

**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**

APPLICANTS

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 CANADIAN CENTRE FOR
CHRISTIAN CHARITIES**

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

**CANADIAN CENTRE FOR CHRISTIAN
CHARITIES**

1-43 Howard Ave.
Elmira, Ontario N3B 2C9

Barry W. Bussey

Deina Warren

Tel: (519) 669-5137

SUPREME ADVOCACY LLP

340 Gilmour Street
Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.

Marie-France Major

Tel: (613) 695-8855

Fax: (519) 669-3291
Email: barry.bussey@cccc.org
deina.warren@cccc.org

**Counsel for the Canadian Centre for
Christian Charities**

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
E-mail: phorgan@carltonlaw.ca

**Counsel for the Applicants Ethiopian
Orthodox Tewahedo Church of Canada St.
Mary Cathedral, Messale Engeda, Abune
Dimetros and Hiwot Bekele**

**LENTO PROFESSIONAL
CORPORATION**
3200 Dufferin Street, Suite 504
Toronto, Ontario M6A 3B2

Anthony Colangelo
Tel.: (416) 398-4044
Fax: (416) 398-7396
E-mail: acolangelo@lentolaw.com

**Counsel for the Respondents Teshome Aga,
Yoseph Beyene, Dereje Goshu, Tseduke
Gezaw and Belay Hebest**

**Association for Reformed Political Action
Canada**
130 Albert Street, Suite 1705
Ottawa, Ontario K1P 5G4

John Sikkema/Marie-France Major
Tel: 416-992-9877
Fax: (613) 249-3238
Email: john@arpacanada.ca

Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

**Ottawa Agent for Counsel for the Moving
Party/Proposed Interveners**

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

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

**Agent for the Applicants Ethiopian
Orthodox Tewahedo Church of Canada St.
Mary Cathedral, Messale Engeda Abune
Dimetros and Hiwot Bekele**

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

Eugene Meehan, Q.C.
Tel: (613) 695-8855 Ext: 101
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Counsel to the Intervener, Association for Reformed Political Action

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

Counsel to the Intervener, Watchtower Tract and Bible Society of Canada

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 to the Interveners, Evangelical Fellowship of Canada and Catholic Civil Rights League

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
Fax: (519) 601-4098
Email: execdir@christianlegalfellowship.org

Counsel to the Intervener, Christian Legal Fellowship

Ottawa Agent for Counsel to the Intervener Association for Reformed Political Action

Supreme Advocacy LLP

100 - 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Eugene Meehan, Q.C.

Tel: (613) 695-8855 Ext: 101
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for Counsel to the Intervener Watchtower Tract and Bible Society of Canada

Supreme Advocacy LLP

100 - 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Eugene Meehan, Q.C.

Tel: (613) 695-8855 Ext: 101
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for Counsel to the Intervener Christian Legal Fellowship

Kuhn LLP

100-32160 South Fraser Way
Abbotsford, British Columbia V2T 1W5

Kevin L. Boonstra/Jonathan B. Maryniuk

Tel: 604-864-8877
Fax: 604-864-8867
Email: kboonstra@kuhnco.net

**Counsel to the Intervener, Seventh-Day
Adventist Church in Canada**

Borden Ladner Gervais LLP

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, Ontario M5H 4E3

Mannu Chowdhury

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

**Counsel to the Intervener, National Council
of Canadian Muslims**

Canadian Civil Liberties Association

90 Eglinton Ave. East, suite 900
Toronto, Ontario M4P 2Y3

Borden Ladner Gervais LLP

World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9

Cara Faith Zwibel

Tel: 416-646-1409
Email: czwibel@ccla.org

**Counsel to the Intervenor, Canadian Civil
Liberties Association**

Supreme Advocacy LLP

100 - 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for Counsel to the
Intervener Seventh-Day Adventist Church
in Canada**

