then the court will have a duty to decide it. However, given that it is controversial whether Hohfeld's scheme can be applied to public bodies, I am stating the rule without relying on that scheme. On this issue see Wesley Hohfeld, TM Sichelman, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, edited and annotated by TM Sichelman", in S Balganesh, TM Sichelman, HE Smith (eds), *Wesley Hohfeld A Century Later: Edited Work, Select Personal Papers, and Original Commentaries* (2022) Cambridge University Press at 23 and Nicholas Bamforth, "Hohfeldian Rights and Public Law" in MH Kramer, *Rights, Wrongs and Responsibilities* (2001) Palgrave Macmillan.
[69] See similarly Lord Mance, "Justiciability" (2018) 67 ICLQ 739 at 756. I don't intend to rule out the possibility that a similar rule applies in public law, as suggested by Erwin Chemerinsky: "if the constitutional or statutory provision creates a legal right in the individual, then he or she should be able to sue to vindicate that right": "A Unified Approach to Justiciability" (1991), 22 Connecticut Law Review 677 at 698. However, Chemerinsky adds that other rules are needed to make sense of public law justiciability. While claims under the *Charter* and similar instruments have a rights-based structure that fits with the rule I've stated in the main text, it would require further investigation to determine whether all of public law would fit.

changes in doctrine) are not. We can now see that these results stem from the application of a perfectly general rule, not one that is limited to religion. The rule applies just as well to other kinds of claims which do not assert the breach of a legal right, and whose pleadings may be struck for failing to disclose a cause of action — for example, "a statement of claim that alleges that the defendant made a face at the plaintiff, or that the defendant drove a car of an offensive colour", or a dispute about "who is the greatest hockey player of all time".[70] These claims are identified in the second category of non-justiciability from *Shergill* as those which do not assert private rights.[71]

Second, the rule does not tell us how to identify whether a private right is being asserted. The question whether a private right is being asserted has to be answered not by a justiciability rule but rather by ordinary private law reasoning. In many cases, this is a straightforward matter of applying existing doctrine, but (as we saw in the Guibord case) it is not always clear either what the doctrine says or how it applies in a given context. An example of this difficulty in a non-religious context is in *S.A. v Metro Vancouver Housing Corp*,[72] in which the plaintiff had applied for and been denied a rental subsidy by the defendant, a private non-profit corporation. She sought a declaration that MVHC had misapplied its own eligibility criteria. MVHC argued that in any event S.A. had no legal right to have her application considered in accordance with the correct interpretation of its terms — until the application was accepted, MVHC would have no contract with S.A. in relation to the rental subsidy — and therefore S.A.'s claim was non-justiciable. The Supreme Court of Canada divided on this question. The majority held that MVHC had a contractual obligation to consider S.A.'s application in accordance with its terms, and therefore the correct interpretation of those terms was a justiciable issue. The dissent held that there was no such contractual obligation, and that "[t]o grant relief in such circumstances, including declaratory relief, would expand the boundaries of what is justiciable" without any legal basis.[73] For present purposes, it doesn't matter who was right. The point is that, for both the majority and the dissent, the justiciability of S.A.'s claim was downstream of the existence or lack of a private right. This is as far as the Private Law Justiciability Rule takes us.[74]

Finally, there is no need for a special rule prohibiting courts from deciding claims which fail to assert the breach of a private right. I am not proposing an additional substantive test or hurdle that a claim has to meet in order to be decided. Rather, having concluded that there is no cause of action, there is nothing further for a court to do.

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[70] *Dawson v Rexcraft Storage and Warehouse Inc* (1998), 111 OAC 201 (CA) at para 10; *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 at para 82.
[71] *Shergill*, at para 43.
[72] 2019 SCC 4.
[73] *Metro Vancouver Housing Corp* at para 93.
[74] The fact that this is also true of Liau's Private Law Standing Rule is suggestive. Both rules tie adjudicability to the existence of a legal right. This suggests that private law may have a more general idea of which claims should be decided from which both the Standing Rule and the Justiciability Rule follow. However, I leave this as a conjecture; pursuing it would take us far afield.

