

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, MESALE ENEGADA, ABUNE DIMETROS and HIWOT BEKELE**

Appellants

- AND -

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

Respondents

- AND -

**CANADIAN MUSLIM LAWYERS ASSOCIATION, ASSOCIATION FOR REFORMED
POLITICAL ACTION CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION,
EVANGELICAL FELLOWSHIP OF CANADA, CATHOLIC CIVIL RIGHTS LEAGUE,
WATCHTOWER BIBLE AND TRACT SOCIETY OF CANADA, BRITISH COLUMBIA
HUMANIST ASSOCIATION, SEVENTH-DAY ADVENTIST CHURCH IN CANADA,
CHRISTIAN LEGAL FELLOWSHIP, NATIONAL COUNCIL OF CANADIAN
MUSLIMS, EGALE CANADA HUMAN RIGHTS TRUST and
CANADIAN CENTRE FOR CHRISTIAN CHARITIES**

Interveners

FACTUM OF THE INTERVENER
CANADIAN MUSLIM LAWYERS ASSOCIATION
(Pursuant to Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. This appeal raises important questions about the Court’s jurisdiction respecting membership issues in religious organizations with written constitutions and bylaws.
2. In particular, this appeal engages important issues about the freedom of religious communities to organize and manage affairs fundamental to their sincerely held beliefs, and whether and what role Courts throughout the dominion of Canada should have in reviewing decision-making in religious entities.
3. The Canadian Muslim community has seen numerous challenges regarding community and mosque membership, and these challenges have often been litigated in lower courts and tribunals.
4. The Court’s decision on how religious organizations may determine who should and should not be a part of the group according to their constitutions and bylaws, and the permissible scope for review, will have a substantial impact on the day-to-day operations of mosques and other Muslim organizations across the country.
5. The Muslim community has had a long association with Ethiopian Christians, ever since early Muslim emigrants escaping religious persecution in Mecca sought refuge with the Negus of Abyssinia. The *Ge’ez* word, *Tewahedo*, shares etymological roots with the Arabic word, *tawhid*, both of which mean “unity.” The legal issues raised in this appeal impact diverse religious communities that have a common interest in the protections of freedom of belief and a fair process to resolve certain disputes.

PART II - QUESTIONS IN ISSUE

6. The Canadian Muslim Lawyers Association (“CMLA”) intervenes to provide this Honourable Court with submissions on the Court’s jurisdiction respecting membership issues in religious entities from a Muslim legal perspective. The CMLA will not engage with *Charter* issues, which are well canvassed by the actual parties and other interveners. The CMLA takes no position on the outcome or facts of the appeal.

PART III - STATEMENT OF ARGUMENT

(a) Importance of this Case for the Muslim Community

7. Canada has no official religion, and support for religious pluralism and freedom of religion is an important part of Canada’s political and social fabric. There is a need for certainty in the clear demarcation between the jurisdiction of the courts and the freedom of religious organizations. The CMLA respectfully submits such a demarcation requires that courts assume a high level of deference to religious membership decision-making and limits the availability of court review.
8. Such an approach is consistent with longstanding jurisprudence of the Court emphasizing that measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom. The approach the Court adopts on this appeal must account for the socially embedded nature of religious belief, and the deep linkages between religious belief and its manifestation in communal institutions and traditions, through the example of the Canadian Muslim community.

9. Courts should intervene in religious membership decision-making only in the rare case. While courts should defer to religious expertise, specialization and particular familiarity with the competing considerations at play, there will inevitably be cases where judicial intervention is warranted.¹
10. For example, CMLA submits that congregants should be entitled to the application of the governing policy or constitutions designated by the religious organizations to control membership (such as the contractual duty to provide fair notice and make due inquiry²), and should not suffer colourable attempts to circumvent basic requirements thereof.
11. In particular, religious organizations should also be required to abide by the basic principles of procedural fairness, where those principles are embedded within the constating documents of corporations. This is especially where there is clear evidence of *mala fides* in decisions about membership or elections and no rights of internal appeal.

(b) Impact of *Highwood Congregation of the Jehovah's Witnesses v. Wall*

12. In its landmark 2018 decision of *Highwood Congregation of the Jehovah's Witnesses (Judicial Committee) v. Wall* [hereinafter *Highwood Congregation*], the Supreme Court of Canada dealt with the issue of judicial review of decisions by religious organizations.³

¹ [Orchard et al v Tunney, 1957 CanLII 57 \(SCC\)](#), [1957] SCR 436 at 441. See also Stephen Aylward, *The Law of Unincorporated Associations in Canada* (Markham: LexisNexis, 2020), CMLA Book of Authorities, Tab 2.

