SCC File No. 39094

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 ENEGADA, ABUNE DIMETROS AND HIWOT BEKELE

APPELLANTS
(RESPONDENTS)

and

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

RESPONDENTS
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INTERVENERS

FACTUM OF THE INTERVENER, BRITISH COLUMBIA HUMANIST ASSOCIATION

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

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PART I: OVERVIEW

1. The British Columbia Humanist Association ("BCHA") intervenes out of concern for how this Court's decision in *Wall*[1] may be, and has been, applied.

2. *Wall* concerned an unincorporated, voluntary religious association without a written constitution, by-laws or rules.[2]

3. This Court held that Mr. Wall's membership in that association did not provide him a civil or property right, and his disfellowship did not give rise to any legal claim.[3]

4. Two concerns arise from the *Wall* decision. Firstly, the Court's comments on justiciability raise the spectre that a valid legal claim may not be justiciable because its resolution would require consideration of religious doctrine. Such a proposition should be rejected. It is inconsistent with over a century of jurisprudence. Furthermore, it would unjustifiably shield religious organizations and their leadership from judicial scrutiny merely because courts do not, without the aid of expert evidence, have the expertise to resolve such disputes.

5. Secondly, lower courts have found that even incorporated associations are immune from judicial scrutiny because membership in an organization does not create a contractual right. Such ignores that in *Wall*, the association was unincorporated. It also ignores the fundamental nature of an incorporated, voluntary association and the compact between its members and between its members and the organization itself.

6. The effect of this is to provide religious organizations and their leadership effective immunity from judicial scrutiny, which is anathema to the BCHA's understanding of a secular state.

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[1] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 ["*Wall*"].
[2] *Ibid* at para. 28.
[3] *Ibid* at paras. 28 –31.

PART II: STATEMENT OF POINTS IN ISSUE

7. BCHA asks this Court to reaffirm over a century of jurisprudence concerning the role of the courts and religious institutions in this country. More specifically, the BCHA asks this Court:

a. to state clearly that justiciability is a concept to determine whether a legal claim exists, not a basis to refuse to adjudicate a legal claim; and

b. to affirm that membership in an incorporated, voluntary association creates a form of legal relationship sufficient for a member to seek redresss through the courts.

PART III: ARGUMENT

A. Courts are Competent to Engage with Intersecting Legal and Religious Issues

8. Courts are understandably reluctant to engage in disputes over religious doctrine. But, where the resolution of a legal dispute requires the court to do so, the court cannot refuse. In her leading text, *Religious Institutions and the Law in Canada*, Professor Ogilvie writes:

> While the courts, as stated earlier, will not adjudicate on matters that are narrowly doctrinal or spiritual in nature, and are expressly reluctant to consider issues relating to religious institutions other than where property and civil rights are involved, they do have jurisdiction to intervene and do consider matters of doctrine, polity, and liturgy when these are relevant to disputes about property rights, rights under contract, or civil rights. Dealing with such disputes is always a delicate matter but a court must discharge its duty in this regard as well as possible, even to inquire into the fundamental tenets of the religious institution when it is necessary for the resolution of the dispute, but without casting judgment on the truth or falsity of those tenets.[4]

9. Professor Ogilvie identifies seven general principles guiding the courts in their intervention in religious disputes:

a. church tribunals are required to follow their own substantive and procedural rules;

b. civil courts may actively review the decisions of church tribunals;

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[4] M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed. (Toronto: Irwin Law, 2017) at 304-305.

c. church tribunals are required to comply with the rules of natural justice;

d. church tribunals should not act *ultra vires*;

e. civil courts may intervene, regardless of any other factors, where a church is incorporated pursuant to civil legislation;

f. civil courts will intervene where property or civil rights are at stake; and

g. civil courts will exercise jurisdiction over a foreign religious society, incorporated elsewhere, if it is resident in Canada.[5]

10. While some religious disputes can be resolved with reference only to secular law, some require a less comfortable foray into religious doctrine.

11. As the property of religious institutions is frequently held in trust, judicial interpretation of trust terms is sometimes necessary in order to resolve property disputes, particularly where the dispute is schismatic.

12. Modern religious trust litigants have relied on *Free Church*,[6] in which the House of Lords considered whether a church's constitution permitted it to change its doctrine or faith and therefore whether the trust in question included an unchangeable doctrine. The majority held that where property is held in trust for a religious body holding certain definite tenets, a majority of that body cannot – by agreeing to unite with another religious body differing on some essential points – alienate the trust property from its original destination for the use of the united body without express power to modify their original tenets. A dissentient minority who disapproved of the union and held the original views of the founders was entitled to retain the trust property.

