
VOLUNTARY ASSOCIATION’S CONSTITUTION AND BY-LAWS FOUND TO BE CONTRACTUAL

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A. INTRODUCTION

The Court of Appeal for Ontario (“Court of Appeal”) released its decision in *Aga v Ethiopian Orthodox Tewahedo Church of Canada*¹ on January 8, 2020. The decision concerns an appeal of a case brought by five former members (the “Appellants”) of the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (the “Congregation”). The Court of Appeal described the Congregation as “a voluntary association governed by a Constitution and By-Laws” and “a local branch of the Ethiopian Tewahedo Orthodox Church, which has parishes around the globe.”² The Appellants, who had been expelled as members of the Congregation, had earlier brought an action before the Superior Court against the Ethiopian Tewahedo Orthodox Church of Canada St. Mary Cathedral, an Ontario corporation (the “Church Corporation”), which the Court of Appeal also identified as a member of the Congregation.

In the Court of Appeal’s decision, the Court of Appeal considered its jurisdiction to determine the affairs of a voluntary association, and reviewed whether, given the Congregation’s status as a voluntary association, the motions judge was correct in holding there was no underlying contract between the Appellants, as members, and the Congregation. The motions judge’s earlier finding that there was not a contract issue was based on her determination that the Appellants were not members of the Church

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¹ 2020 ONCA 10.

² *Ibid*, para 11.

Corporation and, therefore, resulted in her finding that there was no genuine issue requiring a trial. This *Church Law Bulletin* provides a summary of the Court of Appeal case and the Court of Appeal's reasoning behind its decision.

B. BACKGROUND

1. Organizational Status of the Church Corporation and the Congregation

The relationship between the parties, as outlined by the Court of Appeal, is complex. The Congregation is a local branch of the global Ethiopian Tewahedo Orthodox Church, which the Court of Appeal described as “a voluntary association governed by a Constitution and By-Laws,” as mentioned above. The Church Corporation, on the other hand, is a non-share capital corporation incorporated under the Ontario *Corporations Act*. While the Appellants were not members of the Church Corporation, both the Appellants and the Church Corporation were members of the Congregation as a voluntary association.

The legal action had been brought by the Appellants, as members of the Congregation, against the Church Corporation and various members of the Church Corporation's leadership, as respondents, in order to advance claims involving alleged improper removal of the Appellants, as members, from the Congregation, the facts of which are discussed in greater detail in section C, below. In this regard, the Appellants claimed that there were internal procedures governing the relationship between the Church Corporation, its leaders, and the members of the Congregation.

2. Constitution and Revised Constitution of the Congregation

The Congregation was governed by a 1977 constitution written in the Amharic language (“1977 Constitution”), but for which no English translation was provided to the Court of Appeal. A revised constitution written in English came into effect in July 2017, two months after the Appellants were expelled from the Congregation (“Revised Constitution”). While the Revised Constitution was not a direct translation of the 1977 Constitution, both versions contained a brief statement outlining behavioural expectations of members in complying with applicable doctrine and rules. In this regard, Article 61 of the Revised Constitution stated that “Every faithful must abstain from committing acts

violating the moral values of the church and its rules and regulations; the follower is obliged to respect and uphold church rules and Holy Scriptures.”³

Article 63 of the Revised Constitution stated as follows,

5. When any follower is found in violation of the provision under Article 61, section 2 of the Ecclesiastical Constitution (Qale Awadee):

A. First, advice and education will be given by spiritual father or church representative;

B. Secondly, consultation and canon will be given;

C. On the third time, temporary suspension from membership with warning.

6. The decision on cancellation of membership of faithful shall be effective only upon examination by special council and approval by the diocese archbishop.⁴

3. By-laws of the Congregation

The Congregation’s by-laws (“By-Laws”) had the stated purpose to “legally and unitedly administer the Ethiopian Orthodox Tewahedo Church in the Diaspora.”⁵

The stated objectives of the By-Laws were to “ensure that the rights of the clergy and laity are fully respected and to aim for the best interest thereof in consonance with laws of countries where they reside.”⁶

Article 44.1.a of the By-Laws stated as follows, “In accordance with Ch. 7 article 53:1 of the ecclesiastical constitution and under the provisions of parish regulations, the rights of the laity, organized as parishioners, shall be fully respected.”⁷ Further, Article 47 of the By-Laws addressed “disciplinary measures” including: (a) advice, warning or financial penalty (Article 47.1.a); (b) loss of membership status (Articles 47.1.b and 47.1.c); and (c) excommunication (Article 47.2).