4.3 Justiciability and jurisdiction

In this section I'll consider an objection involving justiciability and jurisdiction. Should the rule above be framed as a rule about justiciability or about jurisdiction?

The distinction between justiciability and jurisdiction is explained by Kathryn Chan as follows: "non-justiciability connotes voluntary abstinence, while jurisdiction connotes a lack of authority to decide."[75] More fully,

> To say that a court has no jurisdiction over a matter is to imply that *the court cannot adjudicate that matter*. … The determination of whether a matter is justiciable or non-justiciable is within the discretion of the Court. To say that a matter is non-justiciable, therefore, is not to imply that *a court cannot adjudicate that matter*, but rather to imply that *a court has decided to abstain from adjudicating the matter* based on its unsuitability for judicial determination.[76]

In short, jurisdiction is about whether a court has the authority to decide a certain question, whereas justiciability is about whether it is appropriate for the court to do so. Jurisdiction appears to be something a court either has or doesn't have, whereas justiciability appears to involve a court's discretion.

The rule I've proposed, however, is a strict one: if a legal right is asserted, then the court must decide the dispute, and if not, not. This rule doesn't leave any room for discretion. If a claim does not assert a legal right, it would not only be inappropriate for a court to order a remedy: the court would lack authority to do so. As a result, one might reasonably worry that what I have proposed is a rule about jurisdiction, not about justiciability. The worry is worsened when one notes that some of the cases I've discussed seem to reason in terms of justiciability rather than jurisdiction. For example, as Patrick Hart argues, "the question of jurisdiction in *Lakeside* … was not whether the court was *permitted* to intervene, but rather whether the court *ought* to intervene in the circumstances."[77] If this is so, can the rule I've proposed explain the reasoning in those cases?

There are three points I would make in response. First, while the Private Law Justiciability Rule is strict, there are arguable exceptions to it which I will discuss below, and these exceptions appear to be flexible. As a result, while the rule itself leaves little room for discretion, the framework for thinking about justiciability in private law that emerges from this paper as a whole does include discretion.

Second, however, it is not clear to me that the distinction between justiciability and jurisdiction is really about flexibility versus strictness. From the point of view of a court, some justiciability questions are relatively easy — for example, where the plaintiff's claim entirely lacks legal content. In these situations, justiciability will seem strict, because there

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[75] Chan, "Jurisdiction, Justiciability and Religious Law" at 220

[76] Chan, "Jurisdiction, Justiciability and Religious Law" at 221-222. See also Patrick Hart, "Justice for W(all): Judicial Review and Religion" (2017) 43:1 Queen's LJ 1 at 9-11.

[77] Hart, "Justice for W(all)" at 10; see also Chan, "Jurisdiction, Justiciability and Religious Law" at 221. Hart proposes at 27 that the principle from *Dunnet* is not "the sole measure in determining justiciability" but rather "one factor relevant to … whether a court should intervene".

is no legal basis for the court to intervene. Other justiciability questions are relatively hard — for example, where the issue is whether the court would be stepping into the sphere of the legislature. Given that these situations are hard to evaluate, different courts might draw the line in different places without legal error. We describe these situations as involving 'discretion', but this discretion merely reflects the fact that courts can authoritatively draw the line in different places. Having concluded that deciding a given issue would bring it into the legislature's sphere, the court's view has to be that it is not allowed to decide that issue.[78] There is no deep distinction between such a case and a case where coming to this conclusion was easy. As a result, the fact that the Private Law Justiciability Rule is strict does not cast doubt on it as a rule of justiciability.

Third, even though jurisdiction is about a court's authority and justiciability is about how that authority is appropriately exercised, conclusions about one can have implications for the other. Clearly, if a court concludes that it lacks the authority to decide a certain matter, it follows that it would be inappropriate for the court to (purport to) decide it. But the converse may also be the case. If a court concludes that it would be inappropriate for it to decide a certain matter, then — depending on the reason why it is inappropriate — it may follow that the court lacks the authority to do so. This is unlikely where the reason for the inappropriateness is relatively superficial — for example, that the claim has become moot. But it is quite likely where the reason for the inappropriateness is the content of the claim itself. This is what we see in the present context. When a court determines that a claim does not assert a cause of action, this means both that the claim is non-justiciable and that the court lacks jurisdiction to decide it.