13. In *Pankcherian*,[7] the Ontario Court of Appeal considered the approach Canadian courts have taken in respect of church property disputes. The court reviewed earlier cases and concluded:

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[5] *Ibid* at 230-232.
[6] *Free Church of Scotland v Overtoun*, [1904] AC 515 (HL) ["*Free Church*"].
[7] *Pankcherian v. Djokic*, 2014 ONCA 709 ["*Pankcherian*"].

> The analytical method applied by both appeal courts of construing the terms of the trust by considering the deeds, the applicable legislation, the canons or church law promulgated by each diocese and, to some extent, the doctrinal context, was not novel. The same approach was applied to a similar dispute in *United Church of Canada v. Anderson* (1991), 1991 CanLII 7137 (ON SC), 2 O.R. (3d) 304, [1991] O.J. No. 234 (Gen. Div.), and in numerous earlier and later cases cited by Professor Esau involving Hutterites, Lutherans, Greek Orthodox, Presbyterians, Christian Reformed and other faith groups. Professor Esau summarizes how courts have approached these cases at paras. 117-118 of his article, where he states that "Canadian courts will not simply defer to the ecclesiastical judgments of church authorities about membership issues without judicially reviewing those decisions to ensure that they conform with the internal law of the religious group." He adds that: "Canadian courts can interpret and apply both express and implied doctrinal trusts to resolve property disputes when membership alone does not determine the matter", and are willing "to muddle through religious documents and entertain the conflicting testimony of religious experts." As I noted earlier, this happened in *Delicata*.[8]

14. In *Rand*,[9] the British Columbia Court of Appeal considered a chambers judge's interpretation of religious trust claims the plaintiffs made against an Anglican Diocese. A former churchwarden and two former clergy sought to restrain an Anglican Diocese from interfering with their access to and use of an Anglican church in Victoria, British Columbia.

15. The plaintiffs aligned themselves with a faction of Anglicanism that held same-sex marriages should not be allowed, and a majority of members of the congregation agreed and voted on a realignment under the leadership of a different Archbishop. The Diocese changed the locks on the church and removed the plaintiffs from their positions based on their differing religious views.

16. The plaintiffs sought a declaration that the church property (i.e. the church building) was held in trust for the congregation, and that they could continue to use the church, owned by the Diocese, to provide conservative orthodox Anglican ministry.

17. The plaintiffs relied on *Free Church* to support their argument that the property of a religious institution is held in trust for the original purposes of that religious institution.

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[8] *Ibid* at para. 62.
[9] *Rand v The Anglican Synod of the Diocese of British Columbia*, 2008 BCCA 294 ["*Rand*"].

However, the defendants distinguished it on the basis that the Anglican Church of Canada provides processes for changing its doctrines and purposes.

18. The Court of Appeal found that in order to assess the plaintiffs' argument, the chambers judge needed to consider the plaintiffs' characterization of their beliefs. In considering the two-pronged test for interlocutory injunctive relief, the chambers judge found that there was a serious question to be tried due to the presence of "doctrinal and creedal divisions that have so ruptured the Church."[10] However, the application failed due to the balance of convenience favouring the Diocese's ability to control the church. The Court of Appeal upheld the chambers judge's decision, and approved of her having considered a wide range of factors, some religious in nature, including:

> "…the status quo, the strength of the plaintiffs' case, the Diocese's legal ownership of the property, the effect on the public served by the mission work, the effect on the defendants' work in the parish, the inadequacy of the Heritage Church to accommodate the congregation, the less drastic alternatives available to the plaintiffs and their supporters, and the effect on both the Bishop of the Diocese of British Columbia and the Anglican Church of Canada."[11]

19. Importantly, the doctrinal dispute was not a barrier to the courts for redress.

20. In *Delicata*,[12] the underlying theological dispute was the same as in *Ran*d. Church property was held "in trust for the benefit of the Parish or congregation". The Ontario Court of Appeal held that the trial judge properly found that the words "Parish or congregation" necessarily denoted a static entity that could not be severed from the Diocese and was not defined by any particular group of members at any particular time. The plaintiff churchwardens' interpretation of a fluid entity was contrary to the intent that the Diocese retained control over all church property for the benefit of the Diocese's members. To find otherwise would permit the Diocese to be splintered and its property distributed at the will of a single group of estranged

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[10] *Ibid* at para. 15.
[11] *Ibid* at para. 51.
[12] *Delicata v Incorporated Synod of the Diocese of Huron*, 2013 ONCA 540 ["*Delicata*"], leave to appeal refused [2013] SCCA No 439 (SCC). See also, *Bentley v Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506, leave to appeal refused [2011] SCCA No 26 (SCC).

congregants, or would allow a group to circumvent the statutory requirement of consent of the Bishop or Synod for the distribution or encumbrance of property.

