

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N

**ETHIOPIAN ORTHODOX TEWAHEDO CHURCH OF CANADA ST. MARY CATHEDRAL, MESSALE ENGEDA,
ABUNE DIMETROS and HIWOT BEKELE**

Appellants

and

TESHOME AGA, YOSEPH BEYENE, DEREJE GOSHU, TSEDUKE GEZAW and BELAY HEBEST

Respondents

**FACTUM OF THE RESPONDENTS TESHOME AGA, YOSEPH BEYENE, DEREJE GOSHU, TSEDUKE GEZAW
and BELAY HEBEST, RESPONDENTS**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Statement of Facts and Judgements

1. The five Respondents became registered members of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (the “Church”) in the early 1990s.¹ The Church is governed by the Church’s Constitution and the Bylaw of the Ethiopian Orthodox Tewahedo Church in the Diaspora Promulgated to Administer the Ethiopian Orthodox Church in the Diaspora (the “By-Laws”).²
2. The named Appellant Messale Engeda is Head Priest of the Church. Hiwot Bekele is a priest of the Church. Abune Dimetros is Archbishop of the Diocese of Ontario and eastern Canada, which is part of the global Ethiopian Orthodox Tewahedo Church.
3. In 2016, a number of Church members, including the Respondents and the individual Appellants, were appointed to an ad hoc committee (the “Committee”) by members of the congregation to investigate a movement within the Church.³ The Respondents did not urge the formation of the Committee themselves, but were simply nominated to sit on the Committee.⁴ The Appellant Archbishop Dimetros was the chair and operating mind of the Committee.⁵
4. The Committee established Guidelines that were signed by the Committee’s members (the “Guidelines”). The Guidelines state clearly that the Committee is to be “guided by the rules and regulations of the Ethiopian Orthodox Tewahedo Church synod in the

¹ Affidavit of Yoseph Beyene, Volume II, Tab 5, paragraph 3, p 102 of Appellant’s Record (“AR”).

² Constitution and By-Laws [AR Vol. I Tab 3D, and AR Vol. II Tab 4B].

³ Affidavit of Yoseph Beyene at paras. 18-19, [AR Vol. II Tab 5 p 105].

⁴ *Ibid.* [AR Vol. II Tab 5 p 105].

⁵ *Ibid.* at paragraph 20.

Diaspora” (Guideline #1)⁶, and “the Committee will monitor that the decision made is being implemented” (Guideline #4).⁷

5. In accordance with its mandate and the Guidelines, the Committee submitted a report to Archbishop Dimetros (the “Findings”) which outlined members and clergy responsible for the movement (the “Findings”). Both Dimitros and Engeda also signed their name beside the Findings.⁸
6. The Findings were not implemented by the Church leadership in accordance with the Guidelines. In fact, after months of fact finding, the Findings were contradicted in an announcement by the Archbishop Dimetros before the Church congregation.⁹ The Appellants respectfully questioned the reason for this contradiction. The Respondents attempted to call meetings with the Appellants to address their concerns, but the Appellants refused to attend the meetings or provide an explanation for the contradiction. The Respondents continued to monitor whether the decision made was being implemented in accordance with the Guidelines.¹⁰
7. The Respondents were expelled from the Church. They commenced an action via Statement of Claim outlining that they were given no particulars of the allegations against them leading to their expulsion, no opportunity to respond to the allegations, and no opportunity to make representations in respect of their expulsion. They claimed that this was in breach of the Constitution and By-Laws governing the congregation.¹¹
8. The Appellant Messale Engeda alleged in his sworn Affidavit that a derogatory letter was written by the Appellants.¹² None of the Respondents authored the letter.¹³ The letter formed a major ground of the decision to expel the Respondents from their

⁶ Reasons of Court of Appeal for Ontario para 23 [AR, Vol. I, Tab 2 C p 18].

⁷ Guidelines of the Interim Investigative Committee, at Guideline 4, [AR Vol. I Tab 5B p 121].

⁸ Findings of Interim Committee [AR Vol. I Tab 5C p 130].

⁹ Affidavit of Yoseph Beyene at para. 27, [AR Vol. II Tab 5 p 107].

