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## **COURT OF APPEAL CLARIFIES APPROACH OF COURT IN RELIGIOUS PROPERTY DISPUTES**

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*By Ryan M. Prendergast\**

### **A. INTRODUCTION**

On October 17, 2014, the Court of Appeal for Ontario released its reasons in *Pankerichan v. Djokic* (2014 ONCA 709). The decision concerned, in part, an application arising from a dispute over which individuals had authority to manage the property of a religious organization pursuant to the *Religious Organizations Lands Act* (Ontario). In upholding the decision of the Superior Court of Ontario made on April 23, 2012, the Court of Appeal provided instructive comments concerning the interpretation of ROLA, together with an overview of the approach taken by Canadian courts when determining disputes between parties concerning religious property. The Court of Appeal also provided comments concerning the US “neutral principles of law” (NPL) doctrine and its application in the Canadian context.

This *Church Law Bulletin* provides a brief summary of the background to the decision of the Court of Appeal, together with an overview of the comments made by the Court in relation to ROLA and the NPL doctrine which will be applicable to unincorporated churches in Ontario.

### **B. SUMMARY OF DECISIONS**

#### **1. Background to Dispute**

Canadian courts, particularly in Ontario and British Columbia, have in recent years been called upon to settle disputes concerning religious property. Often these disputes are a result of a belief within a

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congregation that their denomination or faith group is moving away from what they view as their core beliefs. The Court of Appeal noted, though, that neither party in *Pankerichan* were a dissident group seeking to take any congregational property with them.

In *Pankerichan*, the applicants were members of the Serbian Orthodox Church-School Congregation of St. Nicholas in Unity (the “Congregation”) of the Serbian Orthodox Church, whereas the respondents were the bishop of the Serbian Orthodox Diocese of Canada (the “Diocese”) and other diocesan representatives. Since the Congregation was not incorporated, its real property was held pursuant to ROLA, but also through its own governing documents and a complicated array of internal church documents from the Diocese.

The dispute between the Congregation and Diocese arose in part because of a decision by the bishop to retire the priest of the Congregation. At a liturgical celebration, members of the Congregation protested the decision of the bishop to install a new priest in the church. As a result, the Diocese removed the elected executive board of the Congregation and imposed a temporary trusteeship pursuant to its governing statute.

The applicants sought declaratory relief that the elected executive board representatives of the Congregation held the real property of the Congregation in trust, and that the actions by the bishop of the Diocese imposing a temporary trusteeship was an invasion of that trust. The applicants also sought an accounting of the temporary trustees with respect to repair and ancillary costs to the Congregation property.

## 2. Decision of the Superior Court of Justice

In reviewing the approach courts will take in determining disputes within religious organizations, the Superior Court noted that “Courts are reluctant to exercise jurisdiction over disputes within religious organizations that involve issues of church governance”. However, the Superior Court confirmed that it would intervene where property, contract, or other civil rights are engaged.

In determining whether a property or civil right had been engaged by the decision of the Diocese to impose a temporary trusteeship, the court examined subsection 3(2) of ROLA which states that:

“Unless the constitution or a resolution of the religious organization otherwise provides, a trustee holds office until he or she dies, resigns or ceases to be a member of the organization.” The Superior Court therefore examined the other internal governing documents of both the Diocese and the Congregation to determine if “the constitution or resolution of the religious organization otherwise provides” a basis for the Diocese to remove the elected executive board of the Congregation. Essentially, the court examined whether the removal of the executive board, who were in effect the trustees of the Congregation’s property for the purposes of ROLA, and their replacement with a temporary trusteeship, was a violation of ROLA by virtue of by-passing the democratic appointment of trustees by the members of the Congregation.

In reviewing the history of the by-laws adopted by the Congregation as an unincorporated association, and the governing statute of the Diocese, the court concluded that the actions of the Diocese were within its administrative authority, and therefore there was no conflict with ROLA since “the constitution or resolution of the religious organization” provided for the replacement of trustees apart from their appointment by the members of the Congregation. The court stated that, “The trustees have continued to exist but the entity directing them has been changed by the Bishop and diocesan authorities. As a result, I find no breach of provincial law and therefore no engagement of property, contract, or other civil rights.” The Superior Court therefore did not provide the relief sought by the Congregation members.

