S.C.C. Court File No. 39094

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

BETWEEN:

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

APPELLANTS
(Respondents)

-and-

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

RESPONDENTS
(Appellants)

-and-

CANADIAN MUSLIM LAWYERS ASSOCIATION, ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION, EVANGELICAL FELLOWSHIP OF CANADA AND CATHOLIC CIVIL RIGHTS LEAGUE, WATCH TOWER 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, CANADIAN CENTRE FOR CHRISTIAN CHARITIES

INTERVENERS

FACTUM OF THE INTERVENER SEVENTH-DAY ADVENTIST CHURCH IN CANADA

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

KUHN LLP, LEGAL COUNSEL
100 - 32160 South Fraser Way
Abbotsford, BC, V2T 1W5

Kevin L. Boonstra
Jonathan B. Maryniuk
Tel: 604-864-8877
Fax: 604-864-8867
Email: kboonstra@kuhnco.net
jmaryniuk@kuhnco.net

Counsel for the Intervener
Seventh-day Adventist Church in Canada

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario, K2P 0R3

Marie-France Major

Tel: 613-695-8855
Email mfmajor@supremeadvocacy.ca

Agent for the Intervener
Seventh-day Adventist Church in Canada

COUNSEL FOR THE APPELLANTS

Philip H. Horgan Law Office
120 Carlton Street, Suite 301
Toronto, Ontario, M5A 4K2

Philip H. Horgan
Raphael T. R. Fernandes

Tel: 416-777-9994
Fax: 416-777-9921
Email: phorgan@carltonlaw.ca

AGENT FOR THE APPELLANTS

Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario, K2P 0R3

Marie-France Major

Tel: 613-695-8855
Fax: 613-695-8580
Email mfmajor@supremeadvocacy.ca

COUNSEL FOR THE RESPONDENTS

Lento Professional Corporation
3200 Dufferin Street, Suite 504
Toronto, Ontario, M6A 3B2

Anthony Colangelo

Tel: 416-398-4044
Fax: 416-398-7396
Email: acolangelo@lentolaw.com

Abrahams LLP
1457 McCowan Road, Suite 204
Toronto, Ontario, M1S 5K7

Shahzad Siddiqui

Tel: 416-291-6786
Fax: 416-291-8784
Email: shahzad@abrahamsllp.com

Counsel for Canadian Muslim Lawyers Association

Association for Reformed Political Action (ARPA) Canada
130 Albert Street, Suite 1705
Ottawa, Ontario, K1P 4G4

John Sikkema

Tel: 416-992-9877
Fax: 613-249-3238
Email: john@arpacanada.ca

Counsel for Association for Reformed Political Action (ARPA) Canada

Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario, K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major

Tel: 613-695-8855
Fax: 613-695-8580
Email emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Agent for Counsel for Association for Reformed Political Action (ARPA) Canada

Canadian Civil Liberties Association
900 - 90 Eglinton Avenue East
Toronto, Ontario, M4P 2Y3

Cara Zwibel

Tel: 416-646-1409
Fax: N/A
Email: czwibel@ccla.org

Counsel for Canadian Civil Liberties Association

Borden Ladner Gervais LLP
1300 - 100 Queen Street
Ottawa, Ontario, K1P 1J9

Nadia Effendi

Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Agent for Counsel for Canadian Civil Liberties Association

Vincent Dagenais Gibson LLP
260 Dalhousie Street, Suite 400
Ottawa, Ontario, K1N 7E4

Albertos Polizogopoulos

Tel: 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca

Counsel for The Evangelical Fellowship of Canada and The Catholic Civil Rights League

W. Glen How & Associates LLP
13893 Highway 7, P.O. Box 40
Georgetown, Ontario, L7G 4T1

David M. Gnam
Jayden MacEwan

Tel: 905-873-4545
Fax: 905-873-4522
Email: dgnam@wghow.ca
jmacewan@wghow.ca

Counsel for Watch Tower Bible and Tract Society of Canada

Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario, K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major

Tel: 613-695-8855
Fax: 613-695-8580
Email emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Agent for Counsel for Watch Tower Bible and Tract Society of Canada

Allen/McMillan Litigation Counsel
1550 - 1185 West Georgia Street
Vancouver, BC, V6E 4E6