¹⁰ Guidelines of the Interim Investigative Committee, at Guideline 4, [AR Vol. I Tab 5B p 121].

¹¹ Statement of Claim, [AR Vol I. Tab 2A p 32].

¹² Affidavit of Messale Engeda at para 20 [AR Vol I. Tab 2A para 20 pp 70-71].

¹³ Affidavit of Yoseph Beyene [AR Vol. 2 Tab 5 para 45, p 101].

membership in the Church. The Appellant Engeda was cross-examined as to the evidence he could produce in support of the statement in his Affidavit that the Respondents authored the letter. He was unable to produce any evidence, and actually contradicted his Affidavit by stating “really who wrote, I don’t know”.¹⁴ Thus, the Respondents’ expulsions were based on the false attribution of documents that they did not even author.

9. The Respondents alleged that they were not given particulars of the allegations against them which lead to their expulsions, were given no opportunity whatsoever to make full answer and defence to any allegations against them, were not advised they could obtain legal counsel, or make representations or have a record of the proceeding available, were given no reasons for the termination of their over twenty-year old membership aside from the indication that there was an ambiguous “disturbance”.¹⁵ They claim all of this was in violation of the provisions in the Constitution and By-Laws in their action.¹⁶ The Appellants had cited By-Laws in their decision to expel the Respondents.¹⁷

Superior Court

10. The Appellants brought a motion for summary judgment claiming there was no genuine issue requiring a trial and there are no rights to be enforced, on the basis that there was no underlying contract or other civil right. The summary judgement motion was argued on the grounds that the case “fell squarely within *Wall*”.
11. Justice Nishikawa held that there was no genuine issue requiring a trial and granted the Appellants’ motion for summary judgment dismissing the action, with costs. She determined that the case fell squarely within this Court’s decision in *Wall*, reasoning that neither judicial review nor contractual remedies are available for decisions of voluntary religious associations, absent an underlying property or other legal right. She

¹⁴ Transcript of Cross-Examination of Messale Engeda, [AR Vol. II Tab 6, p 225].

¹⁵ Statement of Claim at para 37 [AR Vol. I Tab 2A p 43].

¹⁶ *Ibid.* at para 37ix.

¹⁷ Affidavit of Yoseph Beyene, Exhibit “A” letter of expulsion [AR Vol. II Tab 4A p 118].

held that the Respondents “failed to allege or provide evidence of an underlying legal right” that could justify the court’s review of the Church’s decision making.¹⁸

Court of Appeal Unanimously Overturns Based on By-Laws and Constitution of the Church

12. The Court of Appeal confirmed *Wall*, and held that the jurisdiction to review a voluntary association’s adherence to its own procedures “depends on the presence of an underlying legal right to be adjudicated”.¹⁹ The Court of Appeal concluded that the motion judge erred in finding that there was no evidence of a contract.²⁰

13. The Court of Appeal found that the Respondents completed written membership applications, were admitted as members, offered “consideration” in the form of monthly contributions, the Applicants themselves had relied on By-Laws to expel the members, etc.²¹ The Court also noted: “as evidence that the Plaintiffs would likely have been aware of the Constitution and By-Laws”, that they were advised that the Committee would be “guided by the rules and regulations of the Eastern Orthodox Tewahedo Church synod in the Diaspora”.²²

14. The Court of Appeal reviewed the By-Laws and Constitution of the Church thoroughly and considered carefully how these documents set out the procedure for disciplining members and respecting congregants’ rights.²³

15. The Court pointed to the following as evidence that the Church and its leadership recognized that they had contractual obligations:

- a. inclusion of provisions in the Constitution and Bylaw for discipline of members;
- b. reliance on the Bylaw to suspend memberships; and

¹⁸ Reasons of Ontario Superior Court of Justice [*AR Vol. 1 Tab 1A pp. 1-6*].

¹⁹ Reasons of Court of Appeal for Ontario at para 39 [*AR Vol. 1 Tab 1C p. 18*].

²⁰ *Ibid.* at para 55 [*AR Vol. 1 Tab 1C p 23*].

²¹ *Ibid.* at paras 46-47 and 53(b) [*AR Vol. 1 Tab 1C p 21*].

²² *Ibid.* at para 48 [*AR Vol. 1 Tab 1C p 21*].