² *Labouchere v Earl of Wharncliffe*, [1879] 13 Ch. D 346, stating “The judgment of a committee, with the facts fully before them might be right or wrong. With that the court has nothing to do. If having given the accused fair notice, and made due inquiry, the committee came to the conclusion that the conduct of one of the members of the club was injurious to its welfare and interests, no judicial tribunal could interfere with any consequences which might arise from an opinion thus fairly formed.” See: CMLA Book of Authorities, Tab 1.

³ [Highwood Congregation of the Jehovah's Witnesses \(Judicial Committee\) v Wall, 2018 SCC 26](#).

13. *Highwood Congregation* and the case at bar do not deal with the issue of an action against *incorporated* religious entities with a set of *written* constitutions and bylaws.
14. The Supreme Court's ruling applied to decisions of a voluntary association and, specifically, the issue of jurisdiction over a religious organization that was not incorporated, had no articles and bylaws, no statutory foundation, and did not own property. However, it has been strictly applied in cases which involved incorporated associations, with articles and bylaws, having statutory foundation and property.⁴
15. There have also been subsequent instances where Courts have interfered in the inner workings of a voluntary association, as outlined below.
16. In a 2020 case involving machinations within the Conservative Party of Canada, the Honourable Justice Perell considered *Highwood Congregation* and stated as follows⁵:

The court's jurisdiction to intervene in the affairs of an unincorporated association operating in the private sector depends on the presence of a legal right founded in tort, contract, restitution, or a statutory provision; courts only interfere if legal rights are at stake. The courts will not intervene with the affairs of an unincorporated association where no civil or property right is involved in the activities of the group.

When the unincorporated association or group has a written constitution and by-laws, then these instruments constitute a contractual relationship setting out the rights and obligations of the unincorporated association and its members. Unincorporated associations are organized as a complex of contracts between each and every other member. The unincorporated association or group and its members are bound by the terms of the constitution and by-laws and there is an obligation on the group's members to observe its constitution and by-laws. The complex of contracts is of a special nature; there are multiple contracting parties, entering and leaving the relationship, and being subject to changing contractual obligations as constitutions and bylaws are amended from time to time.

⁴ See [Mathai v George, 2019 ABQB 116](#) and [McCargar v Métis Nation of Alberta Association, 2019 ABCA 172](#).

⁵ [Karaholias v Conservative Party of Canada, 2020 ONSC 3145](#), paras. 179-186.

Thus, the court has a jurisdiction to review the decisions and procedures of an unincorporated association or group operating in the private sector as a matter of contract. Members of groups that have constitutions, by-laws, and rules are entitled to private law remedies to have their agreement enforced in accordance with its proper interpretation. The court 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. The court has the jurisdiction to interpret the contracts that define the rights of the members in respect of the association's operations.

However, where the affairs of a group or unincorporated association are governed by private law, a court has only a limited jurisdiction to review the conduct and decisions of associations, and the court will only do so if a significant private law right or interest is involved.

If a significant private law right or interest is involved; for example if a member of the association has been expelled or lost his or her membership status, been deprived of his or her membership privileges, or his or her ability to pursue vocations and avocations associated with the association, the court does not review the merits of the association's conduct or decision but reviews whether the purported expulsion or loss of membership or of membership privileges was carried out according to the applicable rules of the association and with the principles of natural justice (procedural fairness), and without *mala fides*. Thus, where there is jurisdiction as a matter of contract and a significant right or interest is engaged, the court may determine: (a) whether the voluntary group or unincorporated association acted in accordance with its rules; (b) whether it acted in accordance with the principles of natural justice; and (c) whether the association's decision was come to *bona fide*.

Provisions in the contracts of unincorporated associations that operate in the private sector that purport to oust the court's jurisdiction are variously called: domestic clauses, privative clauses, exclusionary clauses, waiver clauses, on non-justiciable rights clauses. Where the constitution, by-laws, or rules of the group purport to make the group's [decisions] final and binding and without review or appeal on any grounds, nevertheless, the court retains a limited jurisdiction to review the procedural integrity of the association's action even if the constitution or rules of the association purport to oust any jurisdiction in the court. This rule reflects the historic principle that a contract that purports to oust access to the courts is illegal and unenforceable as being against public policy.