Wesley J. McMillan

Tel: 604-282-3980
Fax: 604-628-3832
Email: wes@amlc.ca

Counsel for British Columbia Humanist Association

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, Ontario, K1P 1C3

Jeff Beedell

Tel: 613-786-0171
Fax: 613-563-9869
Email: jeff.beedell@gowlingwlg.com

Agent for Counsel for British Columbia Humanist Association

Christian Legal Fellowship
285 King Street, Suite 202
London, Ontario, N6B 3M6

Derek B.M. Ross
Sarah E. Mix-Ross
Benjamin Ferland

Tel: 519-601-4099
Email: execdir@christianlegalfellowship.org
smixross@christianlegalfellowship.org
bferland@christianlegalfellowship.org

Counsel for Christian Legal Fellowship

Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario, K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major

Tel: 613-695-8855
Fax: 613-695-8580
Email emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Agent for Counsel for Christian Legal Fellowship

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, Ontario, M5H 4E3

Nadia Effendi
Mannu Chowdhury

Tel: 416-367-6000
Fax: 416-367-6749
Email: neffendi@blg.com
mchowdhury@blg.com

Counsel for National Council of Canadian Muslims

Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, Ontario, K1P 1J9

Nadia Effendi

Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Agent for Counsel for National Council of Canadian Muslims

McCarthy Tétrault LLP
Suite 5300 Toronto Dominion Bank Tower
Toronto, Ontario, M5K 1E6

Adam Goldenberg
Connor Bildfell

Tel: 416-601-8357
Fax: 416-868-0673
Email: agoldenberg@mccarthy.ca

Counsel for Egale Canada Human Rights Trust

Juristes Power Law
130 Albert Street, Suite 1103
Ottawa, Ontario, K1P 5G4

Darius Bossé

Tel: 613-702-5566
Fax: 613-702-5566
Email: dbosse@juristespower.ca

Agent for Counsel for Egale Canada Human Rights Trust

Canadian Centre for Christian Charities
1 - 43 Howard Avenue
Elmira, Ontario, N3B 2C9

Barry W. Bussey
Deina Warren

Tel: 519-669-5137
Fax: 519-669-3291
Email: barry.bussey@cccc.org
deina.warren@cccc.org

Counsel for Canadian Centre for Christian Charities

Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario, K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major

Tel: 613-695-8855
Fax: 613-695-8580
Email emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Agent for Counsel for Canadian Centre for Christian Charities

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Seventh-day Adventist Church in Canada ("**SDACC**") intervenes in this case because of its concern that a contractual theory of religious association will secularize the spiritual nature of church membership. The SDACC urges this Court to reject an approach that would presume a legally enforceable contract to exist between members and a church based on a constitution, bylaws or other constating documents. Doing so would enmesh the judiciary in spiritual matters and create a differential approach to the enforcement of spiritual commitments depending on the structure of the various church entities that exist in Canada.

PART II – QUESTION IN ISSUE

2. In the context of a membership dispute, should the constitution and bylaws of a voluntary religious organization be considered a legally enforceable contract?

PART III – ARGUMENT

A. What Are Religious Organizations?

3. Religion offers a system of living based on deeply held personal convictions connected to spiritual faith. It is linked to one's self-definition and spiritual fulfilment.[1]

4. The individual and communal aspects of religious belief and practice are indissolubly intertwined.[2] Religious communities are essential for religious belief and practice[3] and the autonomous existence of those communities is indispensable for pluralism in a democracy.[4] The means of religious expression and practice are in its collective dimension[5] and can only be effectively manifested through organizations.[6] The freedoms of religion and association in Canada are rooted in the protection of religious groups, free from state interference.[7]

---

[1] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 [***Amselem***] at para. 39
[2] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [***Loyola***] at para. 94
[3] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2005 SCC 1 [***Mounted Police***] at para. 64
[4] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 567 at paras. 30-31 and 131
[5] *Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, ECHR 2001-XII at para. 118
[6] *Loyola* at paras. 60 and 94
[7] *Mounted Police* at paras. 56 and 64

5. Faith communities are unique and all of their activities are infused with religious purpose.[8] They are concerned with ultimate concerns such as life, death, sin, the reconciliation of individuals with God and the very purpose of life. Their "unique access to the transcendent"[9] makes them unlike other collective or corporate organizations established for business, sport, hobbies, social, or other concerns.