²³ *Ibid.* at paras 50-51 [*AR Vol. 1 Tab 1C p 22*].

c. claiming that “requisite steps” were taken to expel these members.²⁴

16. Having carefully and thoroughly reviewed the matter, the Court of Appeal concluded that the parties were subject to contractual rights, but that it was not clear if or how those contractual rights were breached since the Appellants did not file the necessary documentation so that the Court of Appeal could draw inferences of fact.²⁵ The Court of Appeal therefore granted the appeal and set aside the summary judgement.

PART II: QUESTIONS IN ISSUE

17. Issue One: Can an association’s written constitution and/or by-laws be enforced according to their terms in a court?
18. Issue Two: The charitable donations issue raised by the Appellants is a red herring, as the Respondents do not seek to recover tithes or “donations” in this proceeding.
19. Issue Three: Courts have the capacity and have regularly addressed questions of expulsion, and whether the terms of Constitutions and By-Laws have been adhered to.
20. Issue Four: The Freedom of Religion Issue cannot dispose of the entire Claim on a summary judgement motion.
21. Issue Five: The Ontario Court of Appeal applied the proper standard of review and made a determination that the Appellants had not provided the necessary evidence on a summary judgement motion to dismiss the claim.

PART III – STATEMENT OF ARGUMENT

Issue One: Can an association’s written constitution and/or by-laws be enforced according to their terms in a court?

22. In addition to the Court of Appeal’s reasoning in this case, there is significant precedent confirming that a religious association’s constitution and by-laws can be enforced according to their terms by a court.

²⁴ *Ibid.* at para 53 [AR Vol. 1 Tab 1C p. 22-23].

²⁵ *Ibid.* at para 63 [AR Vol. 1 Tab 1C p. 25].

23. This is an action that seeks declarations confirming that the expulsion of the Respondents from the Appellant organization are null and void.²⁶ The basis for this allegation is the alleged failure of the Appellants to adhere to their own Constitution and By-Laws in expelling the Respondents. It is submitted that there is an expectation of procedural fairness that attaches once it is established that a Constitution and By-Laws exist.²⁷ In *McCaw v United Church of Canada*, the Ontario Court of Appeal was able to comprehend the very same declaratory relief sought by the Respondents in this case. In *McCaw*, the Court of Appeal declared that the actions of church bodies causing the name of the Minister to be removed from the Presbytery and Conference roll was null and void and of no legal effect.²⁸
24. In the instant case, there is no dispute that the five Respondents were members of the association and that a Constitution and By-Laws governs the membership of the Respondents in the organization, and the relationships between the Respondents and the organization.
25. The Ontario Court of Appeal reasoned correctly that based on this Court's reasoning in *Senez*, becoming a member of a voluntary association entails agreement to the terms of the Constitution and By-Laws.
26. The Court of Appeal cited the reasoning of Beetz J in *Senez*, finding that:
- “When an individual joins a voluntary association, he accepts its constitution and the by-laws then in force, and he undertakes an obligation to observe them. In accepting the constitution, he also undertakes in advance to comply with the by-laws that shall subsequently be duly adopted by a majority of members entitled to vote.”²⁹
27. Thus, the Court of Appeal confirmed the very same point of law in this case, and the Appellants seek to overturn or revisit the settled point in *Senez*.

²⁶ Statement of Claim at paras 1, 37viii, 37ix [AR Vol. I Tab 2A pp 34 and 44].

²⁷ Reasons of Court of Appeal for Ontario para 41 [AR Vol. I Tab 1C p 63].

²⁸ *McCaw v. United Church of Canada (C.A.)*, 1991 CanLII 7048 (ON CA).

²⁹ *Senez* at p. 566-567.