4.4 Justifying the Justiciability Rule

I'll end this part of the paper by commenting briefly on the justification of the rule. I'm not aiming to provide a full discussion here — only to say enough to give a sense of the terrain. First, I'll argue that the Private Law Justiciability Rule stems from two principles which are deeply rooted in the private law of common law jurisdictions. Second, I'll address what I take to be the strongest challenge to the rule.

First, as a general matter, private law is formal: it abstracts from the particular purposes that people are pursuing, and instead focuses on the means they use in the pursuit.[79] Suppose I want to dig a hole in the ground. By and large, whether I have the right to do this is independent of why I want to dig the hole. If I think there is treasure there, or want to plant a tree, or am doing geological research, it makes no difference. What makes a difference is whether I own that patch of ground, or whether the owner has agreed for me to dig, and

[78] As stated in *Shergill* at para 42, "once the forbidden area is identified, the court may not adjudicate on the matters within it".

[79] This claim is characteristic of Kantian private law theories: see Ernest Weinrib, *The Idea of Private Law* (2012) Oxford University Press at 82; Arthur Ripstein, *Force and Freedom* (2009) Harvard University Press at 16; Immanuel Kant, MJ Gregor (trans.), *The Metaphysics of Morals* in MJ Gregor (ed.), *Practical Philosophy* (1996) Cambridge University Press at 389/*Ak.* 6:233. For a dramatic example, see *Bradford Corporation v Pickles*, [1895] AC 587 at 592.

whether my digging poses a risk to or disturbs my neighbours: again, facts that do not depend on my purposes or theirs, but only on our means.

This formality explains why we don't need a specific rule to deal with disputes that involve religion. Religion, as it relates to human action, is about ends, rather than means. An action, such as eating bread, lighting a fire or singing a song, becomes religious or non-religious because of the purposes for which it is carried out. And having a religious purpose, like having any other purpose, is irrelevant to private law. If I want to dig a hole for religious reasons, those reasons have no bearing on whether I have the right to do so: what matters are only the means I am using. In this way, the formality of private law explains why there is no special rule for religious disputes: because private law is about the rights of the parties to use particular means, the presence or lack of a religious purpose plays no analytical role. This means that private law respects religious neutrality by default.

Second, common law jurisdictions are committed to equality before the law, which means "the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts," excluding "any exemption of officials or others from the duty of obedience to the law which governs other citizens."[80] While this principle is often invoked against the immunity of governments or government officials from civil liability, it also applies against the immunity of any particular class of private persons from civil liability, or more generally against specific rules of private law for specific classes of persons. Using justiciability to shield religious organizations from the ordinary operation of private law would undermine equality before the law.

This point is well illustrated in *Brassard v Langevin*,[81] in which the election of Hector-Louis Langevin as MP was challenged on the basis of undue influence by the clergy. Local Catholic priests, acting on Langevin's behalf, had preached that it was a mortal sin to vote for Langevin's opponent and had threatened those who did so with "spiritual penalties". Langevin argued that the priests could not be judged by the courts but only by an ecclesiastical tribunal. In response, Taschereau J wrote:

> I ask myself where is that tribunal to be found in Canada. For me it is invisible, intangible, non-existent in this country… In place of this ideal system … we have a special law, the Electoral Law, and for the Province of Quebec we have, moreover, our civil code and code of procedure, protecting the exercise of the rights of all, Catholics, Protestants or others. All are equal before that law, which declares that whosoever does injury to another must repair it, and indicates the means to be used to compel him to do so.[82]

Similarly, Ritchie J wrote:

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[80] *Attorney General of Canada v Lavell*, [1974] SCR 1349 at 1366, quoting AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: Macmillan, 1915); *R v Burnshine*, [1975] 1 SCR 693 at 705. See also Samuel Beswick, "Equality Under Ordinary Law" (2024) 3:4 SCLR 65.