B. Structure of Religious Organizations

6. Religious communities organize themselves for religious purposes, but also to interact with secular society. Their organizations need to be recognized at law in order to own land or to enter into contracts for obtaining temporal goods and services they require. While English common law made provision for the Church of England, it made no provision for non-established churches.[10] Churches had to find a legal device, such as the trust, incorporation by private act[11] or incorporation under public corporate law statutes.[12] Some religious organizations continue to exist as unincorporated voluntary associations.[13] Some utilize a combination of structures to give effect to their religious customs and practices.[14]

7. Irrespective of the form of organization or incorporation, or whether they have adopted written bylaws or rules, the concerns of all such groups are religious. In assessing whether and

---

[8] *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 SC 327 (1987) [***Amos***] at pp. 342 and 344

[9] Victor Schwartz and Christopher Appel, "The Church Autonomy Doctrine: Where Tort Law Should Step Aside" (2012) 80:2 U Cin L Rev 431 [***Schwartz & Appel***] at pp. 435-436 [Book of Authorities ("BOA"), Tab 5].

[10] M. H. Ogilvie, "The Legal Status of Ecclesiastical Corporations" (1989), 15 Can. Bus. L. J. 74 [***Ogilvie***] at pp. 80-84; *Watson v. Jones*, 80 U.S. 679 (1871) [***Watson v. Jones***] at pp. 727-728

[11] See a list of private acts of the Parliament of Canada for religious organizations here. There are also private acts of the provincial legislatures, such as the *Seventh-day Adventist Church (British Columbia Conference) Act*, S.B.C. 1990, c. 75

[12] *Ogilvie* at p. 83; Zechariah Chafee, Jr., "The Internal Affairs of Associations Not for Profit" (1930), 43 Harv. L. Rev. 993 [***Chafee***] at pp. 997-998, [BOA, Tab 6].

[13] Some of which do not adopt a written constitution of bylaws: *Highwood Congregation v. Wall*, 2018 SCC 26 [***Highwood***] at para. 28

[14] See for example, *Lakeside Hutterite Colony v. Hofer*, [1992] 3 SCR 165 [***Lakeside Colony***] at pp. 176-183. Also see the SDACC's intervention application for its structure

how far to interfere with the internal affairs of a church, the court should focus on the spiritual and religious function, and not the form, of the organization.[15]

8. Courts are reluctant to intervene in the affairs of voluntary associations.[16] Even more so with respect to the internal affairs of churches because courts do not resolve disputes about faith, religious discipline, theology or ecclesiology[17] and do not become entangled in the affairs of religion.[18] These are intimate and spiritual issues that the court cannot endorse or dispute, and for which the court cannot substitute its views, in part because it lacks expertise.[19]

9. Allowing the state or the courts to interfere in such matters undermines church autonomy and distorts the religious group's process and sense of self-definition.[20] These concerns are applicable irrespective of the legal form or structure adopted by a particular church.

10. When a church adopts a constitution and bylaws, whether under a corporate statute or not, those documents will include a variety of interwoven provisions, none of which can be understood in purely secular terms,[21] including:

(a) Explicitly doctrinal statements of religious belief to which all members must adhere, which will be referred to as "***Doctrinal Commitments***";

---

[15] *Jones v. Wolf*, 443 US 595 (1979) [***Jones v. Wolf***] at pp. 612-613

[16] See, for example, *Garcia v. Kelowna Minor Hockey Assn.*, 2009 BCSC 200 [***Garcia***] at paras. 35-37

[17] In *Amselem* at para. 50, this Court said a court is not qualified to "choose among various interpretations of belief", "define the very concept of religious 'obligation'", or "adjudicate questions of religious doctrine". See also *Shergill v. Khaira*, [2014] UKSC 33 at paras. 46 and 48; *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) [***Serbian Orthodox***] at p. 713; *Lewery v. Salvation Army of Canada*, 1993 CanLII 5290 (NB CA) [***Lewery***]; *Bruker v. Marcovitz*, 2007 SCC 54 [***Bruker***] at paras. 20, 42-43; *Highwood*, at paras. 31, 36, 38 and 39