In *Lee v. Showmen's Guild of Great Britain*, which is regarded as a leading case about the authority of the court's to intervene in the affairs of an unincorporated association notwithstanding that the parties purport to oust the court's jurisdiction, Lord Denning stated:

Although the jurisdiction of a [unincorporated association] is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. ... Another limitation arises out of the well-known principle that parties cannot by contract oust the ordinary courts of their jurisdiction: see *Scott v. Avery* (14) (5 H.L. Cas. 845, 846) per Alderson, B., and Lord Cranworth, L.C. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts.

... But the question still remains: To what extent will the courts intervene? They will, I think, always be prepared to examine the decision to see that the tribunal have observed the law. ...

Lee v. Showmen's Guild of Great Britain has been adopted in many Canadian cases, including the leading Supreme Court of Canada decision in *The Lakeside Colony of Hutterian Brethren v. Hofer*, where the Supreme Court held that based on the enforcement of contracts or property rights, there was a limited jurisdiction for courts to intervene in the affairs of an unincorporated association.

17. In the British Columbia Supreme Court case of *Surrey Knights Junior Hockey v. Pacific Junior Hockey League*, the Court drew a spectrum in the caselaw from proceedings at a purely social club to one where a member risked losing a livelihood.⁶ Having found that the hockey league was at the rigorous end of the spectrum and citing *Highwood Congregation and Lakeside Colony of Hutterian Brethren v. Hofer* [hereinafter *Lakeside Colony*], the Court applied the principles of procedural fairness: notice, the right to respond to allegations and an unbiased tribunal.
18. In the case at bar, the Ontario Court of Appeal considered *Highwood Congregation, Lakeside Colony*, its earlier decision in *Ahenakew et al. v. MacKay* and the Supreme Court's decision in *Senez v. Montreal Real Estate Board*, where it held as follows:
- [H]e 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 adopted by a majority of members entitled to vote, even if he disagrees with such changes. Additionally, he may generally resign, and by remaining he accepts the new by-laws. The corporation may claim from him arrears of the dues fixed by a by-law. Would such a claim not be of a contractual nature? What other basis could it have in these circumstances? In my view, the obligation of the corporation to provide the agreed services and to observe its own by-laws, with respect to the expulsion of a member as in other respects, is similarly of a contractual nature [emphasis added by the Court of Appeal].⁷

⁶ [Surrey Knights Junior Hockey v Pacific Junior Hockey League, 2018 BCSC 1748.](#)

⁷ [Senez v Montreal Real Estate Board, \[1980\] 2 SCR 555](#) at pp. 566-567.

19. In relying on this holding, the Court of Appeal decided that whether or not a member had specific knowledge of actual terms in the by-laws was irrelevant and the lower court had erred in finding there was no evidence of an underlying contract between the parties. Becoming a member of the organization meant that those members were bound by the terms of the bylaws and entitled to their benefits.

(c) Other Relevant Caselaw from Lower Courts

20. In *Noori v. Abdin*, the Honourable Justice Michael Quigley held,

...the court can give direction on the interpretation of the Danforth Community Center Constitution, on the proper composition of the voters list, on interpretive questions that may be in dispute, and on the manner in which the election will be held and the governance of the Danforth Community Centre regularized.⁸

21. Justice Quigley went on to state:

The court is empowered to provide such direction as part of its broad remedial discretionary powers as a superior court of record under section 96 of the *Constitution Act*, 1982 as amended, and under the *Courts of Justice Act* of this province. The court can exercise those powers for the protection of the membership of the DCC as a whole and to permit the DCC and its community of worshippers to move forward from the impasse they have faced for a year...⁹

22. Section 96 of the *Constitution Act* gives jurisdiction to the Court where there is a public actor and not a private one. However, section 11 of the *Courts of Justice Act* arguably gave the Courts inherent jurisdiction in matters of membership, the electoral process and procedural fairness until the definitive decision in *Highwood Congregation*.

⁸ [Noori v Abdin, 2011 ONSC 5452](#) at para. 6.

⁹ Ibid.