Borden Ladner Gervais LLP

World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9

Nadia Effendi

Tel: 613-237-5160
Fax: 613-230-8842
Email: neffendi@blg.com

**Ottawa Agent for Counsel to the
Intervenor, National Council of Canadian
Muslims**

Borden Ladner Gervais LLP

World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9

Nadia Effendi

Tel: 613-237-5160
Fax: 613-230-8842
Email: neffendi@blg.com

**Ottawa Agent for Counsel to the
Intervenor, Canadian Civil Liberties
Association**

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

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

**Counsel for the Intervener, British
Columbia Humanist Association**

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

Adam Goldenberg/Connor Bildfell
Tel: 416-601-8357
Fax: 416-868-0673
Email: agoldenberg@mccarthy.ca

**Counsel for the Intervener, Egale Canada
Human Rights Trust**

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**

Gowlings WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Jeffrey W. Beedell
Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingswlg.com

**Ottawa Agent for Counsel to the
Intervener British Columbia Humanist
Association**

Juristes Power
130 rue Albert, bureau 1103
Ottawa, Ontario K1P 5G4

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

**Ottawa Agent for Counsel to the
Intervener Egale Canada Human Rights
Trust**

Hameed Law
43 Florence Street
Ottawa, ON K1P 0W6

Nicholas Valela
Tel: 613-232-2688
Fax: 613-232-2680
Email: nvalela@hameedlaw.ca

**Agent for Counsel for Muslims Lawyers
Association**

TABLE OF CONTENTS

PART I – OVERVIEW	1
PART II – POSITION ON QUESTION IN ISSUE	1
PART III – STATEMENT OF ARGUMENT	2
Causes of Action	2
Contracts and Voluntary Associations	3
A. What is a gift at law?	3
i. Common law understanding of gift applies	4
ii. Tax law understanding of gift applies	5
B. What is a gift in religion?	7
C. What is a gift in Aga? Clarification is Necessary	9
D. Conclusion	10
PART IV & V – COSTS AND ORDER SOUGHT PART	10
VI – TABLE OF AUTHORITIES	11

PART I – OVERVIEW

“[A] religious incident reverberates from one end of this country to the other, and there is nothing to which the ‘body politic of the Dominion’ is more sensitive.” – Justice Ivan Rand¹

1. Is the religious practice of giving to a church the same as consideration in a civil contract? The Court below suggests it is. That is an extremely troubling conclusion. It not only fundamentally alters the relationship between adherent and religious body, but it also has the potential to fundamentally alter the very notion of charity, donations, and gifts.
2. The Ontario Court of Appeal interpreted financial contributions by members of a religious community as consideration, forming a binding membership contract between the adherent and the religious body with civil legal obligations enforceable in court.² The Respondents identified no proprietary or other legal right, but only their status as church members and their desire to see internal church matters dealt with in a particular way.³
3. In contrast, this Honourable Court’s decision in *Wall v. Highwood Congregation* made it abundantly clear that “there is no free-standing right to procedural fairness. Courts may only interfere to address the procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake.”⁴
4. The entire charitable sector needs clarity, certainty and guidance from this Honourable Court, specifically the ability of voluntary communities to freely determine membership in accordance with their own culture, beliefs, and practices, including the practice of giving financial support.

PART II – POSITION ON QUESTION IN ISSUE

5. As it stands, the Ontario Court of Appeal decision transforms the religious practice of financial donations to a church into a legally enforceable contract. This is at odds with the common

¹ *Saumur v. City of Quebec*, [1953] 2 SCR 299, at 329.

² *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10, at para. 46 [“Aga”].

³ Typescript of the Reasons for Judgment of Justice S. Nishikawa (26 February 2019), CV-18-589955 (Ontario Superior Court of Justice), Applicant’s Application Record, at Tab 2A, at 3: “The Plaintiffs have failed to allege or provide evidence of an underlying legal right, that is a civil or property right of the kind that were found in the cases that they rely upon.” [“Judgment of Justice S. Nishikawa”].

⁴ *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750 at para 12 [“Wall”].

law understanding of a gift in property law, and it risks the very essence of charitable donations under the *Income Tax Act*.⁵ Without clarity on these fundamental legal principles, we are left with confusion in Canada’s voluntary and religious sectors, particularly vis-à-vis donations, effectively creating two divergent sets of rules for voluntary associations by limiting *Wall*’s application to a small minority of voluntary associations with no written constitution or by-laws.