[18] *Amselem*, at para. 50

[19] *Regina v. Chief Rabbi of the United Hebrew Congregation of Great Britain and the Commonwealth*, [1993] 2 All ER 219 (UK QB) [***Chief Rabbi***] at p. 254 [BOA, Tab 1]; *Schwartz & Appel* at p. 467; *Chafee* at pp. 1023-1024; *Lakeside Colony* at pp. 190-191

[20] *Schwartz & Appel* at p. 436; *Watson v. Jones* at pp. 728-729

[21] *Jones v. Wolf* at pp. 612-613

(b) Membership criteria, which will include (but are not limited to) adherence to Doctrinal Commitments, which will be referred to as "***Membership Provisions***";[22]

(c) Governance structures that recognize religious authorities and provide them with powers and duties based on ecclesiastical and spiritual considerations, which will be referred to as "***Ecclesial Governance Provisions***";[23] and

(d) Procedural rules for making decisions and processes by which the church will conduct its spiritual affairs, such as the conduct of meetings, changes to bylaws, internal membership hearings etc., which will be referred to a "***Procedural Provisions***".

11. The courts have already determined that most of these provisions are outside of judicial scrutiny. Doctrinal Commitments are clearly not justiciable.[24] Generally speaking, neither are Ecclesial Governance Provisions since they deal expressly with ecclesiastic authority and define spiritual relationships.[25] Outside of strictly Procedural Provisions, the implementation of Membership Provisions are non-justiciable.[26] In *Highwood*, this Court held that *mere* membership in a religious organization should remain outside of judicial review.[27] Such matters are ones of faith, whether or not they seem rational to outsiders or are objectively measurable.[28]

12. The question, then, is whether Procedural Provisions and their implementation should be protected against interference by the courts. The ***substance*** of matters decided through the implementation of Procedural Provisions are already immune from scrutiny. Should the adherence to Procedural Provisions still be open to review and, if so, on what legal basis?

C. Religious Substance versus Religious Procedure

13. Almost any provision in the organizational documents of a church will be religious and have spiritual content.[29] To an outsider, Procedural Provisions may appear to be "merely"

---

[22] *Schwartz & Appel* at p. 466; *Lakeside Colony* at p. 179
[23] *Amos* at p. 344; *Ermogenous v. Greek Orthodox Community of SA Inc.*, [2002] HCA 8 [***Ermogenous***] at para. 36; *Lewery* at pp. 3-5
[24] *Amselem* at paras. 50, 51, 67; *Highwood* at para. 36
[25] *Ermogenous* at para. 38; *Amos* at p. 344; *Chief Rabbi* at p. 254; *Serbian Orthodox* at p. 713
[26] *Schwartz & Appel* at p. 466; *Highwood* at paras. 29, 37; *Garcia* at paras. 35-37; *Farrish v. Delta Hospice Society*, 2020 BCCA 312 [***Farrish***] at paras. 37, 40, 42
[27] *Highwood* at para. 29
[28] *Serbian Orthodox* at p. 714
[29] *Jones v. Wolf* at p. 604

technical. "It is not always easy to separate out procedural complaints from consideration of substantive principles of [religious] law which may underlie them."[30] Even Procedural Provisions are infused with religious content.[31] As recognized in *Highwood*, "even the procedural rules of a particular religious group may involve the interpretation of religious doctrine." The example given was of a biblical process from Matthew 18:15, 16; such "procedural rules are also not justiciable."[32]

14. If court intervention is permitted in respect to the application of Procedural Provisions, then "one way or another, the secular court must inevitably be drawn into adjudicate matters intimate to a religious community."[33]

15. The distinction between substance and procedure is blurred at the best of times, although this does not preclude courts from striving to determine on which side of the line a particular rule will fall.[34] Professors Malcai and Levine-Schnur explain the "justificational priority" of rules.[35] Some procedural rules are adopted because they tend to lead to a just or moral outcome, while for others, the appropriateness of the outcome is justified by the use of the procedure itself. For the former, the rule's objective is to implement, and therefore justify, a morally proper outcome. For the latter, there is no *a priori* correct outcome, but merely the need for a procedural rule to reach a decision.