23. In *Bala v. Scarborough Muslim Association*, the Honourable Justice George Strathy (as he then was) held,

I stated at the outset that a Court should not interfere unduly in the activities of religious organizations...I respectfully agree with the observations of Justice Molloy in *Islamic Foundation of Toronto Trustees (Arbitral Tribunal)*, [1997] O.J. No. 2787 (Gen. Div.) at para. 11 that the right of a religious community to determine how it will be governed is an important one. In this case, however, there was a fundamental flaw in the electoral process and a candidate was disqualified for reasons that were not justified by the Constitution of the Association. The Association is a non-profit charitable organization, governed by the *Corporations Act*, as well as by the laws affecting charities including the *Income Tax Act*, S.C. 1985, c.1 (5th Supp.). It is of fundamental importance that it should conduct itself in accordance with the requirements of law and that its directors are elected in a fair and transparent manner.¹⁰

24. In exercising broad remedial powers in accordance with relevant corporate law, the Honourable Justice David Brown (as he then was), noted that:

Transparency, accountability and procedural fairness are some of the principles of the corporate law applicable to organizations such as the Society.¹¹

25. The Honourable Justice Douglas Gray's decision in *Syed v. Choudhry*, involving the Muslim Association of Milton, provides a good example of when a Court ought to adjudicate on issues of membership.¹² The association had been federally incorporated pursuant to letters patent and had detailed by-laws. Following the resignation of the board of directors, an interim board was installed to conduct new elections. Without any mandate, the interim board expanded the list of members and did not give candidates a sufficient opportunity to canvass.

¹⁰ [Bala v Scarborough Muslim Association, 2008 CanLII 63179 \(ONSC\)](#) at para. 20.

¹¹ [Islamic Society of Toronto v Abowat, 2012 ONSC 1853](#) at para. 4 (vi).

¹² [Syed v Choudry, 2015 ONSC 7653](#).

26. The Court cited the Supreme Court of Canada decision in *Lakeside Colony* for the proposition that courts should be reluctant to interfere in the internal workings of a charitable or religious organization.¹³ With that perspective as a starting point, the Court held that the impugned election was not “in accordance with the by-laws of the corporation, and was not done according to law.”¹⁴

27. There is also precedent for the Court to consider the interest of the public generally and “the interest of those who provide financial support” to charitable organizations in the exercise of the Court’s discretion.¹⁵

28. Furthermore, the refusal to do so based on judicial reluctance to get involved in the “religious thicket” may lead to greater harms. As the presiding judge found in *The Warriors of the Cross Asian Church v. Masih*:

If a car starts down a hill without brakes, its progress cannot be controlled. As it proceeds, the dangers of the pending accident only get worse. If there is a chance to regain control or minimize the damage, we ought to take advantage of the opportunity.¹⁶

29. The judge then concluded by stating:

To return to the metaphor referred to in the opening paragraphs of these reasons, by failing to adhere to the requirements of the Corporations Act, this corporation has been operating without the controls it provides. To allow it to continue unimpeded is simply to create a circumstance where the damage at the end will only be greater.¹⁷

¹³ Ibid. at para. 33.

¹⁴ Ibid. at paras. 27, 36 and 44.

¹⁵ [Rexdale Singh Sabha Religious Centre v Singh, 2015 ONSC 1807 \(CanLII\)](#) at para. 39.

¹⁶ [Warriors of the Cross Asian Church v Masih, 2007 CanLII 41440 \(ONSC\)](#) at para. 2.

¹⁷ Ibid. at para. 40.

30. Legislatures have already recognized that there may be deficiencies in a corporation's constating documents that may be supplemented by corporate law. For example, the pending Ontario *Not-for-Profit Corporations Act* provides for default by-law terms including a maximum term for directors, rights to obtain financial statements and allows for members to bring requisitions at a much lower threshold than previously required.¹⁸
31. The CMLA respectfully submits that the Supreme Court, therefore, ought to limit its holding to unincorporated religious associations as courts could be validly called upon to enforce existing statutory and common law procedural fairness requirements in an incorporated religious organization's written constitution and bylaws in order to prevent greater harms.

PART IV - SUBMISSIONS ON COSTS

32. The CMLA does not seek costs and requests that no order for costs be made against it.

PART V – REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

33. The CMLA requests permission to make oral submissions of no more than 5 minutes and asks that all of its submissions be taken into account in the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of November, 2020



Shahzad Siddiqui
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Counsel to the CMLA

¹⁸ *Not-for-Profit Corporations Act, 2010* SO 2010, c. 15.

