

File Number: _____

**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**

RESPONDENTS' RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

**(TESHOME AGA, YOSEPH BEYENE, DEREJE GOSHU, TSEDUKE GEZAW and BELAY HEBEST,
RESPONDENTS)**

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PART I: OVERVIEW, STATEMENT OF FACTS AND JUDGMENTS

A. Case Raises No Issue of Public Importance

1. In 2018, the Supreme Court of Canada released its decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*.¹
2. In the case at bar, the Ontario Court of Appeal confirmed *Wall* and cited it with approval. The Court of Appeal reasoned clearly that this case concerns a voluntary association that is governed by a Constitution and By-Laws.² The Court of Appeal was mindful that adherence to a religious organization alone is not enough to create a contract, but found that the By-Laws and Constitution present in this particular case constituted a contract setting out the rights and obligations of members and the organization.³ This is not a contradiction of *Wall*, but rather a confirmation that an underlying legal right exists that the Respondents seek to have vindicated.
3. The Court of Appeal has simply permitted this case to be tried by a Judge of the Superior Court, to determine whether the Respondents took the necessary steps in expelling members pursuant to their obligations as set out in their own Constitution and By-Laws. The Court of Appeal made a finding that the Respondents had not supplied the necessary documentary evidence to enable the court to adjudicate this issue on a summary judgment motion.⁴
4. The unanimous decision of the Court of Appeal did not alter *Wall* or misapply *Wall*. The jurisprudence in this area is clear and recent. There is no national significance to having this matter heard once again by this Court. The matter is to proceed for trial before a Judge of the Superior Court.

¹ *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 SCR 750 [*"Wall"*].

² Reasons of Court of Appeal for Ontario, Tab 2. C. of Application for Leave to Appeal, p. 15 and 25 at paragraphs 11 and 49.

³ *Id.* at p. 22-23 and paragraphs 39-40.

⁴ *Id.* at p. 29 at paragraphs 62-63.

B. Statement of Facts and Judgments

5. The Respondents agree that they became registered members of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (the “Church”) in the early 1990s. The Church is governed by a body of ecclesiastical law including the global church’s Constitution and the Bylaw of the Ethiopian Orthodox Tewahedo Church in the Diaspora Promulgated to Administer the Ethiopian Orthodox Church in the Diaspora (the “Bylaw”).⁵
6. The named Applicant Messale Engeda is Head Priest of the Church. Hiwot Bekele is a priest of the Church. Abune Dimetros is Archbishop of the Diocese of Ontario and eastern Canada, which is part of the global Ethiopian Orthodox Tewahedo Church.
7. In 2016, a number of Church members, including the Respondents and the individual Applicants, were appointed to an ad hoc committee (the “Committee”) by members of the congregation to investigate a movement within the Church. The Archbishop Dimetros was the chair and operating mind of the Committee. The Committee was established at the request of the congregation and Church leadership to investigate a movement within the Church. The Respondents did not urge the formation of the Committee themselves, but were simply nominated to sit on the Committee.⁶
8. The Committee established Guidelines that were signed by the Committee’s members (the “Guidelines”). The Guidelines state clearly that the Committee is to be “guided by the rules and regulations of the Ethiopian Orthodox Tewahedo Church in the Diaspora” (Guideline #1), and “the Committee will monitor that the decision made is being implemented” (Guideline #4).⁷

⁵ Excerpts at Tab 4. E of Leave to Appeal Application.

⁶ Affidavit of Yoseph Beyene, Tab 4.K of Application for Leave to Appeal, at paragraphs 18-20.

⁷ Reasons of Court of Appeal for Ontario, Tab 2. C. of Application for Leave to Appeal, p. 18 at paragraphs 23.

9. In accordance with its mandate and the Guidelines, the Committee submitted a report to Archbishop Dimetros (the “Findings”) which outlined the worshippers responsible for the movement (the “Findings”). Both Dimitros and Engeda also signed their name beside the Findings.⁸
10. The Findings were not implemented by the Church leadership in accordance with the Guidelines. In fact, after months of fact finding, the Findings were contradicted in an announcement before the Church congregation.⁹ The Appellants respectfully questioned the reason for this contradiction. The Respondents attempted to call meetings with the Applicants to address their concerns, but the Applicants refused to attend the meetings or provide an explanation for the contradiction. The Respondents continued to monitor whether the decision made was being implemented in accordance with the Guidelines.¹⁰
11. The Respondents were expelled from the Congregation. They commenced a Statement of Claim outlining that they were given no particulars of the allegations against them leading to their expulsion, no opportunity to respond to the allegations, and no opportunity to make representations in respect of their expulsion. They claimed that this was in breach of the Constitution and By-Laws governing the congregation.¹¹
12. The Respondent Messale Engeda alleged in his sworn Affidavit that a derogatory letter was written by on the Appellants.¹² This appeared to form one of the grounds for the expulsion. None of the Appellants authored the letter.¹³ The letter formed a major ground of the decision to expel the Appellants from their membership in the Church. The Respondent Engeda was cross-examined as to the evidence he could produce in

⁸ Id. at paragraphs 24-25.