[81] (1877), 1 SCR 145. For discussion, see Leonid Sirota, "Undue Spiritual Influence", posted at https://doubleaspect.blog/2013/10/06/undue-spiritual-influence/

[82] *Brassard* at 197 (commas added for readability).

> [E]very member of that Church, like every member of every other Church, is subordinate to the law. … Clergymen, and I draw no distinction—my observations I wish distinctly to be understood as applying to all churches and denominations alike—Clergymen, I say, are citizens, and have all the freedom and liberty that can possibly belong to laymen, but no other or greater.[83]

The Private Law Justiciability Rule reflects this equality.

To my mind, the strongest challenge to the Private Law Justiciability Rule is that courts should avoid taking positions on matters they lack the capacity to address.[84] This might include religious questions, but also questions of etiquette and social norms (eg what is appropriate wedding attire, or who should be invited to a party); contested questions of value and morals (eg what is the meaning of life, or whether it is ethical to eat meat); aesthetic matters and differences of taste (eg the right interpretation of a poem, the best flavour of ice-cream, whether a joke is funny, or who is the greatest hockey player of all time); and even contested mathematical and philosophical claims (whether the continuum hypothesis is true, or the correspondence theory of truth). If A contracts with B to "correctly state the meaning of life", or to "buy the tastiest flavour of ice-cream", or to "determine whether the continuum hypothesis is true", can a court assess whether the contract was performed? The Private Law Justiciability Rule says: if there is a legal right here, then a court can enforce it, and if not, not. But we might want a stronger guarantee that courts can avoid such questions.

From this perspective, the error in Kennedy & Kinsinger's proposal is that it is limited to religious questions, which are really just a subset of a broader category. It might be that hard questions like these are more likely to arise in religious contexts. But they are by no means limited to these contexts; the problem is not a distinctively religious one.

It's useful to be clear on what these various questions have in common. It is not that there is no right answer. Some of these questions lack a right answer, but others may well have one, and in any event, the legal system should not assume that they do not. Rather, what these questions have in common is that whether an answer is right is hard for a court to settle with certainty. All of them are subject to significant, and often deep, disagreement among experts, such that it might seem absurd for a court to weigh in. They also seem to fit awkwardly with the evidentiary methods used by courts.

One can imagine a legal system with a rule that allows courts to reject as non-justiciable any claim that would require them to answer questions like these. Still, I want to suggest that our legal system is better off without such a rule. First, as I noted earlier with respect to religious issues, many of these questions will be screened out by existing legal doctrines. A contract's terms must be sufficiently certain; if the terms are too uncertain then there is no contract.[85] In *Raffles v Wichelhaus*,[86] an agreement referred to a ship called the Peerless, but in fact there were two ships with that name, and nothing in the context to

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[83] *Brassard* at 220-222.

[84] Some of the examples that follow are inspired by *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 at paras 80-85 (per Wakeling JA dissenting). Thanks to Amit Singh for suggesting this account.

[85] For general discussion see Mitchell McInnes, Jason Neyers (ed), *Fridman on Contracts* (Thomson Reuters, 2024), s. 2.37.

[86] (1864), 2 H & C 906 (Exch), discussed in *Fridman on Contracts* at s. 2.38.

indicate which one was referred to. The result was that there was no contract. A contract to settle the meaning of life would likely be void for the same reason; others might fail for lack of consideration. It remains possible, of course, for A and B to carefully design their agreement to satisfy all the formalities, with the sole aim of getting the court to weigh in on a controversial question. But this would, in effect, be an attempt to get a judicial declaration of fact with only a contrived right at stake, and could be rejected as such.[87] Second, to the extent that there is a right at stake, that is a very strong reason for requiring courts to answer the questions necessary to decide whether the right has been breached — even when those questions are difficult ones. Avoiding them would risk leaving someone whose rights have been breached without a remedy. I don't claim that these are definitive reasons to reject the challenge, but I do think that the benefits of adopting such a rule are more limited, and the costs greater, than it might seem.

5 Exceptions to the Private Law Justiciability Rule

In this section, I consider potential exceptions to the Private Law Justiciability Rule. I will suggest that there are at least two doctrines which might result in exceptions to the rule, although neither of them is entirely clear. Following this, I argue that the exceptions, such as they are, are all grounded in the separation of powers.

