

**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  
(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,  
WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA,  
BRITISH COLUMBIA HUMANIST ASSOCIATION, SEVENTH-DAY ADVENTIST  
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EVANGELICAL FELLOWSHIP OF CANADA and CATHOLIC CIVIL RIGHTS  
LEAGUE (jointly), and CANADIAN CENTRE FOR CHRISTIAN CHARITIES**

INTERVENERS

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**FACTUM OF THE INTERVENER**  
**WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA**  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I — OVERVIEW

1. Courts must be “slow to exercise jurisdiction over the question of membership in a voluntary association, especially a religious one.”<sup>1</sup> In *Highwood Congregation*, this Honourable Court enunciated sound reasons why courts must avoid entanglement in religious membership disputes, unless obvious *legal rights of importance*<sup>2</sup> hinge in the balance:

- mere membership in a religious organization should remain free from court intervention;<sup>3</sup>
- there is no free-standing right to procedural fairness;<sup>4</sup> and
- ecclesiastical issues are non-justiciable—courts do not have the legitimacy or institutional capacity to deal with such issues.<sup>5</sup>

2. In line with *Highwood Congregation*, courts should reject *in limine* claims failing to clearly identify legal rights of importance that turn on the question of religious membership.

3. The Ontario Court of Appeal in *Aga*<sup>6</sup> reopened the door to judicial intervention in religious membership disputes which had been firmly closed by this Court in *Highwood Congregation*. With respect, the Court of Appeal wrongly used a legal fiction this Honourable Court has repudiated to hop from unincorporated association to written contract based on the mere existence of a written constitution and bylaws and then skipped from there to legally enforced secular norms of procedural fairness. Such judicial enforcement requires intrusive interference with individual and collective freedom of religious belief and practice.

4. This appeal requires this Honourable Court to reiterate that mere religious membership—simply “belonging” to a voluntary religious association—even if that association has governing documents in order to be registered as a charity or to hold title to property, is not a legal right in

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<sup>1</sup> [Lakeside Colony of Hutterian Brethren v Hofer](#), [1992] 3 SCR 165, 1992 CarswellMan 138 at para 6 [*Lakeside Colony*]. **(Appellants’ Authorities)**

<sup>2</sup> *Lakeside Colony*, *supra* note 1 at paras 8-9; [Highwood Congregation of Jehovah’s Witnesses \(Judicial Committee\) v Wall](#), 2018 SCC 26 at paras 29, 31 [*Highwood Congregation*]. **(Appellants’ Authorities)**

<sup>3</sup> *Highwood Congregation*, *supra* note 2 at paras 24, 29.

<sup>4</sup> *Highwood Congregation*, *supra* note 2 at paras 12, 14.

<sup>5</sup> *Highwood Congregation*, *supra* note 2 at paras 2, 36.

<sup>6</sup> [Aga v Ethiopian Orthodox Tewahedo Church of Canada](#), 2020 ONCA 10 at paras 40-41 [*Aga*].



itself. As stated in *Highwood Congregation*, “there is no basis for the courts to intervene in the Congregation’s decision-making process; in other words, the matters in issue fall outside the courts’ jurisdiction.”<sup>7</sup>

## PART II — QUESTIONS IN ISSUE

5. Watch Tower Bible and Tract Society of Canada intervenes on two questions. First, does the mere existence of governing documents turn religious membership into an enforceable contractual right? The answer is “No.” Such reasoning, without more, fails to take into account fundamental principles of contract law, the purpose of the governing documents, and the inherently religious nature of congregants’ connection to their religious community. Second, are faith-based tenets, rules, and procedures governing membership in a religious association and which require interpretation of religious doctrine justiciable? Again, the answer is “No.” As this Honourable Court held in *Highwood Congregation*, courts must avoid becoming entangled in religious disputes about doctrine, religious adherence, and ecclesiastical procedure.

## PART III — STATEMENT OF ARGUMENT

### A. The Mere Existence of Governing Documents Does Not Make Religious Membership an Enforceable Contractual Right

6. The Ontario Court of Appeal in *Aga* misread the judgment in *Ahenakew v MacKay*, and ignored the law as stated by this Honourable Court in *Berry v Pulley*. It wrongly applied the legal fiction of a “web” or “complex of contracts” to an unincorporated religious association and then further presumed any governing documents became terms of the legal fiction.