⁹ Affidavit of Yoseph Beyene, Tab 4.K of Application for Leave to Appeal, at paragraphs 27-29.

¹⁰ Id. at paragraph 30.

¹¹ Statement of Claim, Tab 4.A of Application for Leave to Appeal.

¹² Affidavit of Messale Engeda, Tab 4.C of Application for Leave to Appeal at p. 78, paragraph 20.

¹³ Affidavit of Yoseph Beyene, Tab 4.K of Application for Leave to Appeal, at paragraph 45.

support of the statement in his Affidavit that the Plaintiffs authored the letter. He was unable to produce any evidence, and actually contradicted his Affidavit by stating “really who wrote, I don’t know”.¹⁴ Thus, the Respondents’ expulsions were based on the false attribution of documents that they did not even author.

13. The Respondents alleged that they were not given particulars of the allegations against them which lead to their expulsions, were given no opportunity whatsoever to make full answer and defence to any allegations against them, were not advised they could obtain legal counsel, or make representations or have a record of the proceeding available, were given no reasons for the termination of their over twenty-year old membership aside from the indication that there was an ambiguous “disturbance”.¹⁵ They claim all of this was in violation of the provisions in the Constitution and By-Laws in their action. The Respondents had cited By-Laws in their decision to expel the Appellants.¹⁶

Superior Court

14. The Defendants brought a motion for summary judgment claiming there was no genuine issue requiring a trial and there are no rights to be enforced, on the basis that there was no underlying contract or other civil right.
15. Justice Nishikawa held that there was no genuine issue requiring a trial and granted the Defendants’ motion for summary judgment dismissing the action, with costs. She determined that the case fell squarely within this Court’s decision in *Wall*, reasoning that neither judicial review nor contractual remedies are available for decisions of voluntary religious associations, absent an underlying property or other legal right. She held that the Plaintiffs “failed to allege or provide evidence of an underlying legal right” that could justify the court’s review of the Church’s decision making.¹⁷ Justice Nishikawa concluded that there was no mutual intent to form a legally-binding contract.

¹⁴ Tab 2 of Response to Application for Leave to Appeal.

¹⁵ Statement of Claim, Tab 4. A of Application for Leave to Appeal, p. 61 at paragraph 37.

¹⁶ Application for Leave to Appeal, P. 118.

¹⁷ Reasons of Ontario Superior Court of Justice, Tab. 2. A. p. 3.

Court of Appeal Unanimously Overturns Based on By-Laws and Constitution of the Church

16. The Court of Appeal confirmed *Wall*, and held that the jurisdiction to review a voluntary association's adherence to its own procedures "depends on the presence of an underlying legal right to be adjudicated".¹⁸ The Court of Appeal concluded that the motion judge erred in finding that there was no evidence of a contract.¹⁹
17. The Court of Appeal found that the Respondents completed written membership applications, were admitted as members, offered "consideration" in the form of monthly contributions, the Applicants themselves had relied on By-Laws to expel the members, etc.²⁰ The Court also noted, as "evidence that the Plaintiffs would likely have been aware of the Constitution and By-Laws", that they were advised that the Committee would be "guided by the rules and regulations of the Eastern Orthodox Tewahedo Church synod in the Diaspora".²¹
18. The Court of Appeal reviewed the By-Laws and Constitution of the Church thoroughly and considered carefully how these documents set out the procedure for disciplining members and respecting congregants' rights.²²
19. The Court pointed to the following as evidence that the Church and its leadership recognized that they had contractual obligations:
- a. inclusion of provisions in the Constitution and Bylaw for discipline of members;
 - b. reliance on the Bylaw to suspend memberships; and
 - c. claiming that "requisite steps" were taken to expel these members.²³

¹⁸ Reasons of Court of Appeal for Ontario, Tab 2. C. of Application for Leave to Appeal, p. 22 at paragraph 39.

