

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

BETWEEN:

ETHIOPIAN ORTHODOX TEWAHEDO CHURCH OF CANADA  
ST. MARY CATHEDRAL, MESALE ENEGEDA, 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 CANADAIAN MUSLIMS,  
EGALE CANADA HUMAN RIGHTS TRUST and  
CANADIAN CENTRE FOR CHRISITAN CHARITIES

Interveners

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**FACTUM OF THE INTERVENER,  
CANADIAN CIVIL LIBERTIES ASSOCIATION**

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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

**Cara Zwibel**  
Tel: 416.646.1409  
Fax:  
Email: [cwibel@ccla.org](mailto:cwibel@ccla.org)

Counsel for the Proposed Intervener,  
Canadian Civil Liberties Association

**Borden Ladner Gervais LLP**  
1300 - 00 Queen Street  
Ottawa, ON K1P 1J9

**Nadia Effendi**  
Tel: 416.367.6728  
Fax:  
Email: [neffendi@blg.com](mailto:neffendi@blg.com)

Ottawa Agent for the Proposed Intervener,  
Canadian Civil Liberties Association

**Original To: Registrar**  
Supreme Court of Canada  
301 Wellington Street  
Ottawa, ON K1A 0J1

COPY TO:

**Philip H. Horgan**  
301 - 120 Carlton Street  
Toronto, ON M5A 4K2

**Philip H. Horgan | Mary E. Zettel**  
**Raphael T.R. Fernandes**  
Tel: 416.777.9994  
Fax: 416.777.9921  
Email: [phorgan@carltonlaw.ca](mailto:phorgan@carltonlaw.ca)

Counsel for the Appellants,  
Ethiopian Orthodox Tewahedo Church of  
Canada St. Mary Cathedral, Mesale Enegeda,  
Abune Dimetros and Hiwot Bekele

**Supreme Advocacy LLP**  
100 - 340 Gilmour Street  
Ottawa, ON K2P 0R3

**Marie-France Major**  
Tel: 613.695.8855 Ext: 102  
Fax: 613.695.8580  
Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

Agent for the Appellants,  
Ethiopian Orthodox Tewahedo Church of  
Canada St. Mary Cathedral, Mesale Enegeda,  
Abune Dimetros and Hiwot Bekele

**Lento Professional Corporation**

504 - 3200 Dufferin Street  
Toronto, ON M6A 3B2

**Anthony Colangelo**

Tel: 416.398.4044  
Fax: 416.398.7396  
Email: [acolangelo@lentolaw.com](mailto:acolangelo@lentolaw.com)

Counsel for the Respondents,  
Teshome Aga, Dereje Goshu, Tseduke Gezew  
and Belay Hebest

**Abrahams LLP**

204 - 1457 McCowan Road  
Toronto, ON M1S 5K7

**Shahzad F. Siddiqui**

Tel: 416.291.6786  
Fax: 416.291.8784  
Email: [shahzad@abrahamsllp.com](mailto:shahzad@abrahamsllp.com)

Counsel for the Intervener,  
Canadian Muslim Lawyers Association

**Association for Reformed Political Action**

(ARPA) Canada  
1705 - 130 Albert Street  
Ottawa, ON K1P 4G4

**John Sikkema**

**Marie-France Major**

Tel: 416.992.9877  
Fax: 613.249.3238  
Email: [john@arpacanada.ca](mailto:john@arpacanada.ca)

Counsel for the Intervener,  
Association for Reformed Political Action  
Canada

**Supreme Advocacy LLP**

100 - 340 Gilmour Street  
Ottawa, ON K2P 0R3

**Eugene Meehan, Q.C.**

Tel: 613.695.8855 Ext: 101  
Fax: 613.695.8580  
Email: [emeehan@supremeadvocacy.ca](mailto:emeehan@supremeadvocacy.ca)

Agent for the Intervener,  
Association for Reformed Political Action  
Canada

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

**Nadia Effendi | Mannu Chowdhury**  
Tel: 416.367.6000  
Fax: 416.367.6749  
Email: [neffendi@blg.com](mailto:neffendi@blg.com)  
[mchowdhury@blg.com](mailto:mchowdhury@blg.com)