6. It is CCCC’s position that neither the commitment to give nor the provision of financial support to a church is consideration, whether analyzed pursuant to the private, common law definition of “gift” or the ordinary, tax law understanding of “gift”.

PART III – STATEMENT OF ARGUMENT

7. The *Wall* decision resolved a number of ambiguities in the law as it applies to voluntary organizations and the decisions and relationships formed within them but the Ontario Court of Appeal’s *Aga* decision is at odds with *Wall* on multiple significant points. Two are relevant for our purposes: causes of action in the context of voluntary associations and contracts between members and voluntary associations.

Causes of Action

8. On causes of action in the context of voluntary associations, *Wall* states: A private dispute between a voluntary organization and a member “must be founded on a valid cause of action, for example, contract, tort or restitution”; mere membership in a religious or voluntary organization — where “no civil or property right is granted by virtue of such membership” — does not meet this test, and “should remain free from court intervention”.⁶

9. In contrast, *Aga* states that mere membership in an association *can* form, in itself, a legally enforceable contract⁷— even where, in the parlance of *Wall*, “no civil or property right is granted by virtue of such membership”; and that there need not be evidence of a mutual intention to form or be bound by such a contract – where written constitutions and by-laws exist, they automatically “constitute a contract setting out the rights and obligations of members and the organization”,

⁵ *Income Tax Act*, RSC 1985, c. 1 (5th Supp).

⁶ *Wall* at paras 13, 24.

⁷ *Aga* at paras 40-41.

regardless of whether the member has “specific knowledge of or expressly consents to the specific terms in the by-laws.”⁸

Contracts and Voluntary Associations

10. On contracts and voluntary associations, *Wall* stated: “...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... this may be more difficult to show in the religious context...”⁹ In contrast, *Aga* held: "In this case, the appellants were not simply adherents of the faith. They applied to be members of the Congregation and *offered consideration in the form of monthly payments*. They complete the required membership forms.”¹⁰

11. On its face, the decision in *Aga* is difficult to reconcile with *Wall* and these contrasts create significant difficulty for the charitable sector as it relates to gifts.

A. What is a Gift at Law?

12. The common law defines a gift as “a voluntary transfer of property to another without consideration.”¹¹ The essential ingredients require that “[t]here must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the donee and (3) a sufficient act of delivery or transfer of the property to complete the transaction.”¹² This, by definition, precludes a gift from constituting consideration for the purposes of contract law, and *vice versa*.

13. The common law definition informs the definition applied by the Federal Court, Tax Court, and Canada Revenue Agency’s (CRA) in their interpretation of the *Income Tax Act*, which applies to all Canadian registered charities.¹³

⁸ *Ibid*, paras 40, 43.

⁹ *Wall* at para 29.

¹⁰ *Aga* at para 47.

¹¹ *McNamee v. McNamee*, 2011 ONCA 533 at para. 23 [“*McNamee*,” emphasis added].

¹² *Ibid*, at para. 24.

¹³ See, for example, Canada Revenue Agency, [Income Tax Folio S7-F1-C1, Split Receipting and Deemed Fair Market Value](#), at 1.1-1.2.

14. For tax law purposes, a gift has been defined by the Federal Court of Appeal as “a voluntary transfer of property from one person to another gratuitously and not as the result of contractual obligation without anticipation or expectation of material benefit.”¹⁴

15. Professor Kathryn Chan observes that there is confusion between these two definitions, that is the provincial private common law definition of “gift” and the definition used by the Federal Court of Appeal in interpreting section 118.1 of the *Income Tax Act*. She maintains that the federal courts attach to the term “gift/don” “an ordinary, non-technical meaning, which is distinct from the common law concept of gift that forms part of the law of property in Canada’s common law provinces.”¹⁵ This results in a confusing overlap and inconsistent use of the term “gift” in Canadian law. Such uncertainty in the law concerning s. 118.1 needs clarification.