¹⁹ Id. at paragraph 55.

²⁰ Id. at paragraphs 46-47 and 53(b).

²¹ Id. at paragraph 48.

²² Id. at paragraphs 50-51.

21. Having carefully and thoroughly reviewed the matter, the Court of Appeal concluded that the Plaintiffs were subject to contractual rights, but that it was not clear if or how those contractual rights were breached since the Respondents did not file the necessary documentation so that the Court of Appeal could draw inferences of fact.²⁴ The Court of Appeal therefore granted the appeal and set aside the summary judgement.

PART II: QUESTIONS IN ISSUE

20. The Application for Leave to Appeal lists four issues as follows:

- i. Issue One: Does a voluntary religious association's written constitution or bylaw always form the basis of a legal contract, giving the court jurisdiction over its decisions?
- ii. Issue Two: Is a dispute between members of a voluntary religious association where no underlying civil, contractual, or proprietary right is at stake justiciable?
- iii. Issue Three: Should Canada's courts enforce religious claims by and against church members or religious leaders?
- iv. Issue Four: Can an appellate court overturn the factual findings of a court of first instance while bypassing the "palpable and overriding error" standard of review?

PART III: ARGUMENT

ISSUE ONE – THE COURT DID NOT HOLD THAT A VOLUNTARY RELIGIOUS ASSOCIATION'S WRITTEN BY-LAWS OR CONSTITUTION ALWAYS REPRESENTS A LEGAL CONTRACT

21. The Court of Appeal reviewed the by-laws of this particular organization and held that these were binding, specifically finding that in this case, there was evidence of recognition by the Church and its leadership of its contractual obligations to abide by the rules when seeking to expel a member. The Court of Appeal's reasoning was based on a determination that in this particular case, the Respondents included provisions in

²³ Id. at paragraph 53.

²⁴ Id. at paragraph 63.

their By-Laws with respect to discipline of members, relied on By-Laws to suspend members, and claimed that the requisite steps were taken to have the Respondents expelled.²⁵ Thus, they deemed this particular organization's By-Laws and Constitution as enforceable.

22. The Applicants submit that the Court of Appeal muddled clear precedent, however, the Court of Appeal's decision cited and followed the guidance of this Court in *Wall* and in *Senex*.²⁶

23. The Court of Appeal cited the reasoning of Beetz J in *Senex*, finding that:

“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. In accepting the constitution, he also undertakes in advance to comply with the by-laws that shall subsequently be duly adopted by a majority of members entitled to vote.”²⁷

24. Thus, the Court of Appeal confirmed the very same point of law in this case, and the Applicants wish to overturn or revisit the settled point in *Senex*.

25. At paragraph 32 of the Leave to Appeal Application, the Applicants cite *Wall* for the proposition that Mr. Wall sought to have the Highwood Congregation's written rules enforced. This is contradicted by the *Wall* decision itself, which held that:

“The Highwood Congregation of Jehovah's Witnesses (“Congregation”) is an association of about one hundred Jehovah's Witnesses living in Calgary, Alberta. The Congregation is a voluntary association. It is not incorporated and has no articles of association or by-laws. It has no statutory foundation. It does not own property. No member of the Congregation receives any salary or pecuniary benefit from membership. Congregational activities and spiritual guidance are provided on a volunteer basis by a group of elders.”²⁸

²⁵ Id. at paragraph 53.

²⁶ *Senex v Montreal Real Estate Board*, 1980 CanLII 222 (SCC), [1980] 2 SCR 555 [“*Senex*”].

²⁷ Id. at p. 566-567.

²⁸ *Wall* at paragraph 3.

26. The facts in this particular case are not the same as in *Wall*. In this case, the Respondent Church has a statutory foundation, owns property, and members receive salary and pecuniary benefit. Most importantly, the association has a Constitution and By-Laws that both the Superior Court of Justice and Court of Appeal have reviewed.
27. The Court of Appeal picked up on this distinction and followed the direction of this Court in *Wall* and *Senez*, holding that becoming a member of a voluntary association entails agreement to the terms of the constitution and bylaws. As such, members of the voluntary association, including the organization itself, are bound by the terms in the constitution and by-laws and there is an obligation on the part of an organization to observe the Constitution and By-Laws²⁹.
28. The Court of Appeal found that the Constitution and By-Laws constituted a contract, which is the underlying legal right that the Respondents seek to have vindicated.
29. In response to paragraph 26 of the Application for Leave to Appeal, the Court of Appeal did not create a loophole in *Wall*, and in fact cited *Wall* with approval. The Respondents' submission that membership itself has been made the "underlying legal right" by the Court of Appeal is directly contradicted by the Court of Appeal's detailed reasons with respect to the fundamental issue of whether a contract was breached in this particular case, based on all of the circumstances.
30. The Respondents submit that *Wall* was cited correctly, and the Court of Appeal picked up on the distinction that Mr. Wall's case before the court was substantially different than their own. The Court of Appeal carefully considered the available By-Laws and Constitution in this case. They determined that these could be enforced according to their terms, but the Applicants had not supplied the necessary evidence to determine if they were in fact carried out according to the terms. The matter was thus returned to the Superior Court.