21. Judicial consideration of religious disputes is not limited to the categories presented by Professor Ogilvie. For example, in *Bruker*,[13] this Court had to consider Jewish *get* law and related academic and political discourse to determine the validity of contractual claims made by a wife against her husband for refusing to provider her a *get*.

22. The decision in *Wodell*[14] provides an excellent example of the type of doctrinal religious dispute that the courts must be able to resolve in order address underlying legal claims. In that case, a number of congregants signed a declaration of faith that the trustees of church property believed excluded those congregants as beneficiaries of the trust and sought an order to that effect. In essence, the court was asked to determine if the certificate of faith was contrary to the tenets of the church. The court resolved that dispute with reference to the terms of the trust and while being careful to avoid weighing in on matters of doctrine insofar as that was possible.

23. Importantly, the dispute in *Wodell* was clearly of a religious nature, but that did not preclude the court's jurisdiction to decide the underlying legal issue.

B. This Court's Decision in *Wall* must be Limited to its Facts

24. Subsequent interpretations of this Court's decision in *Wall* risk upsetting all that has been said thus far. *Wall* requires clarification in two respects. Firstly, the *obiter* discussion of justiciability at paragraphs 32 – 39 of *Wall* must be understood as buttressing the conclusion of the Court, not an independent basis for refusing to adjudicate a dispute with religious elements.

25. Secondly, this Court's discussion of when a membership dispute will give rise to a legal claim must similarly be understood in light of the facts in *Wall* and, in particular, the Court's discussion at paragraph 28 of *Wall*.

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[13] *Bruker v Marcovitz*, 2007 SCC 54 ["*Bruker*"].
[14] *Wodell v. Potter*, [1929] O.J. No. 74 (Ont. S.C.), 64 O.L.R. 484.

Justiciability is about whether a legal claim exists, not erecting a bar to its adjudication

26. On reading paragraphs 38 and 39 of *Wall*, one *could* fairly conclude that the courts will only intervene in religious disputes where there is an underlying legal dispute. Even then, paragraph 38 suggests that justiciability concerns may act as a further barrier to judicial intervention, even where there is an underlying legal dispute.

27. This would be a sea change in the law.

28. *Wall* must not be construed as having such a far reach. With respect to justiciability, this Court acknowledged that the "supplementary comments" concerning justiciability were included in the judgment because justiciability was addressed by the parties and the Alberta Court of Appeal.[15] Those comments were *obiter*. But, they are not *obiter* without consequence.

29. The decision in *Mathai*[16] illustrates the concern created by the decision in *Wall*.

30. In *Mathai*, Dunlop J. interpreted *Wall* as holding that courts only have the jurisdiction to review the decisions of religious organizations: (1) made pursuant to authority granted by the state; or (2) when enforcing a church member's legal rights against a church.[17]

31. Despite that the church was incorporated under a law of general application, Dunlop J., relying on *Wall*, held that the court had "no jurisdiction to issue declarations or orders with respect to membership, elections or disciplinary action"[18] of the church. In effect, Dunlop J. held that a church is immune from judicial scrutiny unless the claim falls within one of the two exceptions noted above.

32. In so doing, Dunlop J. expressly called into question[19] the pre-*Wall* decision of the Alberta Court of Appeal in *Sandhu* where the Court of Appeal wrote:

> 53 Put simply, not all disputes within a religious society are religious. A religious society which chooses to be incorporated thereby is required to abide by

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[15] *Wall, supra* at para. 32.
[16] *Mathai v George*, 2019 ABQB 116 ["*Mathai*"].
[17] *Ibid* at para. 9.
[18] *Ibid* at para. 18.
[19] *Ibid* at para. 16.

> its constitution, its bylaws and procedural fairness. Simply because a society exists for religious purposes does not give it carte blanche to deny membership to those to whom its bylaws would extend membership.
>
> 54 The courts can and do intervene in the workings of incorporated religious bodies in order to ensure compliance with their constitution and bylaws and fair election process where elections are required, where the heart of the dispute is not religious differences.[20]

33. Not only is the above statement from *Sandhu* correct, it pertains only to the most benign of judicial intervention in disputes within a religious organization, as evidenced by the fact that the word 'religious' could be replaced by any adjective (e.g., educational, political, oenophilic) and remain as true and inoffensive.