**National Council of Canadian Muslims**  
300 – 116 Albert Street  
Ottawa, ON K1P 5G3

**Sameha Omer**  
Tel: 613.254.9704 Ext: 224  
Fax: 613.701.4062  
Email: [somer@nccm.ca](mailto:somer@nccm.ca)

Counsel for the Intervener,  
National Council of Canadian Muslims

**Vincent Dagenais Gibson LLP**  
400 - 260 Dalhousie Street  
Ottawa, ON K1N 7E4

**Albertos Polizogopoulos**  
Tel: 613.241.2701  
Fax: 613.241.2599  
Email: [albertos@vdg.ca](mailto:albertos@vdg.ca)

Counsel for the Intervener,  
Evangelical Fellowship of Canada and  
Catholic Civil Rights League

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

**Nadia Effendi**  
Tel: 613.787.3562  
Fax: 613.230.8842  
Email: [neffendi@blg.com](mailto:neffendi@blg.com)

Agent for the Intervener,  
National Council of Canadian Muslims

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

**David M. Gnam**  
**Jayden MacEwan**

Tel: 905.873.4545

Fax: 905.873.4522

Email: [dgnam@wghow.ca](mailto:dgnam@wghow.ca)

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

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

**Weley J. McMillan**

Tel: 604.282.3980

Fax: 604.628.3832

Email: [wes@amlc.ca](mailto:wes@amlc.ca)

Counsel for the Intervener,  
British Columbia Humanist Association

**Kuhn LLP**

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](mailto:kboonstra@kuhnco.net)

Counsel for the Intervener,  
Seventh-day Adventist Church in Canada

**Supreme Advocacy LLP**  
100 - 340 Gilmour Street  
Ottawa, ON K2P 0R3

**Eugene Meehan, Q.C.**

Tel: 613.695.8855 Ext: 101

Fax: 613.695.8580

Email: [emeehan@supremeadvocacy.ca](mailto:emeehan@supremeadvocacy.ca)

Agent for the Intervener,  
Watch Tower Bible and Tract Society of  
Canada

**Gowling WLG (Canada) LLP**  
2600 – 160 Elgin Street  
Ottawa, ON K1P 1C3

**Jeffrey W. Beedell**

Tel: 613.786.0171

Fax: 613.788.3587

Email: [jeff.beedell@gowlingwlg.com](mailto:jeff.beedell@gowlingwlg.com)

Agent for the Intervener,  
British Columbia Humanist Association

**Supreme Advocacy LLP**

100 - 340 Gilmour Street  
Ottawa, ON K2P 0R3

**Marie-France Major**

Tel: 613.695.8855 Ext: 102

Fax: 613.695.8580

Email: [emeehan@supremeadvocacy.ca](mailto:emeehan@supremeadvocacy.ca)

Agent for the Intervener,  
Seventh-day Adventist Church in Canada

**McCarthy Tétrault LLP**  
5300 Toronto Dominion Bank Tower  
Toronto, ON M5K 1E6

**Adam Goldenberg**  
**Connor Bildfell**  
Tel: 416.601.8357  
Fax: 416.868.0673  
Email: [agoldenberg@mccarthy.ca](mailto:agoldenberg@mccarthy.ca)

Counsel for the Intervener,  
Egale Canada Human Rights Trust

**Canadian Council of Christian Charities**  
1-43 Howard Avenue  
Elmira, ON N3B 2C9

**Barry W. Bussey**  
**Deina Warren**  
**Marie-France Major**  
Tel: 519.669.5137  
Fax: 519.669.3291  
Email: [barry.bussey@cccc.org](mailto:barry.bussey@cccc.org)

Counsel for the Intervener,  
Canadian Centre of Christian Charities

**Christian Legal Fellowship**  
202 - 285 King Street  
London, ON N6B 3M6

**Derek B.M. Ross**  
**Sarah E. Mix-Ross**  
**Benjamin Ferland**  
**Marie-France Major**  
Tel: 519.601.4099  
Fax: 519.601.4098  
Email: [execdir@christianlegalfellowship.org](mailto:execdir@christianlegalfellowship.org)