28. As reasoned by Justice Perell of the Ontario Superior Court of Justice in *Karahalios v Conservative Party of Canada*, a 2020 case following the decision of the Ontario Court of Appeal, even unincorporated associations or groups that have written constitutions and by-laws create contractual relationships that set out the rights and obligations of the unincorporated association and its members.³⁰ The groups and members are thus bound by the terms of the Constitution and By-laws and there is an obligation on the group's members to observe the Constitution and By-laws.³¹
29. Justice Perrell further clarified that members of groups that have Constitutions, By-laws, and rules are entitled to private law remedies to have their agreements enforced in accordance with their proper interpretation. The court therefore has the jurisdiction to enforce the contractual rights between an association and its members and the contractual rights of the members between or among themselves.³²
30. This was similar reasoning to that employed by Justice Shabbits twenty years ago in the Supreme Court of British Columbia, in reasoning that the by-laws of an organization constitute a contract between members, and between the members and itself.³³
31. Courts have therefore grappled with this question and successfully interpreted that an organization's adherence to its own Constitution and By-Laws is capable of review.
32. The Appellants cite *Wall* for the proposition that Mr. Wall sought to have the Highwood Congregation's written rules enforced. This is contradicted by the *Wall* decision itself, which held that:

“The Highwood Congregation of Jehovah's Witnesses (“Congregation”) is an association of about one hundred Jehovah's Witnesses living in Calgary, Alberta. The Congregation is a voluntary association. It is not incorporated and has no articles of association or by-laws. It has no statutory foundation. It does not own property. No member of the Congregation receives any salary or pecuniary

³⁰ *Karahalios v Conservative Party of Canada*, 2020 ONSC 3145 at paragraphs 180-181.

³¹ *Ibid.* at paragraph 181.

³² *Ibid.* at paragraph 181.

³³ *Demiris et al v. Hellenic Community et al.* at Summary paragraph 4.

benefit from membership. Congregational activities and spiritual guidance are provided on a volunteer basis by a group of elders.”³⁴

33. The facts in this particular case are clearly distinguishable from *Wall*. In this case, the Appellant Church has a statutory foundation, owns property, and members receive salary and pecuniary benefit. Most importantly, the association has a Constitution and By-Laws that both the Superior Court of Justice and Court of Appeal have reviewed.

34. The Ontario Court of Appeal picked up on this distinction and followed the direction of this Court in *Wall* and *Senez*, holding that becoming a member of a voluntary association entails agreement to the terms of the constitution and bylaws. Based on a clear precedent and a clear history of a court’s ability to enforce the terms of Constitutions and By-Laws, the decision of the Court of Appeal for Ontario was correct.

Issue Two: Charitable Donations Issue is a Red Herring

35. The issue raised by the Respondents in this case pertains to expulsions, production of financial records, and ancillary issues pertaining to whether the By-Laws and Constitution were adhered to in electing members to the Board of the Church.

36. The Respondents do not seek a “liquidation order which would effectively allow them to recover tithes” or the recovery of any other membership payment made to the organization. The Appellants reliance on *Faital v Evangelical Samoan Wesleyan Methodist Church* is therefore not instructive of any issue before the court.

37. The Respondents claim declarations, which are permitted under the *Courts of Justice Act* as of right.³⁵ As reasoned by the Ontario Superior Court in *Hellenic Congress of Quebec v Canadian Hellenic Congress*, a decision of 2020 following the Court of Appeal’s decision in the case at bar, binding declarations of right may be made pursuant to the *Courts of Justice Act*.³⁶

³⁴ *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (CanLII), [2018] 1 SCR 750 [“*Wall*”] at paragraph 3.

³⁵ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 97.

³⁶ *Hellenic Congress of Quebec v Canadian Hellenic Congress*, 2020 ONSC 2224 (CanLII) at paragraph 146.

38. The Respondents in this particular case were “members” of the Church. This is clear from the Church’s own form of Membership application that the Appellants put before the court on the summary judgement motion.³⁷ This is also confirmed by the Statement of Defence of the Appellants.³⁸
39. The decision of the Ontario Court of Appeal simply requires organizations to adhere to their own By-Laws and Constitutions. In the case at bar, the terms of these By-Laws and Constitutions were created by the Organization itself. Therefore, the purported threat to the “tax status of religious charities” would only flow from an organization’s own decision to characterize contributions in a manner that has the implications the Appellants suggest.