16. This distinction is of particular importance for Procedural Provisions in the constating documents of churches and other religious organizations. A Procedural Provision may be based on spiritual and ecclesiastical considerations, reflecting the group's notions of spiritual hierarchy and collective religious commitments. In that case, the outcome is religiously justified through the application of the Procedural Provision. Such rules could include those determining *who* makes a particular decision or the ecclesiastical processes that lead to the decision. However, the religious

---

[30] *Chief Rabbi* at p. 255
[31] *Amos* at pp. 344-345
[32] *Highwood* at para. 38
[33] *Chief Rabbi* at p. 255
[34] Mary Liston, "Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process", in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford Hart Publishing, 2016) [***Liston***]
[35] Ofer Malcai and Ronit Levine-Schnur, "Which Came First, the Procedure or the Substance? Justificational Priority and the Substance-Procedure Distinction" (2014) 34 Oxford Journal of Legal Studies , [BOA, Tab 4].

foundation of such a Procedural Provision will not be evident to an outsider.

17. Other Procedural Provisions may have no moral, spiritual, or religious foundation. It is just a way for the group to make necessary decisions. The problem is that the only way for a court to determine whether a Procedural Provision contains substantive spiritual content is to inquire deeply into, and try to fully understand, the doctrinal and religious commitments of the church. Additionally, determining whether there is a real failure to follow such a Procedural Provision requires an understanding of the importance of the rule to the group, for religious reasons. For example, whether or not a particular person within the church's structure actually made a required determination is inextricably linked to Doctrinal Commitments and Ecclesial Governance Provisions, the review of which is generally outside of the purview of the courts.[36]

18. The ***substance*** of membership disputes are non-justiciable. Members or former members of a church that feel aggrieved can only attack the process. But the real issue is still almost always one of religious substance, not the process itself.[37] Further, there is no easily applicable legal construct or cause of action that allows the court to review such procedural matters.[38]

19. In *Bruker*, *Lakeside Colony* and *Highwood* this Court determined that the law may still intervene in matters pertaining to religious organizations where civil or property rights have been invaded. A court may not then be precluded by the religious character of the dispute[39] but only when the essence of a dispute involving such rights is not spiritual or ecclesiastical.[40]

20. Since questions of membership are excluded from review,[41] the only possible role for the court is to determine matters of contract between the members, or between a member and the organization, if a legally recognizable contract exists.[42] Even then, the courts will not endorse or apply a religious norm, determine religious doctrine, or compel a religious obligation.[43]

---

[36] *Amos* at p. 344; *Ermogenous* at para. 36; *Amselem* at para. 50; *Highwood* at para. 36
[37] *Liston* at p. 26
[38] *Chafee* at pp. 995-999
[39] *Bruker* at paras. 41, 42, 43 and 47; *Lakeside Colony*; *Highwood* at paras. 27, 36, 38
[40] *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728 [***Hart***] at paras. 20, 23, 24
[41] *Highwood* at para. 29
[42] *Highwood* at para. 28; *Bruker* at paras. 10, 14, 16, 51
[43] *Bruker* at paras. 20, 43, 47 and 51

21. This leads directly to the question whether the association of co-religionists, itself, forms a contract that is enforceable by the court in membership issues. Since most provisions are outside of the court's review, the only remaining question is whether the Procedural Provisions of a constitution, bylaws or rules of a church form part of a legally enforceable contract. It is certainly possible for a member to enter into an enforceable contract with her church – such as for the purchase of property – but are consensual procedural terms adopted by the community a contract? The SDACC respectfully submits that they are not.

D. Religious Association Does Not Form an Enforceable Contract

22. The courts have applied a contractual theory to the terms of the association of non-religious voluntary organizations. But this has been done because other legal theories do not fit, and otherwise all decisions of voluntary associations would be immunized from court intervention. In *Senez*, Beetz J. applied the contractual theory to a non-religious voluntary organization because "what other basis" could there be?[44] But this is not a sound rationale when it comes to religious associations.