7. In disputes involving the question of religious membership, courts should always require that a claimant set out a *prima facie* case demonstrating the existence of a contract, in accordance with the general principles of contract law as stated in *Highwood Congregation*.<sup>8</sup> No presumptions apply. Most often, religious membership concerns only *religious or spiritual* relationships.

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<sup>7</sup> *Highwood Congregation*, *supra* note 2 at para 31.

<sup>8</sup> *Highwood Congregation*, *supra* note 2 at para 29.

(i) **The Legal Fiction of a “Web of Contracts” Was Rejected in *Berry v Pulley***

8. The notion members of an unincorporated religious association are bound to one another by a web of contracts is wrong in law. As this Honourable Court stated in *Berry*, the idea of a web of contracts “arose as a legal fiction designed by courts as a way to exert jurisdiction over the internal affairs of a trade union. It allowed courts to circumvent the lack of legal status of unions and hold unions liable through the medium of its membership.”<sup>9</sup> The underlying problem which led to this legal fiction was that union membership is often a prerequisite to employment, forcing members to join the union based on its prescribed terms. The problem was resolved in *Berry* by formally recognizing “that when a member joins a union, a relationship in the nature of a contract arises between the member and the trade union *as a legal entity*.”<sup>10</sup>

9. *Berry* rejected the web of contracts legal fiction as ‘unnecessary, impractical, and detrimental’ adding, “it stretches the imagination to suppose that each and every member of a union makes an offer of membership to an individual who then accepts these various offers, or vice-versa, or that there takes place some mutual exchange of consideration between and among perhaps thousands of members.”<sup>11</sup>

10. Nor does *Ahenakew*<sup>12</sup> stand for the proposition the legal fiction of a web of contracts applies to religious associations. At paragraph 20 of *Ahenakew*, Goudge J.A., summarizes the majority decision in *Astgen*,<sup>13</sup> a case decided thirty-four years previously, involving the merger of two unions. “The voluntary association” referred to in paragraph 20 is a trade union. Goudge J.A. then went on to apply this Honourable Court’s decision in *Berry*, stating: “The legal fiction of the union as a voluntary association whose legal essence is simply a complex of contracts between all of its members was rejected as no longer appropriate.”<sup>14</sup>

11. *A fortiori*, a theory of implied contract between members of a *religious* association must be rejected and, in fact, was rejected in *Highwood Congregation*:

<sup>9</sup> [Berry v Pulley, 2002 SCC 40](#) at para 53 [*Berry*].

<sup>10</sup> *Berry*, *supra* note 9 at paras 48-51 [emphasis in original].

<sup>11</sup> *Berry*, *supra* note 9 at paras 4, 55.

<sup>12</sup> [Ahenakew v MacKay \(2004\), 71 OR \(3d\) 130 \(CA\)](#) [*Ahenakew*]. (**Appellants’ Authorities**)

<sup>13</sup> [Astgen v Smith \(1969\), \[1970\] 1 OR 129 \(CA\)](#). (**Appellants’ Authorities**)

<sup>14</sup> *Ahenakew*, *supra* note 12 at para 25.

Where one party alleges that a contract exists, they would have to *show* that there was an intention to form contractual relations. While this may be *more difficult to show in the religious context*, the general principles of contract law would apply.<sup>15</sup>

12. Furthermore, while the relationship between the member and the trade union ‘fits with ease into the contractual method’<sup>16</sup> the same cannot be said for voluntary religious membership and affiliation. Religious association is faith-based and religiously motivated, and unless a claimant brings a compelling case showing an obvious meeting of the minds over a bargain with enforceable legal rights at stake (such as an employment contract) courts should not assume jurisdiction.

13. Unlike unions or professional associations where membership is not just a contract issue but more importantly a livelihood issue, rarely does a legal right of sufficient importance turn on a question of religious membership. There is no justification for a court to *circumvent* an unincorporated religious association’s lack of legal status in order to resolve a religious dispute about membership.

**(ii) Governing Documents Do Not Create Presumption of Contract**

14. The Court of Appeal leapt from an implied contract to a written contract on the presumption any and all governing documents are contracts that bind all members and can be judicially enforced.<sup>17</sup> No intention required. Again, the basis for this sweeping presumption is said to be found in *Ahenakew*, but as demonstrated above that quotation misapplies the judgment. The Court of Appeal tried to support this proposition with a quotation from this Honourable Court’s judgment in *Senez*: “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.’”<sup>18</sup> In fact, Justice Beetz in *Senez* said, “when an individual decides to join *a corporation like the Board . . .*”<sup>19</sup> The Board in *Senez* was incorporated and controlled access to employment similar to a trade union. (*Senez* predates *Berry* by more than 20 years.) As pointed out in that same

<sup>15</sup> *Highwood Congregation*, supra note 2 at paras 28-29 [emphasis added].