³ *Ibid*, para 15.

⁴ *Ibid*, para 16.

⁵ *Ibid*, para 17.

⁶ *Ibid*, para 18.

⁷ *Ibid*, para 19.

C. FACTS

1. Dispute with Appellants

The Appellants consist of five individuals who had been members of the Congregation for over two decades. They were even asked to join a committee, along with other senior spiritual leaders, including the Head Priest and Archbishop, in order to investigate an alleged heretical movement within the broader church community. After completing their investigation, all of the Appellants (in their capacity as members of the investigatory committee) signed and submitted a report to the Archbishop outlining their findings. However, the recommendations outlined in the report were not implemented and a dispute subsequently arose, with the Appellants expressing their dissatisfaction with the Archbishop's decision not to implement the committee's recommendations.

2. Expulsion of Appellants

On October 26, 2016, letters from the Head Priest were sent to the Appellants, warning them that that they could face expulsion if they did not cease expressing their dissatisfaction with the Archbishop's decision. On May 23, 2017, the Archbishop sent letters to each of the Appellants indicating that their membership in the Congregation had been suspended "according to the bylaw of our Church" and referenced Chapter 57, Article 4 and Chapter 55, Article 1 pursuant to the By-Laws. The excerpts of the By-laws were not enclosed with the Archbishop's letter. The next day, the Church Corporation's legal counsel wrote to each of the Appellants advising that "the requisite steps have been taken to have you expelled from the Church," but without providing any additional details regarding the steps taken to expel the Appellants.

D. ANALYSIS

1. Trial Level Decision

The Appellants subsequently brought a legal action against the Church Corporation seeking a declaration that their expulsion from the Congregation was null and void, and that the investigatory committee's findings were valid and enforceable. The Appellants claimed that they were given no particulars of the allegations against them leading to their expulsion from the Congregation, and no opportunity to respond or make representations in respect of their expulsion, in breach of the rules governing the Congregation. The Appellants also claimed that their right to natural justice and freedom to practice their religion, as set out in section 2(a) of the *Canadian Charter of Rights and*

Freedoms, was violated as a result of their expulsion. In its defence, the respondents pleaded that the Congregation is a “voluntary association, the members of which acquire no civil or property rights by virtue of becoming members.” On that basis, the respondents took the position that the Appellants had “no freestanding right to procedural fairness with respect to the manner in which they were expelled from membership,” and therefore the decisions to expel them were not subject to review by a court of law.

The respondents brought a motion for summary judgment, alleging that the court had no jurisdiction to review the Archbishop’s decision to expel the Appellants from the Congregation, on the basis that there was no underlying contract between the parties or other civil right.

The Appellants opposed the motion for summary judgment on the basis that there were internal procedures governing the relationship between the Church Corporation, its leaders, and the members of the Congregation and that the respondents had failed to follow those procedures.

The motions judge found that neither the 1977 Constitution, the Revised Constitution nor the By-Laws constitute a contract between the Appellants and the Church Corporation, and that an essential element of a contract is a mutual intent to be bound by its terms, which was not possible in this case, as the Appellants were not aware of the By-laws or its terms until the court proceeding. In addition, the motions judge noted that, while members of the Congregation are required to complete an application form, it does not mention a requirement to abide by the By-laws.

Most importantly, the motions court found that, while the Appellants were members of the Congregation (a voluntary association), the Appellants were not “members” of the Church Corporation (an Ontario corporation) and, therefore, did not acquire rights as members of the Church Corporation under the Ontario *Corporations Act*.