23. The "web of contracts" or "complex of contracts" approach to voluntary organizations is an artificial "legal fiction" that can be supplanted when organizations incorporate under a public or private statute.[45] While for some incorporated entities, the law may view the relationship to be "contractual in nature" for some purposes, it is "an unusual" contract at best.[46] Even for non-religious corporations, the contract theory is not universally accepted and does not fit well with many incorporated entities, whose members may have statutory rights and remedies.[47]

24. Foundationally, religious organizations lack a key component for the recognition of a

---

[44] *Senez v. Montreal Real Estate Board*, [1980] 2 SCR 555 at p. 567

[45] *Berry v. Pulley*, 2002 SCC 40 at paras. 2-5; *Ahenakew v. MacKay*, 2004 CanLII 12397 (ONCA) at paras. 21-26; *Chafee* at pp. 1002-1003, 1007-1008

[46] *Farrish* at paras. 46-48; See also *Karahalios v. Conservative Party of Canada*, 2020 ONSC 3145 [***Karahalios***] in which such a contract is described as "special" with parties that come and go, and for which a court has only limited jurisdiction even if the organization is not religious in nature (paras. 180-181)

[47] Kevin P. McGuinness, *Canadian Business Corporations Law*, 3d ed (Markham, ON: LexisNexis Canada, 2017), at §5.59-5.61, §5.65-5.67, §5.81; *Chafee* at p. 1008, [BOA, Tab 2].

contract between the members and between the members and the organization: the intention to create contractual relations. Church members do "not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization."[48] Their relationship is spiritual, not contractual, and they have submitted themselves to an ecclesiastical structure and government for church purposes.[49] This is also the line the Court drew in *Bruker*, where a contract with a religious component was justiciable because the parties "intended to have legally enforceable consequences."[50]

25. In treating the terms of association of a church as contractual, a court presumes there is an intention to enter legally enforceable contractual relations. It should not.[51] These associations are based on a spiritual consensus and a religious (not a legal) covenant. As stated by the Australian High Court:

> Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract.[52]

26. Since mere membership in a religious organization is not a civil right, neither should the adherence to religious and spiritual rules by which the organization is established and maintained be presumed to have a contractual foundation, enforceable at law. Presuming an intention to create a contractual relationship would violate the foundational principles that the courts will not become involved in spiritual matters.

27. As noted, a church's constitutions, bylaws and internal rules contain Doctrinal Commitments, Membership Provisions, Ecclesial Governance Provisions and Procedural Provisions. If there is a contract among the members, or between the members and the organization, are ***all*** of these provisions contractual? If they are, then they become enforceable at

---

[48] *Highwood* at para. 29; *Karahalios* at para. 182 ("… a court has only a limited jurisdiction…"). See also *Chafee* at p. 1003: "The fact is that a new member does not think of himself as forming any such vast network of executory transactions with other members … it is a consensual relation, but it is not usually regarded by him as mainly promissory."
[49] *Ermogenous* at paras. 36-37; *Watson v. Jones* at pp. 728-729; *Chafee* at pp. 1002, 1005, 1007
[50] *Bruker* at para. 47
[51] *Ermogenous* at para. 37
[52] *Cameron v. Hogan* (1934), 51 C.L.R. 358 (Aust HC) at p. 371; see also *Watson v. Jones* at pp. 728-729

law despite the fact that most of them remain non-justiciable. Such an approach would directly enmesh the courts in the spiritual matters they have so assiduously avoided.

28. Or, are only ***parts*** of these documents, contractual? That would be strange. Either there is an intention to create a contract or there is not. There cannot be an intention to create only a part of a contract.[53] If that were possible, who would determine which parts are contractual? Presumably a church would have made that determination based on its religious commitments and understanding, which would again remove the review from the court's purview.

29. Contractual remedies are not effective even where procedural rights are violated, since "[p]eople cannot be compelled to agree or socialize" with one another; organizations operate on the "mutual compatibility of its members" and a body remaking a decision after violating procedural rights "most likely will form the same conclusion again."[54]

30. The contractual approach would also create distinctions between various types of church organization. Those that create no written bylaws, as in *Highwood*, would be entirely immune from scrutiny on membership issues.[55] Those that reduce their spiritual and ecclesiastical structures to the written word, in whole or in part,[56] would be seen to have created contracts, only parts of which are enforceable. When courts examine secular contracts, there is no such oral/written distinction.

31. It is respectfully submitted that the better approach is to presume that these written documents are the codification of religious commitments and ecclesiastical law, regardless of whether the form of church government is episcopal, presbyterian, congregational, or some other model.[57] They are inherently theological and religious documents, not suited to judicial review for all of the reasons articulated in the jurisprudence.