<sup>16</sup> *Berry*, supra note 9 at para 55.

<sup>17</sup> *Aga*, supra note 6 at para 40.

<sup>18</sup> *Aga*, supra note 6 at para 42 [some emphasis added; some emphasis omitted].

<sup>19</sup> *Senez v Montreal Real Estate Board*, [1980] 2 SCR 555 at para 48 [*Senez*] [emphasis added].  
**(Appellants’ Authorities)**

quote, the constitution provided the legal basis for the Board to enforce arrears for dues, and contained numerous mutual legal obligations between the parties on which Mr. Senez' livelihood depended.<sup>20</sup> In those circumstances the Court found the relationship contractual in nature.

15. Pointing to the existence of a congregation's governing documents is not enough to show an intention to form contractual relations. More is required to avoid confusing religious adherence (or a 'religious contract based on norms that are faith-based') with the intention to form enforceable contractual relations.<sup>21</sup>

16. The fundamental elements of a contract are: (i) contractual intention; (ii) an agreement; and (iii) consideration,<sup>22</sup> which requires 'that something of value and of substance be exchanged for the promise sought to be enforced.'<sup>23</sup> The onus is on the party seeking to establish the existence of a contract to show one exists.

17. *Bruker v Marcovitz* demonstrates the robust analysis required to test a claim of contract breach in a religious context. *Bruker* involved a signed contract, a Consent to Corollary Relief, between divorcing parties. Even so, this Honourable Court did not *presume* the promise in the contract to obtain a *get* was legally binding. Instead, Abella J. for the majority thoroughly analyzed whether the written agreement to remove a religious barrier to remarriage was a valid contractual agreement at law. Abella J. noted, for example, the contractual provision was a "voluntary exchange of commitments intended to have legally enforceable consequences," negotiated with the assistance of separate legal counsel,<sup>24</sup> and the agreement to attend and obtain a *get* was part of the financial trade-offs negotiated by the parties.<sup>25</sup> Only after a detailed and careful review did this Honourable Court determine all the requirements for a valid contract were

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<sup>20</sup> *Senez, supra* note 19 at paras 35-39, 41.

<sup>21</sup> *Highwood Congregation, supra* note 2 at para 29.

<sup>22</sup> [Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp, 2020 SCC 29](#) at para 37; [VK Mason Construction Ltd v Bank of Nova Scotia, \[1985\] 1 SCR 271](#) at paras 19-22; [Warren v Football Canada, 2020 NSSC 29](#) at para 56. (**Appellants' Authorities**)

<sup>23</sup> Waddams, SM, *The Law of Contracts*, 7th ed (Thomson Reuters, 2017) at paras 119, 122. (**Book of Authorities of the Intervener, Watch Tower Canada (BOA Tab 2)**)

<sup>24</sup> [Bruker v Marcovitz, 2007 SCC 54](#) at paras 10, 23, 47, 69 [*Bruker*]. (**Appellants' Authorities**)

<sup>25</sup> *Bruker, supra* note 24 at para 12.

met in accordance with Quebec civil law. The Court ordered Mr. Marcovitz to pay damages for breach of a civil contract—he was *not* ordered to obtain a *get*.<sup>26</sup>

18. Likewise, a claim that governing documents are a contract must be subjected to rigorous scrutiny. All unincorporated associations are required by Canada Revenue Agency to have governing documents in order to register as a charity.<sup>27</sup> It cannot be presumed all such governing documents are intended to be contracts among members and legally enforceable by a court when the only intention is for members to receive tax deductible donation receipts. For Jehovah’s Witnesses, these governing documents do not include any rules for the ecclesiastical activity of the congregation as a *religion*. In such cases, the constitution has *no application whatsoever* to questions of religious adherence which, in the case of Jehovah’s Witnesses, are decided based solely on Biblical precepts.