16. It is our position that despite the uncertain context in the law over the meaning of “gift,” the church member giving funds to her church is both (a) a gift under the common law definition (and therefore not consideration in the form required of a contractual relationship) and (b) a gift under the s. 118.1 *ITA*.

i. Common Law Understanding of Gift Applies

17. As noted above, the common law identifies three essential elements of a gift as (a) the donor’s intention to give, (b) the donee’s acceptance of the gift, and (c) sufficient delivery of the gift.¹⁶ A gift is therefore “a voluntary transfer of property to another without consideration.”¹⁷ “‘Consideration’ in law is a contractual concept. It is the value that flows from a promisee to a promisor as a result of a bargain.”¹⁸ An intentional, voluntary transfer of property cannot be made pursuant to a contractual obligation or it ceases to be a gift.¹⁹

¹⁴ [*Woolner v Canada \(Attorney General\)*](#), [2000] 1 CTC 35 (FCA) at para 7 [“*Woolner*”]

¹⁵ Prof. Chan also notes the meaning attached to s.118.1 of the *Income Tax Act* is distinct from the civil law concept of gift (set out in Book V of the *Civil Code of Quebec*). As the *Aga* case originates in Ontario, we will not address the civil law concept of gift. See Kathryn Chan, “The Perils of Federalizing the Common Law: A Case Study of the *ITA* Gift Concept” (2017) 50 UBC L Rev 579 at 580-582 [“Chan, “*ITA* Gift””].

¹⁶ *McNamee*, at para 24.

¹⁷ *McNamee* at para. 23.

¹⁸ *McNamee*, at para. 29.

¹⁹ [*Tudora v The Queen*](#), 2020 TCC 11 at para 28

18. In this case, the Ontario Court of Appeal’s decision is premised on the assumption that the members having made “monthly payments” to the Church was, in fact, contractual; however, this sets aside the common law use of a property law framework for understanding gifts. Further, there is no assessment of the nature of the transfer. The judgment states only that the adherents “applied to be members of the Congregation and *offered consideration in the form of monthly payments*” without further elaboration or clarification.²⁰

19. The monthly payments would have been received by the Corporation, one of whose objects is to “solicit and receive donations.” The donors (respondents in the instant appeal), are not members of that Corporation.²¹

20. There is no consideration passing from the respondents to the Corporation, as the Corporation holds the property for the public benefit in the pursuit of its charitable purpose. The *ITA* obliges the corporation, as a “charitable organization” that is “constituted and operated exclusively for charitable purposes” to devote all of its resources “to charitable activities.”²²

21. Transferring property by giving a gift is not treated in the same way as a property transfer by way of consideration or as a contract for service or goods. It is unique. While the common law uses the property law framework to classify the concept of gift, it is not a perfect fit; the gift is “a complex and deeply entrenched social institution, which remains largely beyond the law’s sphere of influence.”²³ Even granting this challenge, the “monthly payments” should not be treated as consideration for the purposes of creating a contractual relationship but as a gift pursuant to the common law.

ii. Tax Law Understanding of Gift Applies

22. As noted above, the Federal Court of Appeal defines gift as “a voluntary transfer of property from one person to another gratuitously and not as the result of contractual obligation without anticipation or expectation of material benefit.”²⁴ CRA guidance echoes this definition to

²⁰ *Aga* at para 46.

²¹ *Aga* at paras 9-10.

²² *Income Tax Act*, RSC 1985 c 1 (5th Supp), s 149.1 “charitable organization”.

²³ Chan, “*ITA Gift*”, at 584.

²⁴ *Woolner* at para 7.

say that “if a gift is made as a result of a contractual or other obligation ... a receipt cannot be issued” because it is no longer a gift.²⁵

23. Professor Chan helpfully outlines two ways that this definition is different from the common law definition. First, it applies an “extended concept of donor benefit” and second, it applies greater scrutiny to the donor’s motive, asking whether it stems from a “detached and disinterested generosity.”²⁶ Even under an extended concept of donor benefit, it is our position that there is no benefit flowing to the donors in this instance that vitiates its essential character as a gift.