Issue Three: The Dispute is Justiciable

A. The Court of Appeal specifically analyzed the issue to determine if it was a matter the court should consider

40. The Court of Appeal was mindful that adherence to a religious organization alone is not enough to create a contract, but found that the By-Laws and Constitution present in this particular case constituted a contract setting out the rights and obligations of members and the organization.³⁹ This is not a contradiction of *Wall*, but rather a confirmation that an underlying legal right exists that the Respondents seek to have vindicated.
41. The Court of Appeal did not create a loophole in *Wall*, and in fact cited *Wall* with approval. The Appellants’ submission that membership itself has been made the underlying legal right by the Court of Appeal is directly contradicted by the Court of Appeal’s detailed reasons with respect to the fundamental issue of whether a contract was breached in this particular case, based on all of the circumstances.

³⁷ Affidavit of Messale Engeda sworn November 27, 2018, Exhibit “B” [AR Vol. I Tab 3B, p. 81].

³⁸ Further Amended Statement of Defence at paragraph 4 [AR Vol. I Tab 2B p 48].

³⁹ Reasons of Court of Appeal for Ontario at paras 39-41 [AR Vol. I Tab 1C p 19].

42. There was a specific finding made by the Court of Appeal that the Church and its leadership recognized their contractual obligations and specifically suggested that they abide by rules when seeking to expel a member.⁴⁰
43. The Court of Appeal's reasoning was based on a determination that the Appellants included provisions in their By-Laws with respect to discipline of members, relied on By-Laws to suspend members, and claimed that the requisite steps were taken to have the Respondents expelled.⁴¹ Thus, the Court of Appeal deemed this particular organization's By-Laws and Constitution enforceable.
44. It is worthy of note that the Appellants own Statement of Defence confirms their position that "the Church complied with the procedure set out in its by-laws for the expulsion of a member of the congregation from membership in the Church."⁴²
45. The Court of Appeal determined that the By-Laws could be enforced according to their terms, but the Appellants had not supplied the necessary evidence to determine if they were in fact carried out according to the terms.⁴³ The matter was thus referred back to the Superior Court.
46. It is submitted that a determination of whether the requisite steps under the By-Laws were taken can involve consideration of the principles of natural justice and a factual consideration of the evidence led by the parties.
47. In this particular case, the Respondents pointed to numerous problems in the evidence, including that the Appellants had a meeting wherein they decided to expel the Respondents, but did not disclose this meeting or allow representations from the Respondents at it⁴⁴, there was a false attribution of a defamatory letter to the Respondents⁴⁵, and there are factual issues pertaining to whether the Patriarch

⁴⁰ Reasons of Court of Appeal for Ontario at para 53 [AR Vol. I Tab 1C p 22].

⁴¹ *Ibid.* at paragraph 53.

⁴² Further Amended Statement of Defence at paragraph 22i [AR, Volume I, Tab 2B, p 54]

⁴³ *Reasons of Court of Appeal for Ontario.* at paras 62-63 [AR Vol. I Tab 1C p 25].

⁴⁴ Transcript of Cross-Examination of Messale Engeda at Questions 79-83 [AR Vol II, Tab 6, pp 189-190].

⁴⁵ Transcript of Cross-Examination of Messale Engeda at Question 212 [AR Vol II Tab 6 p 225].

“approved” of the expulsion, even though the Respondents allege he was entirely unaware of this matter. These are factual issues that can only be determined at a trial.

B. This Dispute is not a Doctrinal Dispute or about Religious Spirituality

48. The dispute between the Appellants and the Respondents is a contractual dispute centered around whether the proper steps pursuant to the Constitution and the By-Laws were followed in deciding to expel the Appellants. A court is competent to decide this question.

49. The relief the Respondents seek includes the following:

- a) Declarations with respect to the decision to expel the members (alleged to have been taken contrary to the requisite steps and procedure in the Constitution and By-Laws);
- b) Declarations with respect to the Findings and Guidelines of the Committee (alleged to have been taken contrary to the written terms of the Findings and Guidelines);
- c) Enforcement of the election policy of the Church (a contractual right provided in the Constitution and By-Laws);
- d) Production of financial records (a contractual right given to the Respondents pursuant to the By-Laws and Constitution of the organization).⁴⁶

50. None of this relief requires a court to wade into theological matters or understand religious dogma as the Appellants attempt to frame this matter. The Respondents do not ask the court to decide on a canonical or theological question. A declaration that certain provisions of the Constitution and By-Laws of an organization are of no force or effect can be made by the court as a remedy.⁴⁷

51. This particular Church’s Constitution and By-Laws present numerous articles that can be assessed by a court very easily for compliance. For instance, article 40.6 of the

⁴⁶ Statement of Claim at paragraph 1, 37 [AR Vol I Tab 2A].