Counsel for the Intervener,  
Christian Legal Fellowship

**Juristes Power**  
1103 – 130 Albert Street  
Ottawa, ON K1P 5G4

Tel: 613.702.5666  
Fax: 613.705.5566  
Email: [dbosse@juristespower.ca](mailto:dbosse@juristespower.ca)

Agent for the Intervener,  
Egale Canada Human Rights Trust

**Supreme Advocacy LLP**  
100 - 340 Gilmour Street  
Ottawa, ON K2P 0R3

**Eugene Meehan, Q.C.**

Tel: 613.695.8855 Ext: 101  
Fax: 613.695.8580  
Email: [emeehan@supremeadvocacy.ca](mailto:emeehan@supremeadvocacy.ca)

Agent for the Intervener,  
Canadian Centre of Christian Charities

**Supreme Advocacy LLP**  
100 - 340 Gilmour Street  
Ottawa, ON K2P 0R3

**Eugene Meehan, Q.C.**

Tel: 613.695.8855 Ext: 101  
Fax: 613.695.8580  
Email: [emeehan@supremeadvocacy.ca](mailto:emeehan@supremeadvocacy.ca)

Agent for the Intervener,  
Christian Legal Fellowship

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## **PART I – OVERVIEW AND STATEMENT OF FACTS**

### **A. OVERVIEW**

1. The Canadian Civil Liberties Association (“CCLA”) was granted leave by this Court to address fundamental questions that consider the appropriate boundaries of the court’s jurisdiction and the justiciability of disputes and enforceability of remedies which may touch upon religious obligations. The way in which this Court answers these questions has significant implications for the protection of state neutrality, religious freedom, and access to justice.

2. CCLA’s submissions first consider whether an incorporated religious association’s constitution and by-laws necessarily and automatically give rise to civil rights that can be enforced in court. As this Court held in *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*,<sup>1</sup> a dispute regarding a voluntary religious association will only be justiciable if there is an underlying legal right at issue. In assessing whether a religious association’s constating documents give rise to such a right, courts must consider the circumstances under which a member joined the association and whether there was a mutual intent to be bound by the terms contained therein. There may be special considerations that are relevant in evaluating a mutual intent to be bound in the context of religious contracts.

3. Moreover, where an underlying legal right is found, the court must still consider whether the issues to be adjudicated are justiciable and the remedy sought is enforceable - distinct but related concepts.

4. Justiciability queries whether a court has “the institutional capacity and legitimacy to adjudicate the matter”.<sup>2</sup> While a court may properly adjudicate a dispute involving a religious subject matter, courts should exercise caution where adjudication requires wading into ecclesiastical matters or imposing obligations based on the court’s own understanding of what a particular faith requires. This approach is consistent with the development of the common law.

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<sup>1</sup> 2018 SCC 26 [*Wall*].

<sup>2</sup> *Ibid.*, para 34.



5. Finally, where there is a legal right that is justiciable, the court must consider if enforcement would unduly tread on constitutionally protected rights, including freedom of religion and freedom of association. This consideration may limit the remedial options available to a court.

## **B. STATEMENT OF FACTS**

6. CCLA takes no position on the facts in this case or the evidentiary record. This factum will focus on the general legal principles to apply in cases where the court is asked to intervene in the ostensibly internal affairs of a voluntary religious association.

## **PART II – QUESTIONS IN ISSUE**

7. The CCLA will focus on two aspects of the appeal:

a) how to determine when an incorporated religious association’s constitution and by-laws give rise to rights enforceable in civil courts; and

b) the justiciability of claims and enforceability of remedies in light of the principle of state neutrality and the constitutional protection of freedom of religion.

## **PART III – STATEMENT OF ARGUMENT**

### **A. STATE NEUTRALITY, RELIGIOUS FREEDOM AND ACCESS TO JUSTICE**

8. CCLA’s submissions are grounded in a deep and abiding belief in the importance of state neutrality and respect for religious freedom. CCLA also recognizes that denying an individual recourse to the civil courts is a serious consequence. Adjudication of claims with a religious component will require a careful balancing of these considerations.