24. We leave to the appellants and other interveners the detailed questions of membership as our concern is with the characterization of gifts; however, membership is related to any purported “donor benefit” in this case. Procedural rules relating to religious considerations are not a “donor benefit” such that gifts given to a church that implements procedures for membership questions and concerns would then fall outside the scope of s.118.1 *ITA*. As noted in *Wall*, “mere membership in a religious or voluntary organization” does not automatically demonstrate that the parties intended to create legal relations, nor does it automatically confer a civil or property right.²⁷ Further, *Wall* also held that procedural rules that involve the interpretation of religious doctrine are not justiciable, unless they are “based on a contract between the two parties” where there are “legal rights at stake.”²⁸ No such rights exists here.

25. Practically speaking, should the existence of a constitution, bylaws and policies serve to nullify gifts on the basis that it provides a “donor benefit”, chaos within the charitable sector would ensue.²⁹ To the extent that it is considered a “benefit”, it should only be considered “incidental.” In other words, it does not outweigh any public benefit, and it arises as no more than necessary to achieve the charitable purpose³⁰ by using a corporate structure.

²⁵ Canada Revenue Agency, “[What is a gift](#)” (16 November 2016)

²⁶ Chan, “*ITA Gift*” at 589.

²⁷ *Wall* at paras 28-29

²⁸ *Wall* at para 38

²⁹ It is perhaps trite, but important, to highlight that legislation such as the [Canada Not-for-Profit Corporations Act](#), SC 2009, c 23 require articles of incorporation to set out “the classes...of members... and any voting rights” among other things. See s.7(1).

³⁰ Canada Revenue Agency, CPS-024 [Guidelines for registering a charity: Meeting the public benefit test](#) (10 March 2006), at 3.2

26. Even if there is arguably some advantage received from giving a gift, if it was voluntarily transferred with the intention of making a gift, it is still considered a gift for income tax purposes as long as the value of the advantage does not exceed 80 per cent of the gift's value.³¹ And that tax treatment does not take away from the common law definition that the gift is not consideration despite the fact that the member receives a tax benefit in the form of charitable receipts. The charitable sector is highly dependent on the ability of charities to issue charitable receipts for the purposes of the donor reducing his or her tax payable.

27. Finally, in regard to the understanding of a gift in a tax law context, there is concern with the mischaracterization of a pledge. The lower court held that the respondents, in a membership application, “offered consideration in the form of monthly payments”; however, offering or pledging gifts does not generally constitute a contract, nor does it transform a future gift into contractual consideration. A pledge itself is not a gift, but when a pledge is honoured through the voluntary transfer of property, it is a gift.³²

28. Without additional evidence and further analysis about the nature of the pledge and/or any actual financial gifts, the finding from the Court below fundamentally alters the notion of charity, donations, and gifts and puts in jeopardy the basic relationship between charity and donor, adherent and church.

B. What is a Gift in Religion?

29. Not only is there a tax and regulatory basis for concern stemming from the analysis in the Court below, but there is also a concern stemming from the fundamental misunderstanding of the nature of religious commitment through the practice of financial giving.

30. In Christianity, financial gifts to the local and worldwide church is an integral part and manifestation of faith. While there are diverse views and practices on how to give - freewill offerings with no stipulation of the amount, tithing with a set amount,³³ contemporaneous,

³¹ Canada Revenue Agency, “[P113 – Gifts and Income Tax 2019](#)” (21 January 2020)

³² Canada Revenue Agency, “[Can a charity issue official donation receipts for pledges?](#)” (1 June 2011); see also *Brantford General Hospital Foundation v Marquis Estate* (2003), 67 OR (3d) 432 (SCJ).

³³ Malachi 3:10, “Bring all the tithes into the storehouse” (NKJV).

spontaneous giving, pre-planned giving – there is unity in the principle of giving.