²⁹ Reasons of Court of Appeal for Ontario, Tab 2. C. of Leave to Appeal Application, at p. 24, paragraph 43.

31. Further, it is submitted that the English decision cited by the Applicants, *Shergill v Khaira*, supports the Respondents in this proceeding. In *Shergill*, the United Kingdom court reasoned that:

“it would be more than strange if a pure question of interpretation of a trust deed executed in England relating to property in England and clearly intended to be governed by English law, could not be resolved by an English court”³⁰

32. Similarly, it is submitted that it would be more than strange if an Ontario court could not interpret the meaning of a By-Law enacted by an organization dealing with the production of financial records or the expulsion of members. A court is competent to decide the terms of By-Laws and whether an organization has complied with those terms, just as it does with any other contractual matter.

ISSUE TWO – MATTERS IN DISPUTE ARE JUSTICIABLE

33. The dispute between the Appellants and the Respondents is a contractual dispute centered around whether the proper steps pursuant to the Constitution and the By-Laws were followed in deciding to expel the Appellants. A court is competent to decide this question.

34. The Applicants allege that this dispute centers around the “Tehadiso” movement. However, the relief sought is the following:

- a) Declarations with respect to the decision to expel the members (alleged to have been taken contrary to the requisite steps and procedure in the Constitution and By-Laws);
- b) Declarations with respect to the Findings and Guidelines of the Committee (alleged to have been taken contrary to the written terms of the Findings and Guidelines);
- c) Enforcement of the election policy of the Church (a contractual right provided in the Constitution and By-Laws);

³⁰ *Shergill v Khaira*, [2014] UKSC 33 at paragraph 20.

- d) Production of financial records (a contractual right given to the Respondents pursuant to the By-Laws and Constitution of the organization).³¹
35. None of this relief requires a court to wade into theological matters or understand the “Tehadiso” movement as the Applicants attempt to frame this matter.
36. The Ontario Court of Appeal in *Pankerichan* explained when church disputes may become justiciable:
- “while disputes about religious doctrine are not appropriate for judicial determination, courts have intervened to review the actions of religious bodies when the controversies (typically regarding membership) involve property, contracts or other civil rights. This was a fair characterization of how Canadian courts generally approach disputes within religious organizations.”³²
37. The Respondents have not argued that they have a freestanding right to procedural fairness, but rather, a contractual one based on the Constitution and By-Laws of the Applicants. Once this right is granted via the By-Laws, a court is competent to deal with the controversy regarding membership because it is capable of assessing whether the requisite steps have been followed.
38. The Court of Appeal simply confirmed that the Respondents are entitled to a review and declaration that contractual terms may have been breached and for enforcement of the terms. A court is competent and can decide this question without venturing into the underlying theological dispute.

ISSUE THREE – Fundamental Charter Freedoms are not threatened

39. The Applicants allege that this claim results in “such a high degree of interference with church affairs that religious freedom and freedom of association concerns must be considered”.

³¹ Statement of Claim, Tab 4.A of Application for Leave to Appeal.

³² *Pankerichan v Djokic*, 2014 ONCA 709 [*“Pankerichan”*] at paragraph 54.

40. The Applicants in this case have created a Constitution and By-Laws. These documents set out fundamental obligations for both parties. The Respondents allege that these terms were not adhered to by the Applicants.
41. If the Applicant Church desired to have no oversight or interference whatsoever in its affairs, the obligations placed on the Applicants could have been reduced or made clearer within their own Constitution and By-Laws. However, once an expulsion procedure and the rights of the Congregation have been spelled out in By-Laws and a Constitution, the Respondents submit that there must be some mechanism to ensure adherence and enforcement of the By-Laws and Constitution.
42. The reverse suggestion made by the Applicants is problematic. It is submitted that if a party has made the decision to set out obligations and insist upon compliance, then there must be some procedure to ensure these obligations can be enforced in accordance with their terms. If the court cannot intervene to assess whether a party has breached these terms, then there would be no reason for the By-Laws and Constitution at all, since they would be wholly incapable of enforcement.