A first potential exception to the Private Law Justiciability Rule arises from the UK case of *Buttes Gas and Oil Co v Hammer (Nos 2 and 3)*.[88] This case concerned a dispute over rights to an oil deposit in the Arabian Gulf. Armand Hammer, the chairman of Occidental Oil, had publicly accused Buttes Gas and Oil of colluding with the ruler of the Emirate of Sharjah to fraudulently extend Sharjah's territorial waters to include an oil deposit previously granted to Occidental by Umm al Quwain, a neighbouring Emirate. Iran also claimed rights over the waters in question, and the UK government had intervened, issuing a 'recommendation' to Umm al Quwain and eventually sending in a navy ship to enforce its view. After Hammer's press conference, Buttes sued Hammer for slander. Occidental responded by raising the defence of justification, and counterclaimed for conspiracy. Buttes then argued that the proceedings involved non-justiciable issues and should be stayed.

The House of Lords held that "there exists in English law a … general principle that the courts will not adjudicate upon the transactions of foreign sovereign states". This general principle was explicitly derived from the nature of the judicial process: "the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, upon an appreciation of the nature and limits of the judicial function." More specifically, adjudicating the defence of justification and the counterclaim for conspiracy would have required a court to determine whether the decree of Sharjah was invalid, not under Sharjah law but under international law; this in turn required determining what effect to give to the claims of Iran

[87] See *1472292 Ontario Inc (Rosen Express) v Northbridge General Insurance Company*, 2019 ONCA 753 at paras 22 and 34 on the inappropriateness of declaratory relief outside of a claim. For discussion, see Rowe & Shnier, "The Limits of the Declaratory Judgment" at 313.
[88] [1982] AC 888 (HL).

and Umm al Quwain and the actions of the UK government. The court would be "asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law". The proceedings were stayed. As the UK Supreme Court commented in *Shergill*, deciding the issue in *Buttes* would have "trespassed on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations", and would have "involved assessing decisions and acts of sovereign states which had not been governed by law but by power politics."[89]

Buttes Gas is an exception to the Private Law Justiciability Rule. Under that rule, if A is asserting that they have a legal right that was breached by B, then a court ought to decide that claim. Here, Buttes and Occidental were both raising tort claims against each other, clearly asserting that their legal rights had been breached. The court declined to decide these claims, not on their merits, but rather because this would have led the state to comment on issues that should be left to the executive.

Whether the rule in *Buttes Gas* would apply in Canada is unclear. That depends on what exactly the rule is, a matter which is unclear both in subsequent cases and in academic commentary. In *Nevsun v Araya*,[90] the Supreme Court of Canada addressed a claim by Eritrean workers that they were abused and subjected to forced labour by a Canadian mining company operating in Eritrea together with the Eritrean state. The claim was challenged on the basis of the "act of state doctrine", which was said to preclude a domestic court from adjudicating the lawfulness of the sovereign acts of a foreign state. The majority (per Abella J) held that this doctrine, which it associated with *Buttes Gas*, was not part of Canadian law, but was subsumed in existing conflict of law doctrine. That doctrine suggests that Canadian courts will typically give effect to foreign laws, except where they are contrary to public policy, and that Canadian courts may make determinations about the validity of foreign laws where this is necessary to resolve a dispute.

While Abella J's reasons imply that *Buttes Gas* is not part of Canadian law, it is unclear how the problem addressed in *Buttes Gas* is dealt with by conflict of law doctrine. As pointed out by Côté J in dissent, the issue in *Buttes Gas* was not about choices between competing municipal legal systems, but about the validity of a state's actions under international law. One answer may be that the validity of a state's actions under international law is for international tribunals to decide, not municipal courts.[91] Still, Canadian courts have made determinations about international law when necessary in public law cases.[92] So even if the issue in *Buttes Gas* involved international law, this might not render it non-justiciable in a municipal court. Another answer is that such issues should not be decided by courts, at least where the executive wishes to address them, because on such issues the state should