⁴⁷ *Hellenic Congress of Quebec v Canadian Hellenic Congress*, 2020 ONSC 2224 at paragraphs 156-158.

Appellant Church states that “there shall be an annual report presented to parishioners”.⁴⁸ A court has the capacity to assess whether a report was delivered by reviewing available evidence and considering the credibility of witnesses. Courts undertake these exercises routinely.

52. Furthermore, Article 44.1a of this Church’s By-Laws provides that the rights of the parishioners will be fully respected⁴⁹, and Article 47 specifically addresses disciplinary measures.⁵⁰ Using the principles of natural justice that courts have articulated, a court is clearly competent to determine whether disciplinary measures that an organization has referenced in its own By-Laws comply with the principles of natural justice and were followed. The Court is clearly capable of assessing whether an expulsion from any organization was done in accordance with the steps an organization has outlined as applicable to its members. It is submitted that once the Appellants engage a disciplinary process or refer to the expulsion of members in their By-Laws, a court is capable of assessing whether such a provision should stand or whether the requisite steps were followed.

53. The Ontario Court of Appeal in *Pankerichan* explained when church disputes may become justiciable:

“while disputes about religious doctrine are not appropriate for judicial determination, courts have intervened to review the actions of religious bodies when the controversies (typically regarding membership) involve property, contracts or other civil rights. This was a fair characterization of how Canadian courts generally approach disputes within religious organizations.”⁵¹

54. Furthermore, this court has confirmed that the fact that a dispute “has a religious aspect does not by itself make it non-justiciable”⁵². Religious institutions and persons in Canada

⁴⁸ By-Law, Article 40.6, Exhibit “D” to Affidavit of Messale Engeda [AR Vol I Tab 3D p 178].

⁴⁹ By-Law, Article 44.1A, Exhibit “D” to Affidavit of Messale Engeda [AR Vol I Tab 3D p 182].

⁵⁰ By-Law, Article 47, Exhibit “D” to Affidavit of Messale Engeda [AR Vol I Tab 3D p 185].

⁵¹ *Pankerichan v Djokic*, 2014 ONCA 709 at paragraph 54.

⁵² *Bruker v Marcovitz*, 2007 SCC 54, at para 41

are subject to the sovereignty of Parliament and the sanctioning powers of the state invoked by the courts when disputes concerning religion are brought for resolution.⁵³

The court can and should intervene where matters are not narrowly doctrinal, but where civil rights such as expulsion and breach of internal rules are at stake.⁵⁴

55. In the instant case, the Ontario Court of Appeal reasoned that the Respondents did have rights and obligations in contract upon becoming members of the Congregation, but the court could not determine whether those rights were breached on a summary judgment motion because the Appellant Organization did not provide all of the information in respect of the rules and the steps taken by the respondents leading to expulsion.⁵⁵

Therefore, the appeal was granted and the summary judgment motion was dismissed accordingly.

56. If the Appellant Church desired to have no oversight or interference whatsoever in its affairs, the obligations placed on the Applicants could have been reduced or made clearer within their own Constitution and By-Laws. However, once an expulsion procedure and the rights of the Congregation have been spelled out in By-Laws and a Constitution, the Respondents submit that there must be some mechanism to ensure adherence and enforcement of the By-Laws and Constitution.

57. The reverse suggestion made by the Appellants is problematic. It is submitted that if a party has made the decision to set out obligations and insist upon compliance, then there must be some procedure to ensure these obligations can be enforced in accordance with their terms. If the court cannot intervene to assess whether a party has breached these terms, then there would be no reason for the By-Laws and Constitution at all, since they would be wholly incapable of enforcement.

58. The Alberta Court of Appeal's reasoning in *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta* was particularly poignant in reasoning that an organization that exists for

⁵³ *Ibid.* at paragraph 42.

⁵⁴ *Ibid.* at paragraph 43.