31. Whatever system any church or religious group teaches or practices, they are fundamentally *religious* obligations. They are not justiciable. They give rise to a religious commitment between the member and the religious organization – whether it is a church or other religious charity. This Honourable Court observed,

[...] 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.³⁴

32. In the context of religion, then, the motivation to donate to one’s church is a religious motivation not a contractual obligation. The relationship between the member and the church is part of, and fosters, the relationship between the divine and the member. In other words, there is no contractual relationship, in spiritual matters, between the church and the member. This basic understanding of religion is reflected in this Court’s affirmation of what freedom of religion encompasses:

...[to] undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely *undertaking in order to connect with the divine or as a function of his or her spiritual faith*, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.³⁵

33. Upon solely non-religious terms it can be difficult to grasp why one might voluntarily give 10% or more of one’s earning to a religious entity when there is no material *quid pro quo*. It is irrational from that perspective. Yet, for the religious this is part of religious worship. Some refer to it as the ‘worship in giving.’ To suggest that the relationship is a contractual relationship between the adherent and the religious institution is to misconstrue the religious experience. It is not a means of obtaining a material advantage, but rather an expression of devotion, a *free will gift* in celebration of the relationship with the divine.

34. While financial giving may have a “spiritual currency” it does not mean it has a “legal

³⁴ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 50.

³⁵ *Ibid.*, at para 46 [emphasis added].

currency” in that it is consideration for a legal contract. As Professor Gary A. Anderson observes, “charity” may be “construed as a loan to God, which was then converted into a form of spiritual currency and stored in an impregnable divine bank.”³⁶ A spiritual obligation to give does not render it involuntary or subject to a legally enforceable contract with the divine: “a Christian may consider it her religious duty to give to the church, but also consider herself free to settle on the amount of the gift as a matter of personal choice.”³⁷

35. No common law framework is sufficient to convey the religious understanding, desire, and practice of giving. Perhaps the closest similar human interaction is that which occurs between parent and child. Were the child, upon reaching maturity, to give a gift to her parents as an expression of gratitude for what they did for her over her life, it would not be a contractual relationship. It is simply a heart response, not a legal requirement.

C. What is a Gift in Aga? Clarification is Necessary

36. As outlined above, *Aga* suggests that a monetary contribution (in this case, a payment to a church), or even a pledge to make such gifts, constitutes sufficient legal consideration to create an enforceable contractual relationship.³⁸ This may have been a finding unique to the specific facts, but it is unclear why these payments were characterized by the lower court as contractual consideration, rather than a gift. Clarification is needed on this point. If a monetary contribution to a charity can, by itself, create a legally enforceable contract, this would fundamentally redefine both the law surrounding gifts, whether pursuant to the private common law definition or the tax law definition, and the very nature of the donor-recipient relationship.

37. Many people make regular contributions or “payments” to their religious communities, which are often motivated by a sense of *religious* obligation. There is overlap between the both the private common law and the tax and regulatory treatment of gifts and a religious understanding of gifts insofar as some of the fundamental characteristics. Our legal regimes (both common law and tax) recognize the unique characteristics of gifts. In the tax context, the inherent good of

³⁶ Gary A. Anderson, *Charity: The Place of the Poor in the Biblical Tradition* (New Haven and London: Yale University Press, 2013) at 182. [Book of Authorities, (“BOA”), Tab 1]

³⁷ Matthew Harding, *Charity Law and the Liberal State* (Cambridge: Cambridge University Press, 2014) at 148 [BOA, Tab 2].

³⁸ *Aga* at para 46.

charitable giving is why donations, including those made to religious communities,³⁹ are widely understood to represent (and are legally recognized as) voluntary charitable gifts, not contractual payments and which are given special tax treatment. Without clarity, there will be significant confusion in Canada's charitable sector as to the proper treatment of donations and the nature of any legal relationships they may create.

D. Conclusion

38. In *Wall*, this Honourable Court observed that “members of a congregation may not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization.”⁴⁰ CCCC, which represents thousands of charities across Canada, including many churches, agrees.