PART VII - TABLE OF AUTHORITIES

CASE	REFERENCE IN FACTUM
1. <u><i>Bala v. Scarborough Muslim Association</i>, 2008 CanLII 63179 (ONSC)</u>	Paragraph 23
2. <u><i>Highwood Congregation of the Jehovah's Witnesses (Judicial Committee) v. Wall</i>, [2018] 1 S.C.R. 750, 2018 SCC 26</u>	Paragraph 12
3. <u><i>Islamic Society of Toronto v. Abowat</i>, 2012 ONSC 1853</u>	Paragraph 24
4. <u><i>Karaholias v. Conservative Party of Canada</i>, 2020 ONSC 3145</u>	Paragraph 16
5. <i>Labouchere v. Earl of Wharncliffe</i> , [1879] 13 Ch. D 346	Paragraph 10
6. <u><i>Lakeside Colony of Hutterian Brethren v. Hofer</i>, [1992] 3 S.C.R. 165, 1992 CanLII 37</u>	Paragraphs 17-18
7. <u><i>Mathai v. George</i>, 2019 ABQB 116</u>	Paragraph 14
8. <u><i>McCargar v. Métis Nation of Alberta Association</i>, 2019 ABCA 172</u>	Paragraph 14
9. <u><i>Noori v. Abdin</i>, 2011 ONSC 5452</u>	Paragraph 20-21
10. <u><i>Orchard et al. v. Tunney</i>, [1957] S.C.R. 436, 1957 CanLII 57 (SCC)</u>	Paragraph 9
11. <u><i>Rexdale Singh Sabha Religious Centre v. Singh</i>, 2015 ONSC 1807 (CanLII)</u>	Paragraph 27
12. <u><i>Senez v. Montreal Real Estate Board</i>, [1980] 2 S.C.R. 555, 1980 CanLII 222</u>	Paragraph 18
13. <u><i>Surrey Knights Junior Hockey v. Pacific Junior Hockey League</i>, 2018 BCSC 1748</u>	Paragraph 17
14. <u><i>Syed v. Choudry</i>, 2015 ONSC 7653 (CanLII)</u>	Paragraphs 25-27
15. <u><i>Warriors of the Cross Asian Church v. Masih</i>, 2007 CanLII 41440 (ONSC)</u>	Paragraphs 28-29

Secondary Source

1. Stephen Aylward, *The Law of Unincorporated Associations in Canada* (Markham: LexisNexis, 2020).

STATUTORY PROVISIONS

1. [Courts of Justice Act, R.S.O. 1990, c. C. 43:](#)

Section 11:

Superior Court of Justice

11. (1) The Ontario Court (General Division) is continued as a superior court of record under the name Superior Court of Justice in English and Cour superieure de justice in French.

Idem

(2) The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.

2. [Constitution Act, 1867 \(UK\), 30 & 31 Victoria, c 3:](#)

VII. JUDICATURE

Appointment of Judges

96. The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

3. [*Not-for-Profit Corporations Act, 2010, S.O. 2010, c. 15.*](#)

Default organizational by-laws

18 (1) If the directors do not pass an organizational by-law within 60 days after the date of incorporation, the corporation is deemed to have passed the standard organizational by-laws approved by the Director. 2010, c. 15, s. 18 (1).

Election and appointment of directors

Election and term

24 (1) At the first meeting of the members and at each succeeding annual meeting at which an election of directors is required, the members shall, by ordinary resolution, elect directors to hold office for a term expiring not later than the close of the fourth annual meeting of the members after the election, as provided in the by-laws. 2010, c. 15, s. 24 (1).

Members may requisition meeting of members

60 (1) The members of a corporation who hold at least 10 per cent of votes that may be cast at a meeting of the members sought to be held, or a lower percentage that is set out in the by-laws, may requisition the directors to call the meeting for the purposes stated in the requisition. 2010, c. 15, s. 60 (1).

Presentation of annual financial statements to members

84 (1) The directors of a corporation shall place before the members at every annual meeting,

(a) the financial statements approved by the directors under subsection 83 (1);

(b) the report of the auditor or of the person who conducted a review engagement, as the case may be; and

(c) any further information respecting the financial position of the corporation and the results of its operations required by the articles or the by-laws. 2010, c. 15, s. 84 (1).

Copy to members

(2) Not less than 21 days before each annual meeting of the members or before the signing of a resolution under section 59 in lieu of the annual meeting, a corporation shall give a copy of the documents referred to in subsection (1) to all members who have informed the corporation that they wish to receive a copy of those documents.

**ETHIOPIAN ORTHODOX TEWAHEDO
CHURCH OF CANADA ST. MARY
CATHEDRAL et al.**
Appellants

and

**SCC Court File No. 39094
AGA et al.**

Respondents

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

**FACTUM OF THE INTERVENER
CANADIAN MUSLIM LAWYERS
ASSOCIATION**

***In Accordance with Rules 47, 55 and 56 of
the Rules of the Supreme Court of Canada***

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