34. As discussed by Professor Ogilvie, the courts will intervene – indeed, they are required to intervene – where there is an underlying legal dispute, even if the heart of that dispute is religious differences.[21]

35. Invoking justiciability is unhelpful and can only lead to the court abdicating its responsibility to resolve legal disputes. A legal dispute is by definition justiciable.

36. Concerns about the "legitimacy and institutional capacity"[22] of courts to resolve religious disputes mischaracterizes what a court is being asked to do. In such cases, a court is being asked to resolve a legal claim. Resolution of a legal claim often involves determining matters outside of the court's expertise. That is why we have expert witnesses.

37. By reason of the parties' relationship, and the terms imposed upon the parties, resolution of a legal dispute may require consideration of religious doctrine. Indeed, it may go so far as requiring the court to opine on who among competing factions are the "true" adherents to a faith. Trusts, contracts, constitutions and bylaws that are expressly religious do not lose their character as legal documents to be interpreted and applied by the courts merely because they are religious.

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[20] *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 at paras. 53-54.
[21] M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed. (Toronto: Irwin Law, 2017) at 230.
[22] *Wall, supra* at para. 34.

38. In deciding such cases, the courts are determining legal rights as best they can for the purposes of the secular and material world in which the courts have jurisdiction.

39. While *Mathai* may be a singular decision, it demonstrates that the *obiter* comments in *Wall* risk setting aside over a century of jurisprudence concerning the courts and religious institutions. If the decision in *Mathai* is correct, this Court's decision in *Wall* casts doubt on the first five (and perhaps the seventh) of Professor Ogilvie's seven guiding principles.

Membership in an incorporated voluntary organization gives rise to a legal relationship

40. The Alberta Court of Appeal's decision in *McCargar*[23] demonstrates that the misapplication of *Wall* is of concern to more than just religious organizations.

41. In *McCargar*, the court determined it did not have jurisdiction to consider whether an incorporated association's bylaws were "contrary to law". In effect, the appellant asked that the court find the association's board to have acted *ultra vires*.

42. The court refused to adjudicate the claim, noting that "nowhere in the bylaws of the Association was there any reference to membership being contractual or commercial in nature."[24]

43. Respectfully, it cannot be that easy for an incorporated, voluntary organization to shield itself and its leadership from judicial scrutiny. If the absence of contractual language in the bylaws is enough to preclude judicial scrutiny, then the bylaws are properly viewed as merely aspirational or optional statements enforceable only against members, who have no redress.

44. Such an understanding, endorsed by the Alberta Court of Appeal, fundamentally misunderstands the nature of membership in a voluntary organization. While membership may not create a contract in the traditional sense, it is a compact between members and the organization's leadership.

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[23] *McCargar v. Métis Nation of Alberta Association*, 2019 ABCA 172.
[24] *Ibid* at para. 9.

45. Persons join such organizations because they believe in the organization's purpose or goals. Surely the members of an organization should be able to seek redress from the courts when the organization's leadership ignores its own constitution or bylaws.

46. A refusal to find a legal right created by means of membership leaves those in charge of religious or other voluntary organizations essentially unchecked.

47. Such a refusal also ignores that members have expressly or impliedly agreed to the terms of a constitution, bylaws, or rules which cannot be reasonably seen as anything other than an enforceable right.

48. *McCargar* stands in stark contrast to *Bains*.[25] In *Bains*, Norell J. found that the court had the authority to review the constitution and bylaws of a Sikh organization to determine whether members had been properly expelled. She found that religious issues at stake for the petitioners were of "sufficient importance to attract a level of procedural fairness above that of a purely social club, but not as high as an organization that could affect property rights or employment."[26] As such, Norell J. considered the elements of procedural fairness adopted in the organization's bylaws – namely the rights to notice, opportunity to be heard, and bias.

49. *Bains* is consistent with pre-*Wall* jurisprudence and Professor Ogilvie's seven guiding principles. While this case is not an appeal of *Mathai*, *Sandhu* or *Bains*, this Court can provided much needed guidance by affirming that the approach taken in *Bains* is correct.

50. If organizational leaders can remove members without any threat of judicial scrutiny of that decision, it is possible they could prevent anyone from bringing a valid legal claim concerning the conduct of the organization or its leadership.

PART IV: COSTS

51. The BCHA does not seek costs and ask that none be awarded against it.

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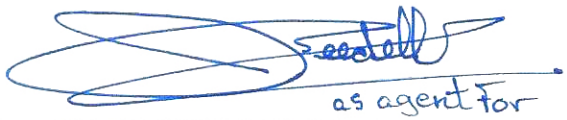
[25] *Bains v Khalsa Diwan Society of Abbotsford*, 2020 BCSC 181 ["*Bains*"].
[26] *Ibid* at para. 42.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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