ISSUE FOUR – APPELLATE REVIEW AND QUESTIONS OF LAW, FACT, and MIXED FACT AND LAW

43. At paragraph 36 of its decision, the Court of Appeal correctly identified the standard of review. On a motion for summary judgment, the standard of review is correctness.³³
44. The Court of Appeal properly identified the issue, framed as whether the motion judge was correct in holding that there was no underlying contract and therefore no genuine issue requiring a trial. The Court of Appeal unanimously decided that the motion judge erred in finding that there was no evidence of an underlying contract between the parties.³⁴
45. In response to paragraph 60 of the Application for Leave to Appeal, the Court of Appeal reasoned that the Appellants had not filed the necessary evidence to enable the court

³³ Reasons of Court of Appeal for Ontario, Tab 2. C. of Leave to Appeal Application, at p. 21, paragraph 36.

³⁴ Id. at paragraph 44.

to determine the rules of expulsion or whether they were followed. Thus, the Court of Appeal made a finding that it was not possible to determine whether the contractual terms were breached on a summary judgment motion³⁵.

46. After determining that the motion judge erred and the Respondents had not filed the necessary material for a factual determination to be made, the Court sent the matter back to the Superior Court for trial. The Respondents are not being deprived of the opportunity to argue that a contract was not breached.

Conclusion

47. The factual dispute between the Applicants and the Respondents and a determination of whether the Constitution and By-Laws was followed in this particular case is not a matter of national importance. This determination is important to these particular aggrieved Appellants. It is respectfully submitted that the Applicants have not demonstrated that the issue raised in this case is one of national or public importance.
48. The Supreme Court of Canada very recently reviewed the law pertaining to voluntary associations in *Wall* and the Court of Appeal confirmed this body of jurisprudence in its decision. The Court of Appeal was mindful that adherence to a religious organization alone is not enough to create a contract, but found that the By-Laws and Constitution present in this particular case constituted a contract setting out the rights and obligations of members and the organization.³⁶ This is not a contradiction of *Wall*, but rather a confirmation that an underlying legal right exists that the Respondents seek to have vindicated.

PART IV – SUBMISSIONS ON COSTS

49. The Respondents respectfully request that costs be awarded for this leave to appeal Application.

³⁵ Id. at paragraph 63.

³⁶ Id. p. 22-23 and paragraphs 39-40.

PART V – ORDER SOUGHT

50. The Respondents respectfully request that leave to appeal be denied, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF APRIL, 2020

A handwritten signature in black ink, appearing to read 'AColangelo', is written in a cursive style.

ANTHONY COLANGELO

Counsel for the Respondents

PART VI – TABLE OF AUTHORITIES

Cases	Paragraphs in Memorandum
<i>Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall</i> , 2018 SCC 26, [2018] 1 SCR 750	3
<i>Pankerichan v Djokic</i> , 2014 ONCA 709	54
<i>Senez v Montreal Real Estate Board</i> , 1980 CanLII 222 (SCC), [1980] 2 SCR 555	pp. 566-567
<i>Shergill v Khaira</i> , [2014] UKSC 33	20

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MESSALE ENGEDA - 52

- 1 you said. Right?
- 2 MR. WOOD: Well, it's addressed to the
- 3 church.
- 4 BY MR. COLANGELO:
- 5 210. Q. I'm saying -- yes. And how did it
- 6 come to you? Was it in the mail? Was it sitting
- 7 on the pews?
- 8 A. Not -- they just put it individually
- 9 to the people.
- 10 211. Q. Who's they?
- 11 A. The agency, whoever it is.
- 12 212. Q. So my question is, what evidence do
- 13 you have that they actually wrote this?
- 14 A. Really who wrote, I don't know.
- 15 213. Q. So you don't know who wrote it?
- 16 A. No.
- 17 214. Q. So in paragraph 20 you said:
- 18 "The plaintiffs, in April, 2016, falsely
- 19 identifying themselves as 'the committee's
- 20 supporting group' distributed to the
- 21 congregation a written statement..."
- 22 A. Yeah.
- 23 215. Q. And that's this statement here?
- 24 A. Yeah.
- 25 216. Q. But you said they falsely identified