[89] *Shergill* at para 40.
[90] 2020 SCC 5
[91] See Campbell McLachlan, *Foreign Relations Law* (2014) Cambridge University Press para 12.22, suggesting that this claim provides the best explanation for the result in *Buttes*. See also FA Mann, *Foreign Affairs in English Courts* (1986) Oxford University Press, chapter 9.
[92] See *Nevsun* at paras 144, 296, 300. Justice Côté seemed to suggest that the courts have a special mandate to consider international law in public law cases which they lack in private law. But no such mandate is necessary if answering an international law question is necessary for resolving private rights.

speak with "one voice".[93] I won't attempt to settle these issues here; all I will say is that both the basis for the result in *Buttes Gas* and its status in Canadian law are unclear.

A second potential exception arises in tort law. A prima facie duty of care in negligence can be negated on the basis that public authorities are not liable for policy decisions.[94] For example, in *Imperial Tobacco*, the court held that Canada's decision to design low-tar tobacco strains was a policy decision for which Canada could not be held liable in tort, even though Canada may well have been in sufficient proximity to the tobacco companies to ground a duty of care. This exception may reflect a broader principle: in misfeasance in public office, for example, there is a similar exception for decisions based on budgetary constraints or political beliefs.[95]

The policy immunity is ordinarily understood as part of the duty of care analysis. Framed in this way, cases that fall within the policy immunity are not exceptions to the Private Law Justiciability Rule. Rather, they are simply cases where there is no duty of care, and therefore no legal right for the court to enforce. However, when understood in this way, the policy immunity has been subject to significant criticism by those who see it as inconsistent with basic principles of tort law.[96] From this perspective, the immunity should simply be dropped from tort law, and replaced with a more careful application of ordinary tort principles.

Without purporting to settle the issue, I want to suggest a different way of understanding the immunity, one which is suggested by certain Quebec cases. In *Laurentide Motels Ltd v Beaufort (City)*,[97] the Supreme Court of Canada had to decide whether the policy immunity applies in Quebec. In Quebec, private law is civil, and public law is common, so the court had to decide whether the policy immunity is a rule of public or private law.[98] It held that the policy immunity is a rule of public law: "A rule which has application only to public bodies, which exists and is justified by the public nature of those bodies, is surely a rule of public law." Specifically, it is a rule "designed to determine when the private law will apply to public authorities". As a result, the policy immunity also applies in Quebec law.[99]

Along similar lines, the policy immunity has often been associated with the separation of powers. In *Marchi*, the Supreme Court of Canada held that

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[93] See for discussion Lawrence Collins, "Foreign Relations and the Judiciary" (2002) 51 ICLQ 485 at 507-508 and Marcus Teo, "Denouncing the 'One Voice' Doctrine" (2024) Oxford Journal of Legal Studies 1 at 18.
[94] *Kamloops v Nielsen*, [1984] 2 SCR 2; *Cooper v Hobart*, 2001 SCC 79.
[95] *Odhavji*, supra note 51 at para 26; *L(A) v Ontario (Minister of Community and Social Services)* (2006), 83 OR (3d) 512 (CA) at para 37; *First National Properties Ltd v McMinn*, 2001 BCCA 305 at para 45.
[96] See Ernest Weinrib, "The Disintegration of Duty", Adv Q 31: 212. For discussion, see Joost Blom, "Do We Really Need the *Anns* Test for Duty of Care in Negligence?" (2016) 53:4 Alberta Law Review 895. Another point of uncertainty which arises on the ordinary understanding is precisely where in the duty of care analysis the policy immunity is considered: see *Nelson (City) v Marchi*, 2021 SCC 41 at paras 33-36.
[97] [1989] 1 SCR 705
[98] *St-Hilaire v Canada (Attorney General)*, 2001 FCA 63 at paras 40-42
[99] This continues to hold under the Civil Code of Quebec, as held in *Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, 2004 SCC 61 at para 27. See also *Kosoian v Société de transport de Montréal*, 2019 SCC 59 at para 107: "The purpose of this immunity is to preserve the latitude that a legal person established in the public interest must have in order to make policy decisions in the interests of the community".