⁵⁵ Reasons of Court of Appeal for Ontario at para 63 [*AR Vol. I Tab 1C p 25*].

religious purposes should not be given carte blanche to deny membership to individuals to whom their bylaws would extend membership.⁵⁶ If the Appellants' reasoning in the case at bar is permitted, organizations will have carte blanche to trample on member's rights with no neutral arbiter.

59. Similarly, it is submitted that it would be more than strange if a Canadian court could not interpret the meaning of a By-Law enacted by an organization dealing with the production of financial records or the expulsion of members. A court is competent to decide the terms of By-Laws and whether an organization has complied with those terms, just as it does with any other contractual matter.

60. The Court is not being asked to opine on issues of religious dogma, but rather to determine if the "requisite steps" are followed in expulsion and to confirm that procedural fairness concerns have been addressed once a party is intent on including disciplinary measure provisions in its governing documents. This dispute is justiciable.

Issue Four: The Relief Claimed would not violate the Charter

61. The Appellants suggest that if the Respondents succeed in this case, the relief claimed by the Respondents would violate the *Charter*.

62. In asking the Superior Court to grant summary judgement, the Appellants did not make any *Charter* argument that their freedom of religion, freedom of association, or freedom of speech would be violated as they seek to do at this level. The Appellants were content to rely on the position that *Wall* stood for the position that there could be no review of the plaintiffs' expulsion from membership.

63. The Respondents do not ask the court to change the Appellants' position on religious doctrine as the Appellants allege in paragraph 68 of their Factum. The Respondent's claim is being framed incorrectly by the Appellants.

64. The Respondents ask the court to review the procedure utilized by the Appellants to expel them, and determine if this procedure complied with the disciplinary measures

⁵⁶ *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta* at paragraph 53.

outlined in the By-Laws and the concomitant principles of natural justice that attach to the disciplinary measures. The Respondents also ask the court to determine whether the Appellants have complied with the organization's own disclosure By-Laws and election By-Laws.

65. The Appellants suggest that an organization "may feel obliged by conscience to disregard a declaration from civil courts purporting to overrule them" as submitted at paragraph 73 of the Appellants' Factum. However, organizations have the capacity to carefully craft their own internal rules, regulations and By-Laws. The organization has the freedom to create rules and regulations with little reporting requirements to members, and members of these organizations can assess whether to be included in such an organization when deciding to enter into membership.
66. Instead, this particular Church chose to have an election policy, financial record keeping requirements, and disciplinary measures spelled out in its By-Laws. It is submitted that these requirements were established to ensure proper governance and fairness. Once established, the Appellants should not be permitted to "sidestep" their own rules when convenient only.
67. Organizations such as the one at issue in this proceeding have the ability to determine their By-Laws and amend their By-Laws in accordance with their terms.

Issue Five: The Ontario Court of Appeal applied the proper standard of review

68. At paragraph 36 of its decision, the Court of Appeal correctly identified the standard of review. On a motion for summary judgment, the standard of review is correctness.⁵⁷
69. The Court of Appeal properly identified the issue, framed as whether the motion judge was correct in holding that there was no underlying contract and therefore no genuine issue requiring a trial. The Court of Appeal unanimously decided that the motion judge

⁵⁷ Reasons of Court of Appeal for Ontario at para 35 [AR Vol. I Tab 1C p 17].

erred in law in finding that there was no evidence of an underlying contract between the parties.⁵⁸

70. The Court of Appeal reasoned that the Appellants had not filed the necessary evidence to enable the court to determine the rules of expulsion or whether they were followed. Thus, the Court of Appeal made a finding that it was not possible to determine whether the contractual terms were breached on a summary judgment motion⁵⁹.

71. It is submitted that there is no basis for the Appellants' contention that an improper standard of review was applied.

PART IV – SUBMISSIONS ON COSTS

72. The Respondents ask that the appeal be dismissed, with costs payable to the Respondents.

PART V – ORDER SOUGHT

73. The Respondents respectfully request that the Appellants' motion to introduce fresh evidence to this Court and for leave to serve and file a revised factum be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF NOVEMBER, 2020



Anthony Colangelo

Counsel for the Respondents

⁵⁸ *Ibid.* at paragraph 44.

⁵⁹ *Ibid.* at paragraph 63.

PART VI – TABLE OF AUTHORITIES

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