32. While this approach would not necessarily discharge the courts from considering statutory remedies when a church decided to incorporate under a federal or provincial incorporation statute[58]

---

[53] *Chafee* at pp. 1004-1005
[54] *Turnbull-Spence et al v. Kamloops Long Blades Assn.*, 2004 BCSC 1500 at paras. 36-38
[55] *Highwood* at para. 28
[56] *Lakeside Colony* at pp. 190-191
[57] *Ogilvie* at pp. 80-81
[58] See for example *Bains v. Khalsa Diwan Society of Abbotsford*, 2020 BCSC 181

(if such statutory remedies exist), it would avoid the unwieldy and legally fictitious contract theory that secularizes the spiritual commitments of church members.

33. This approach would not preclude the courts from considering certain property interests as were in issue in *Lakeside Colony* and *Hofer v. Hofer*,[59] complaints regarding employment contracts where the essence of the complaint is not ecclesiastical,[60] or contracts between members and the organization extrinsic to the constating documents. It also would not preclude review of a contract between religious individuals that only had a connection with religion, as in *Bruker*, provided that it did not involve judicial review of a doctrinal religious principle.[61]

34. Presuming a contract among the members of religious organizations, even if only to enforce Procedural Provisions of constating documents, unavoidably creates what Professor Chafee called the "dismal swamp" problem, in which the court becomes enmeshed in attempting to wade through, understand and apply religious rules and doctrines, the intent and application of which is best left to the religious authorities.[62] Rejecting the notion that constating documents of religious organizations create a contract avoids the courts determining which religious doctrines or processes must be followed.

35. Instead, it is respectfully submitted that, consistent with *Highwood* and *Amselem*, all matters of mere membership, should remain free from court intervention. That is the only way to avoid secularizing the sacred commitments of members of religious organizations.

PART IV – COSTS

36. The SDACC seeks no costs and requests that no costs be ordered against them.

PART V – ORDERS SOUGHT

37. The SDACC seeks no specific order.

---

[59] *Hofer v. Hofer*, [1970] SCR 958

[60] Some employment disputes could be immune from judicial scrutiny when they involve spiritual and religious matters such as in *Ermogenous*, *Chief Rabbi, Serbian Orthodox* and *Hart*

[61] *Bruker* at paras. 43 and 47

[62] *Lakeside Colony* at pp. 190-191; *Chafee* at pp. 1021, 1023-1024

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of November, 2020.

Kevin L. Boonstra, **Counsel for the Intervener, Seventh-day Adventist Church in Canada**

PART VI – TABLE OF AUTHORITIES

AUTHORITIES	Paragraph(s)
Ahenakew v. MacKay, 2004 CanLII 12397 (ONCA)	23
Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 567	4
Bains v. Khalsa Diwan Society of Abbotsford, 2020 BCSC 181	32
Berry v. Pulley, 2002 SCC 40	23
Bruker v. Marcovitz, 2007 SCC 54	8, 19, 20, 24, 33
Cameron v. Hogan, 51 C.L.R. 358 (Aust HC)	25
Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos, 483 SC 327 (1987)	5, 10, 11, 13, 17
Ermogenous v. Greek Orthodox Community of SA Inc., [2002] HCA 8	10, 11, 17, 24, 25, 33
Farrish v. Delta Hospice Society, 2020 BCCA 312	11, 23
Garcia v. Kelowna Minor Hockey Assn., 2009 BCSC 200	8, 11
Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada, 2011 ONCA 728	19, 33
Highwood Congregation v. Wall, 2018 SCC 26	6, 8, 11, 13, 17, 19, 20, 24, 30, 35
Hofer v. Hofer, [1970] SCR 958	33
Jones v. Wolf, 443 US 595 (1979)	7, 10, 13
Karahalios v. Conservative Party of Canada, 2020 ONSC 3145	23, 24
Lakeside Hutterite Colony v. Hofer, [1992] 3 SCR 165	6, 8, 10, 19, 30, 33, 34
Lewery v. Salvation Army of Canada, 1993 CanLII 5290 (NBCA)	8, 10
Loyola High School v. Quebec (Attorney General), *2015 SCC 12*	4
Metropolitan Church of Bessarabia and Others v. Moldova, No. 45701/99, ECHR 2001-XII	4