9. Freedom of religion includes the notion that the State may not impose the tenets of any one particular faith upon its citizens.<sup>3</sup> It also requires that the State respect the freedom of individuals and communities to hold beliefs and engage in practices according to their religion or conscience. In *R. v. Edwards Books and Art Ltd.*, Dickson C.J. stated that the purpose of s. 2(a) of the *Charter* is “to ensure that society does not interfere with profoundly personal beliefs that govern one’s

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<sup>3</sup> *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295.

perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."<sup>4</sup>

10. Questions about when a court may intervene in a dispute with a religious character or subject matter require a balance between meaningful protection of freedom of religion and the values of a secular state - which is supposed to be neutral when it comes to matters of religion. This Court considered this balance in *Loyola High School v. Quebec (Attorney General)*, noting:

A secular state does not – and cannot – interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. Nor can a secular state support or prefer the practices of one group over those of another...The pursuit of secular values means respecting the right to hold and manifest different religious beliefs.<sup>5</sup>

11. Respect for religious freedom does not mean turning a blind eye to the potential for religious institutions and communities to visit harm upon their members by breaching legal rights to which they may be entitled. As a result, courts reluctant to intervene in matters that touch upon a religious subject matter must be cognizant of the impact this may have on meaningful access to justice for an individual claimant.

## **B. CONSTITUTION AND BY-LAWS INSUFFICIENT TO GROUND A CONTRACTUAL CLAIM**

12. At the heart of this appeal is a question about the significance of a religious association's constitution and by-laws. The Appellant and Respondent frame the issue and appropriate response in dramatically different terms, due in part to the Ontario Court of Appeal's articulation of a hard and fast rule: "Voluntary associations do not always have written constitutions and by-laws. But when they do exist, they constitute a contract setting out the rights and obligations of members and the organization."<sup>6</sup>

13. From the Appellants' perspective, it will rarely, if ever, be suitable for a court to weigh in on questions of membership in a voluntary religious association, regardless of whether there is a

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<sup>4</sup> [1986] 2 S.C.R. 713 at 759.

<sup>5</sup> 2015 SCC 12, para 43, citations omitted.

<sup>6</sup> *Aga v Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10, para 40.

constitution and by-laws. From the Respondents' perspective, the mere existence of a written constitution would appear to be sufficient to allow for judicial intervention in a wide variety of matters.

14. CCLA's position is that a more nuanced approach is required in order to ensure that religious associations are not treated as presumptively immune from all judicial intervention, while at the same time guarding against excessive judicial interference in the internal matters of such bodies. This approach aims to uphold state neutrality while giving due respect to both freedom of religion and the importance of access to justice.

15. This appeal provides the Court with an opportunity to reiterate and refine its holding in *Wall*. The Court's *ratio* in that case was driven significantly by the framing as an application for judicial review and the Court's recognition that "judicial review is a public law concept".<sup>7</sup> As such, *Wall* should not be read as creating a judicial "no-go" zone vis-a-vis voluntary religious associations.

16. While *Wall* clearly recognizes that the membership decisions of voluntary religious associations will be largely autonomous, it also acknowledges the need for a case-by-case assessment to determine if there is a *legal* dispute or right over which the court may exercise jurisdiction. As this Court held:

Even if Mr. Wall had filed a standard action by way of statement of claim, his mere membership in a religious organization – where no civil or property right is granted by virtue of such membership – should remain free from court intervention. Indeed, there is no free-standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.<sup>8</sup>

17. The determination of whether there is a legal right will require examining the particularities of the religious association. This will include considering whether it is grounded in a public statute

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<sup>7</sup> *Wall*, *supra* note 1, para 13.

<sup>8</sup> *Ibid.*, para 24.

that might give rise to oppression remedies.<sup>9</sup> It will also consider whether the association is governed by a written constitution and by-laws. The nature and history of its relationship to and with members will also be relevant.