19. Recently, the High Court in Britain applied this Honourable Court’s decision in *Highwood Congregation*. The plaintiff in *Otuo* claimed his disfellowshipping was *ultra vires* the Wimbledon Congregation because its constitution did not include provisions dealing with membership. The High Court held the constitution necessarily covered only discrete matters related to the law of charities that did not preclude the Congregation from disfellowshipping the plaintiff, and the religious reasons and procedure followed for doing so were not justiciable.<sup>28</sup> The UK Court of Appeal denied the plaintiff’s permission to appeal, viewing it as, “entirely without merit.” Simon J.A. agreed with the lower court’s finding that ‘power of expulsion was inherent to the spiritual organisation,’ and not based on the constitution.<sup>29</sup>

20. Demonstrating that the relationship is contractual is not a claimant’s only hurdle. In *Lakeside Colony*, this Honourable Court did not assume jurisdiction simply because there existed a contract between the parties. Rather, the Court stressed that, “while contractual, the rights in question are *of great importance* to all concerned, and are *susceptible of enforcement* by the

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<sup>26</sup> *Braker*, *supra* note 24 at paras 13, 39-64.

<sup>27</sup> See [Canada Revenue Agency, “What is a governing document?” \(online\)](#).

<sup>28</sup> [Otuo v Watch Tower Bible and Tract Society of Britain, \[2019\] EWHC 1349 \(QB\)](#) at paras 48, 118, 120-122.

<sup>29</sup> *Otuo v Morley and Watch Tower Bible and Tract Society of Britain*, (17 March 2020), UKCA, A2/2019/1645 (order rejecting permission to appeal) at para 3. **(BOA Tab 1)**

courts.”<sup>30</sup> In *Lakeside Colony*, the rights in question—property rights, and the right to earn a livelihood—were “of the utmost importance,” and these rights *turned* on the question of membership in the colony.<sup>31</sup>

21. A superior court judge should decline jurisdiction over a matter involving a religious membership dispute unless a claimant demonstrates a *prima facie* case with regard to the following elements: (i) evidence of an intent to enter into enforceable contractual relations (as opposed to formalities which exist only to facilitate religious relationships and communal worship); and (ii) a legal claim to something of legal or material value which is reliant on the parties respecting their mutual contractual obligations. Conversely, if it is clear that the dispute is ecclesiastical in nature, then as held in *Highwood Congregation* the matter is not justiciable and is beyond the court’s jurisdiction.

**(iii) Imposing Rules of Natural Justice on Religious Membership Decisions Interferes with Religious Freedom**

22. Individuals have the constitutional freedom to select coreligionists according to their own *faith-based* standards and procedures. Freedom of religion protects the right to take contrary views. Dickson C.J. wrote in *R v Big M Drug Mart Ltd*:

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of “the tyranny of the majority”.<sup>32</sup>

23. Internal religious procedures or rules governing membership decisions need not appear “good” or fair in the eyes of an outsider. In some cases, religious procedures might be at polar ends from what is expected from a secular body. For example, religious membership decisions could conceivably be based on sincerely-held religious beliefs that appear superstitious or unorthodox to the majority of society. But compelling a religious association to respect secular rules of procedural fairness for membership in the religious association would intrusively interfere with their freedom of religion. Freedom of religion allows a religious association to

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<sup>30</sup> *Lakeside Colony*, *supra* note 1 at para 8 [emphasis added].

<sup>31</sup> *Lakeside Colony*, *supra* note 1 at para 9.

<sup>32</sup> [R v Big M Drug Mart Ltd, \[1985\] 1 SCR 295](#) at para 96.

tailor its membership policies and procedures according to spiritual requirements that are valued by the association, even if these might seem unfair to a secular court.

**(iv) Religious Membership Concerns *Religious Relationships***

24. ‘Religion is about both religious beliefs and *religious relationships*.’<sup>33</sup> Seeing as “[r]eligious beliefs, by their very nature, are fluid and rarely static,”<sup>34</sup> it follows that religious relationships and the composition of religious associations are also naturally dynamic.

25. Freedom of religion involves the “ability of religious adherents to come together and create cohesive communities of belief and practice.”<sup>35</sup> This ‘coming together through communal institutions is a manifestation of religious belief.’ It is religiously motivated. The law cannot approach religious associations the same way it does business-like associations. Otherwise, religious membership will be “devoid of its meaning and purpose.”<sup>36</sup>

26. Independent of whether a religious entity has governing documents, “members of a congregation may not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization.”<sup>37</sup> As the UK Supreme Court stated in *Shergill et al v Khaira et al*, “transactions not intended by the participants to affect their legal relations” are non-justiciable.<sup>38</sup> In that circumstance, the members “may enjoy that happy state of freedom in which nobody is bound to anything” as described in *Dunnet v Forneri*.<sup>39</sup> In *Ermogenous v Greek Orthodox Community of SA Inc*, the High Court of Australia described this relationship as a “voluntary consensual compact” between members that would not be treated by the courts as “amounting to an enforceable contract.”<sup>40</sup>

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<sup>33</sup> [Loyola High School v Quebec \(AG\), 2015 SCC 12](#) at para 59, quoting from [Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37](#) at para 182.