### 3. Decision of the Court of Appeal

After a review of the facts and a summary of the Superior Court decision, the Court of Appeal indicated that the facts raised the issue of whether the real property of the Congregation was held in trust by the elected executive board of the Congregation, or by the temporary trusteeship. On appeal, the appellants contended that the lower court erred in taking into consideration the by-laws of the Congregation and internal governing documents of the Diocese in reaching its decision. They reiterated that the authority of the Diocese to remove the elected executive board through its statute should be subservient to ROLA.

In confirming the decision of the lower court, the Court of Appeal briefly examined the history of ROLA and its purpose. The Court of Appeal stated that the argument of the Congregation members

was based on a “misapprehension of the nature and purpose of the ROLA.” The Court of Appeal was unable to find any intention in ROLA, “to force governance changes on religious organizations, for example, by making congregational democratic practices mandatory for hierarchical organizations.” As well, in challenging the argument of the appellants that the lower court erred in examining the governing documents of the Diocese, the Court of Appeal noted that a consistent method has emerged with respect to how Canadian courts have dealt with disputes concerning religious property. The Court of Appeal summarized various recent judicial decisions in which Canadian courts considered the historical and statutory context of the congregations in question. Of note, the court pointed out at paragraph 62 that:

The analytical method applied by both appeal courts of construing the terms of the trust by considering the deeds, the applicable legislation, the canons or church law promulgated by each diocese and, to some extent, the doctrinal context, was not novel.

The court then referred to further decisions to illustrate at paragraph 64 that, “while courts are cognizant of the unique implications of property disputes within religious organizations, they have nonetheless been willing to imply trust terms and to construe institutional documents that involve some aspect of religious doctrine.” As a result, the court confirmed the decision of the lower court based upon its review of the applicable bylaws and governing documents at issue.

#### 4. Comments by the Court of Appeal concerning NPL Doctrine

In asserting that the lower court erred in examining the institutional documents of the Diocese and Congregation, the appellants relied upon the NPL doctrine often applied in US court decisions. They argued that it had been adopted by Canadian courts in *Balkou v. Gouleff*, and in *Montreal and Canadian Diocese of the Russian Orthodox Church Outside of Russia Inc. v. Protection of the Holy Virgin Russian Orthodox Church (Outside of Russia) in Ottawa, Inc.* In summary, the NPL doctrine, as set out in the U.S. Supreme Court decision *Jones v. Wolf*, 443 U.S. 595 (1979), required that courts reviewing documents in relation to religious property disputes must do so in a completely secular manner and rely only on established concepts in trust or property law.

The Court of Appeal stated that, in fact, the court’s usual approach with respect to examining institutional documents in Canada does not generally involve the determination of doctrinal issues. As

well, the court examined the history of the NPL doctrine and its discussion in Canadian court decisions and concluded that not only has it never been adopted in Canada, the difference between the US constitution and Canadian constitution renders it unhelpful as “Canadian courts have not hesitated to interpret religious documents that involved doctrinal matters when adjudicating church property cases”.

## C. CONCLUSION

Although the reasons of the Court of Appeal in *Pankerichan* do not represent new law, the reasons provide a helpful summary of recent decisions in Canada in which aggrieved members of religious organizations have sought the assistance of the courts in determining property disputes. The decision confirms that where a dispute concerning property can be resolved by reference to the governing documents of the religious body, its history, and context, the courts will find ways to resolve the dispute without reference to doctrine or other religious matters. However, prior to *Pankerichan*, it was not clear how the NPL doctrine was to be applied in Canadian decision. Although it appeared that some courts in Ontario had adopted, or at least referred to the NPL doctrine in reaching their decision, the Court of Appeal appears to have settled that the NPL doctrine is not applicable in Ontario at least.