18. *Wall* dealt with an unincorporated religious association with no constitution or by-laws. However, nothing in the decision implies that the existence of such constating documents automatically and necessarily gives rise to underlying legal rights that can be adjudicated by the courts. To the contrary, this Court recognized that claiming a contractual right in the context of a voluntary religious association may invoke special considerations:

...members of a congregation may not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization, since “[a] religious contract is based on norms that are often faith-based and deeply held”. *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>10</sup>

19. In assessing whether there was an intention to form contractual relations, the religious nature of the association may be relevant in at least two ways. First, as noted above, a party who joins a religious association (or has simply always been a member due to long-standing family ties) may not have conceived of the relationship as a contractual one and may not even be aware of the existence of a constitution or by-laws. Second, there may be some question as to whether an individual has a meaningful choice about entering a contract with a religious association,<sup>11</sup>

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<sup>9</sup> See e.g. *Bains v Khalsa Diwan Society of Abbotsford*, 2020 BCSC 181 and *Mathai v George*, 2019 ABQB 116.

<sup>10</sup> *Wall*, *supra* note 1, para 29 (citations omitted, emphasis added).

<sup>11</sup> See Moon, Richard. “*Bruker v. Marcovitz: Divorce and the Marriage of Law and Religion.*” (2008), 42 S.C.L.R. (2d) 37 at 41: “The parties to a religious contract may be connected by a common history and a shared commitment to a set of faith-based norms and practices. They may be materially and psychologically tied to their spiritual community. In this context, pressure to agree may be applied by family and friends....She/he may feel “compelled” to agree to contractual terms that are presented as morally binding, or as elements of community membership. Because individuals are deeply tied to their religious communities, they may feel significant pressure to submit to the rules or expectations of their community.”

particularly where a single constitution governs not just one congregation, but an entire national religious order.

20. In light of these considerations, CCLA respectfully submits that courts should exercise some restraint in finding a mutual intent to be bound when the members of a religious association had no or limited knowledge of or exposure to the constitution and by-laws. In any event, such considerations must be factored into the contractual analysis undertaken by a court. The Court of Appeal's seemingly irrebuttable presumption that a constitution and by-laws automatically and necessarily give rise to a contractual right should be rejected.

### **C. JUSTICIABILITY AND ENFORCEABILITY IN LIGHT OF RELIGIOUS FREEDOM AND STATE NEUTRALITY**

21. When faced with a dispute within a religious community or context, the court should first assess whether there is a legal right at issue (e.g. tort or contractual claim, claim grounded in statute, claim grounded in restitution). However, a determination that a legal right is at stake does not end the inquiry; questions of justiciability and enforceability may still arise. Though related, these concepts are distinct. Even obligations that the court finds are set out in a legally valid contract, for example, may not be justiciable if they are based upon and require interpretation of religious doctrine or duties. Indeed, a single contract (or an association's constitution and by-laws) may give rise to both justiciable and non-justiciable matters.

22. The justiciability question in this context is about ensuring that the court has the institutional capacity to address the issue without becoming "the arbiter of religious dogma." As this Court held in *Amselem*:

courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.<sup>12</sup>

23. Reluctance to enforce agreements based on religious norms or dealing with religious matters may have several sources. According to Prof. Moon:

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<sup>12</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47, para 50.

There are several reasons why the courts may hesitate or refuse to enforce agreements that are based on religious norms or deal with religious matters. First, the interpretation of such an agreement may draw the courts into disputes about the proper understanding of religious doctrine or practice. Second, legal enforcement may be inappropriate given the subject matter of the agreement (matters of faith or deep commitment) and the relationship between the parties (members of a community bound by a shared commitment to a set of values/practices or to a way of life). Third, agreements between religious community members may be tainted by undue influence or unfair pressure.<sup>13</sup>

24. In *Bruker v. Marcovitz*, this Court found that the agreement at the heart of the case was “negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences.”<sup>14</sup> As a result, the matter was justiciable and would not entangle the court in questions of religious doctrine.

25. The line drawing involved in assessing whether a contract gives rise to religious or non-religious obligations will often be challenging. Indeed, there was division among the members of this Court in assessing the nature of the obligations at stake in *Bruker*. CCLA submits that courts should ask whether a question requires the interpretation of a religious text, whether it requires a court to opine on a matter that is heavily contested within the religious community (and not just as between the parties), and whether a religious institution would recognize a civil order in respect of the matter. While not exhaustive, these factors may help to appropriately characterize an obligation.