> The primary rationale for shielding core policy decisions from liability in negligence is to maintain the separation of powers. Subjecting those decisions to private law duties of care would entangle the courts in evaluating decisions best left to the legislature or the executive.[100]

This suggests that the policy immunity is not a rule internal to tort law, but rather a public law rule which may override tort law in its application to public authorities.

On this (admittedly unorthodox) way of understanding the policy immunity, it constitutes an exception to the Private Law Justiciability Rule. It provides for situations in which all of the requirements internal to private law are met, such that the plaintiff is asserting that a legal right of theirs was breached by the government authority, but public law considerations intervene to prevent a court from adjudicating the claim.[101] On this approach, the applicability of the policy immunity should be determined before getting to the duty of care analysis, rather than as part of that analysis.[102] Of course, it may be that some situations which were thought to fall under the policy immunity are actually situations in which a careful application of ordinary tort principles would show that there was no duty of care. But it would be surprising if this were always the case.

Neither the rule in *Buttes Gas* nor the interpretation I have proposed of the policy immunity in tort law are settled in Canadian law. But both exceptions, for what they are worth, result from the separation of powers. In *Buttes Gas*, deciding the issues would have involved the court in taking a position on the validity of another state's actions under international law. This would have brought the court into a sphere that the court took to be legally reserved to the executive. In the policy immunity cases, deciding the issues in question would have involved the court in assigning liability for a policy decision — a decision legally reserved to the legislature, or in some cases the executive. So both exceptions to the justiciability rule are driven by the separation of powers. In this sense, it is likely true in private law just as in public law that "[i]n exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government".[103] If this is right, then when evaluating additional exceptions to the rule, it would make sense to start by asking whether they can be grounded in the separation of powers.[104]

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[100] *Marchi*, at 42. See also *Kamloops*, supra note 10 at 25 ("prevents the courts from usurping the proper authority of elected representatives and their officials") and *Rowling v Takaro Propervfties Ltd*, [1988] AC 473 (PC) at 501.

[101] More specifically, the court is prevented from adjudicating the claim in private law. The plaintiff might still be entitled to challenge the policy decision in administrative law, e.g. for bad faith, as acknowledged in *Just v British Columbia*, [1989] 2 SCR 1228 at 1239.

[102] This is not ruled out by the court's rejection of Stratas JA's proposal from *Paradis Honey Ltd v Canada (Attorney General)*, 2015 FCA 89, in *Marchi*, at para 41. Justice Stratas was proposing that private law does not apply at all to the state; I am proposing that the policy immunity determines when private law applies.

[103] *Reference re Canada Assistance Plan (Canada)*, [1991] 2 SCR 525. For general discussion of the separation of powers, see Malcolm Rowe, Chris Puskas and Allyse Cruise, "The Separation of Powers in Canada" (2024) 1 SCLR (3d) 323.

[104] Cases in which a private law claim is blocked by Parliamentary privilege — for example, where a defamation claim is rejected because it would intrude on freedom of speech in Parliament — might be an additional example: see *Shergill* at para 42 and Lord Mance, "Justiciability" at 751. The dismissal of claims which have

6 Conclusion

Kennedy and Kinsinger begin their article by observing that 'civil law' is sometimes contrasted not with common law but with canon law.[105] This, they suggest, reflects the distinction between secular and religious disputes, a boundary which common law courts should respect by declining to weigh in on religious matters. In this article, I've suggested that the religious and the secular are not so easily separated. Religious institutions often use legal means to pursue their purposes. Indeed, a priest's rights under canon law might be incorporated as terms of a contract.[106] In this context, the most neutral way for a secular court to proceed is not to make an exception for religion, but rather to decide all, and only, those claims which assert the breach of a legal right.

passed their limitation period is structurally similar to these exceptions, but it depends on the timing of the claim rather than its content. As a result, I wouldn't class it among the exceptions to the rule. For discussion of expired claims, see Samuel Beswick, "Retroactive Adjudication" at 340.

[105] Kennedy and Kinsinger, "Towards a Predictable Framework" at 297.

[106] See *Pederson* and *Hart*, discussed in n 30 above.