39. Without further guidance from this Honourable Court, however, the decision of the Court of Appeal suggests the opposite: that a legally enforceable contract *is* entered into automatically whenever a congregation has written by-laws, and a member makes a pledge, gift or tithe. A monetary contribution from a member is a voluntary gift, not a contractual transaction. This goes to the very core of relationships between charity and donor, and how it is answered will directly impact the day-to-day operations of thousands of organizations.

PARTS IV & V – COSTS AND ORDER SOUGHT

40. The Intervener requests that no costs be awarded for or against it.

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

SIGNED BY:

Deina Warren
Associate Director of Legal Affairs
Canadian Centre for Christian Charities



Barry W. Bussey
Director of Legal Affairs
Canadian Centre for Christian Charities

³⁹ See John Pellowe, “The Public Benefit of ‘Advancing Religion’ as a Charitable Purpose: A Canadian Perspective,” in Barry W. Bussey, Ed., *The Status of Religion and the Public Benefit in Charity Law* (London: Anthem Press, 2020), 41-77 [BOA, Tab 3].

⁴⁰ *Wall*, at para 29

PART VI – TABLE OF AUTHORITIES

<u>Case law</u>	<u>Paragraph(s) in factum</u>
1. <i>Samur v City of Quebec</i> , [1953] 2 SCR 299	preamble
2. <i>Aga v. Ethiopian Orthodox Tewahedo Church of Canada</i> , 2020 ONCA 10	2, 9, 10, 18, 19, 36
3. Typescript of the Reasons for Judgment of Justice S. Nishikawa (26 February 2019), CV-18-589955 (Ontario Superior Court of Justice)	2
4. <i>Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall</i> , 2018 SCC 26, [2018] 1 S.C.R. 750	3, 8, 9, 10, 23
5. <i>McNamee v. McNamee</i> , 2011 ONCA 533	12, 17
6. <i>Woolner v Canada (Attorney General)</i> , [2000] 1 CTC 35 (FCA)	14, 22
7. <i>Tudora v The Queen</i> , 2020 TCC 11	17
8. <i>Brantford General Hospital Foundation v Marquis Estate</i> (2003), 67 OR (3d) 432 (SCJ)	27
9. <i>Syndicat Northcrest v Amselem</i> , 2004 SCC 47	31, 32
 <u>Legislation</u>	
10. <i>Income Tax Act</i> , RSC 1985, c 1 (5 th Supp)	5, 20
11. <i>Canada Not-for-Profit Corporations Act</i> , SC 2009, c 23	24
 <u>Secondary sources</u>	
12. Canada Revenue Agency, <i>Income Tax Folio S7-F1-C1, Split Receipting and Deemed Fair Market Value</i> , at 1.1-1.2, online: < https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-7-charities-non-profit-organizations/series/income-tax-folio-s7-f1-c1-split-receipting-deemed-fair-market-value.html >	13
13. Kathryn Chan, “ The Perils of Federalizing the Common Law: A Case Study of the ITA Gift Concept ” (2017) 50 UBC L Rev 579	15, 21, 22
14. Canada Revenue Agency, “ What is a gift ” (16 November 2016)	22

<u>Secondary sources (cont.)</u>	Paragraph(s) in factum
15. Canada Revenue Agency, CPS-024 <i>Guidelines for registering a charity: Meeting the public benefit test</i> (10 March 2006)	25
16. Canada Revenue Agency, “ P113 – Gifts and Income Tax 2019 ” (21 January 2020)	26
17. Canada Revenue Agency, “ Can a charity issue official donation receipts for pledges? ” (1 June 2011)	27
18. Gary A. Anderson, <i>Charity: The Place of the Poor in the Biblical Tradition</i> (New Haven and London: Yale University Press, 2013)	34
19. Matthew Harding, <i>Charity Law and the Liberal State</i> (Cambridge: Cambridge University Press, 2014)	34
20. John Pellowe, “The Public Benefit of ‘Advancing Religion’ as a Charitable Purpose: A Canadian Perspective,” in Barry W. Bussey, Ed., <i>The Status of Religion and the Public Benefit in Charity Law</i> (London: Anthem Press, 2020), 41-77	37