26. For example, even where a court determines that the *merits* of a decision to expel members from a congregation would involve the adjudication of religious doctrine, the court may still be able to consider whether the expulsion was carried out according to the applicable rules. A court may be able to assess whether a procedure chosen by an association was followed, even if the procedure itself is intended to give effect to doctrinal principles.

27. Closely related to the question of justiciability, a court may also be required to consider whether enforcement would unduly tread on constitutionally protected rights, including freedom of religion and freedom of association. Thus, in a breach of contract case, the party against whom enforcement is sought may have a defence, arguing that enforcement would amount to an

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<sup>13</sup> Moon, *supra* note 11 at 41.

<sup>14</sup> 2007 SCC 54, para 47.

unreasonable restriction on their religious freedom. As this Court has repeatedly acknowledged, religious freedom claims are not assessed by consulting religious texts or experts, but rather by considering the sincerity of the claimant's belief.

28. Without taking a position on the outcome of this appeal, a court order requiring church leadership to make certain declarations to a congregation is likely to constitute a significant intrusion on religious freedom. Along similar lines, an order of specific performance in *Bruker* (i.e. requiring the husband to grant the wife a *get*) posed a greater threat to the husband's religious freedom than the award of damages that was in fact sought and granted. Specific performance may be a particularly difficult remedy in relation to contractual claims that have a religious subject matter. As this Court held in *Bruker*:

To determine whether a particular claim to freedom of religion is entitled to protection, a court must take into account the particular religion, the particular religious right, and the particular personal and public consequences, including the religious consequences, of enforcing that right.<sup>15</sup>

29. In sum, even where legal rights are concerned, and the court has a justiciable question before it, the remedial options available may be constrained by the importance of religious freedom.

#### **PARIT IV – SUBMISSION ON COSTS**

30. The CCLA does not seek costs in this matter and asks that no award of costs be made against it.

#### **PARTI V – ORDER SOUGHT**

31. The CCLA takes no position on the outcome of the appeal.

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<sup>15</sup> *Ibid.*, para 18.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 23<sup>rd</sup> day of November 2020.

Per:



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**Cara Zwibel**  
Counsel for the Intervener,  
Canadian Civil Liberties Association



**PART VI – TABLE OF AUTHORITIES**

**Caselaw**

No.	Authority	Paragraph Reference
1.	<i>Aga v Ethiopian Orthodox Tewahedo Church of Canada</i> , <a href="#">2020 ONCA 10</a>	12
2.	<i>Bains v Khalsa Diwan Society of Abbotsford</i> , <a href="#">2020 BCSC 181</a>	17
3.	<i>Bruker v Marcovitz</i> , <a href="#">2007 SCC 54</a>	24, 28
4.	<i>Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall</i> , <a href="#">2018 SCC 26</a>	2, 4, 15, 16, 18
5.	<i>Loyola High School v Quebec (Attorney General)</i> , <a href="#">2015 SCC 12</a>	10
6.	<i>Mathai v George</i> , <a href="#">2019 ABQB 116</a>	17
7.	<i>R. v Big M Drug Mart Ltd.</i> , <a href="#">[1985] 1 S.C.R. 295</a>	9
8.	<i>R. v. Edwards Books and Art Ltd.</i> , <a href="#">[1986] 2 S.C.R. 713</a>	9
9.	<i>Syndicat Northcrest v Amselem</i> , <a href="#">2004 SCC 47</a>	22

**Secondary Sources**

No.	Secondary Source	Paragraph Reference
1.	Moon, Richard. “ <a href="#">Bruker v. Marcovitz: Divorce and the Marriage of Law and Religion.</a> ” (2008), 42 S.C.L.R. (2d) 37 at 41	19, 23

**Statutes, Regulations, Rules, etc.**

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
1.	<i>The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)</i> , 1982, c 11	<a href="#">s. 2(a)</a>
	<i>Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U)</i> , 1982, c 11	<a href="#">s. 2(a)</a>

**PART VII – STATUTES, REGULATIONS, ETC.**

See Part VI