<sup>34</sup> [Syndicat Northcrest v Amselem, 2004 SCC 47](#) at para 53 [*Syndicat Northcrest*].

**(Appellants’ Authorities)**

<sup>35</sup> [Law Society of British Columbia v Trinity Western University, 2018 SCC 32](#) at para 64.

<sup>36</sup> *Highwood Congregation*, *supra* note 2 at para 29.

<sup>37</sup> *Highwood Congregation*, *supra* note 2 at para 29.

<sup>38</sup> [Shergill et al v Khaira et al, \[2014\] UKSC 33](#) at para 43. **(Appellants’ Authorities)**

<sup>39</sup> [Dunnet v Forneri, 1877 CarswellOnt 66, 25 Gr. 199 \(Ont Ct Ch\)](#) at para 10.

**(Appellants’ Authorities)**

<sup>40</sup> [Ermogenous v Greek Orthodox Community of SA Inc, \[2002\] HCA 8](#) at paras 63-64.

**B. Faith-Based Tenets, Rules, and Procedures Governing Membership in a Religious Association Are Not Justiciable**

27. This Court in *Highwood Congregation* reaffirmed that courts have neither the legitimacy nor institutional capacity to deal with “religious disputes.” Such secular judicial determinations “unjustifiably entangle the court in the affairs of religion.”<sup>41</sup> Religious membership disputes *are* religious disputes. The fact a religious organization has governing documents does not change the inherently religious nature of religious affiliation.

28. Procedural rules that regulate a religious association are inextricably tied to religious belief. *Lakeside Colony* demonstrates it is generally impossible for a court to review whether a member has been “validly expelled” without interpreting and determining the content of religious customs or rituals in order to assess whether a religious group followed its own rules.<sup>42</sup> After determining that tradition and custom was the highest source of authority within the Hutterite colony, this Honourable Court endeavoured to identify and interpret these unwritten rules to determine whether the colony had acted in accordance with them.<sup>43</sup> This Honourable Court acknowledged its inquiry into the realm of religious sources of authority was a “vexing question.”<sup>44</sup>

29. Incorporating spiritual and doctrinal tenets and procedures into a religious organization’s governing documents as a dispute resolution clause, such as the steps outlined at Matthew 18:15-16,<sup>45</sup> does not make them justiciable. The simple fact a religious association has a constitution does not cloak a superior court judge with “the legitimacy and institutional

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<sup>41</sup> *Highwood Congregation, supra* note 2 at para 36, quoting from *Syndicat Northcrest, supra* note 34 at para 50.

<sup>42</sup> *Lakeside Colony, supra* note 1 at paras 10-13.

<sup>43</sup> *Lakeside Colony, supra* note 1 at paras 61-66.

<sup>44</sup> *Lakeside Colony, supra* note 1 at para 61.

<sup>45</sup> [Matthew 18:15-16](#) (New World Translation of the Holy Scriptures):

“Moreover, if your brother commits a sin, go and reveal his fault between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take along with you one or two more, so that on the testimony of two or three witnesses every matter may be established.”



capacity” to determine, for example, if congregation elders have prayed as required by the Scriptures or if a sinner was sufficiently repentant to avoid expulsion.

30. As this Court concluded in *Highwood Congregation*: “In the end, religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.”<sup>46</sup> The mere existence of governing documents does not automatically transform a dispute about religious membership into a *legal* dispute.

#### **PART IV — SUBMISSIONS CONCERNING COSTS**

31. Watch Tower Bible and Tract Society of Canada does not seek costs and asks that no costs be awarded against it.

#### **PART V — ORDER SOUGHT**

32. Watch Tower Bible and Tract Society of Canada makes no submissions in respect of the order on the merits of the appeal itself.

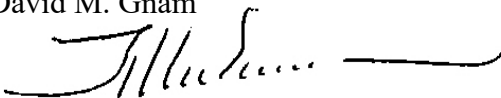
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of November, 2020.

Counsel for Intervener, Watch Tower Bible and Tract Society of Canada



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David M. Gnam



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Jayden MacEwan

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<sup>46</sup> *Highwood Congregation, supra* note 2 at para 39.

## PART VI — TABLE OF AUTHORITIES

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