In closing, the motions judge held that the case was analogous to the Supreme Court of Canada’s decision in *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*

(“*Wall*”),⁸ where the Court held that, as a general principle, judicial review is not available for the decisions of voluntary religious organizations absent the existence of an underlying legal right. The motions judge held that the Appellants had sought remedies for alleged breaches of procedural fairness, but there was no basis to do so, since there were no underlying contractual rights at issue, and dismissed the Appellants’ claim.

2. Court of Appeal Decision

At the appeal level, the Appellants argued that the motions judge erred in its decision, as the Congregation’s 1977 Constitution, Revised Constitution and By-Laws do contain contractually binding and enforceable provisions governing disciplinary measures. The Court of Appeal therefore considered: (1) whether the rights and obligations of voluntary associations’ members were contractual; and (2) if so, whether the contract provides for a process for expelling the Appellants from the Congregation, and whether any of those contractual provisions were breached.

Following the analysis in *Wall*, the Court of Appeal stated that “[a]dherence to a religious organization alone is not enough to create a contract.”⁹ Instead, a court’s jurisdiction to address a voluntary association’s adherence to its own procedures and, whether procedural fairness was provided in following those procedures depends on “the presence of an underlying legal right to be adjudicated, such as a property or a civil right in contract or tort” which needed to first exist.¹⁰ Where a voluntary association has a written constitution and by-laws, the Court of Appeal stated that these documents constitute a contract setting out the rights and obligations of members and the organization. Further, pursuant to the *Wall* decision, it held that “[o]nce it is established that a contract exists, an expectation of procedural fairness may attach as a way of enforcing the terms of a contract.”¹¹ The applicable requirements of procedural fairness would depend on the circumstances, including the nature of the organization and the seriousness of the consequences of discipline. In this regard, the

⁸ 2018 SCC 26. For further information on this decision, see Terrance S Carter, Sean S Carter and Theresa LM Man, *Church Law Bulletin No. 54*, “Supreme Court Upholds Religious Autonomy in Wall Decision” online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/church/2018/chchlb54.pdf>>.

⁹ *Supra* note 1, para 39

¹⁰ *Ibid.*

¹¹ *Ibid.*, para 41.

basic requirements of procedural fairness include “notice, opportunity to make representations, and an unbiased tribunal.”¹² Further, the Court of Appeal stated that:

[...] whether or not a member has specific knowledge of or expressly consents to the specific terms in the by-laws, 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 its constitution and by-laws.¹³

In this case, the Court of Appeal found that the Appellants had applied to be members of the Congregation, completed the necessary membership forms and offered consideration through monthly payments. They were, therefore, more than simply adherents of the faith, and upon approval of their membership applications, they became members of the Congregation, which the Court of Appeal described as “a mutual agreement to be part of the Congregation and abide by the governing rules, whether or not they were specifically aware of the terms.”¹⁴ Given the evidence before the Court of Appeal, it found that the rules governing the treatment and discipline of members were set out in the 1977 Constitution and the By-Laws, which the Court of Appeal found was a contract between the parties (and indicated the motions judge erred in finding there was no evidence of an underlying contract between the parties). The Court of Appeal also found the Appellants would have been aware of those provisions in the 1977 Constitution and the By-laws before the legal actions, by virtue of their participation on the investigatory committee.

Having determined that (1) a contract existed and (2) the Congregation’s constitution and By-Laws contain the rules that the Church Corporation and its leadership were required to follow in sanctioning members, the Court of Appeal then turned to the matter of whether the contract had been breached. On this point, it held that there was insufficient evidence to determine whether or not there had been a breach of contract on the basis of failure to comply with the rules within the 1977 Constitution and By-Laws. This was because the Church Corporation had failed to provide the Court of Appeal with information concerning the rules and steps that they took to expel the members in accordance with the constitution and By-laws. Given this, the Court of Appeal granted the

¹² *Ibid.*

¹³ *Ibid.*, para 43.

¹⁴ *Ibid.*, para 47.

Appellant’s appeal, set aside the trial court’s decision, and ordered the matter be returned to the lower court as there were “genuine issues to be determined.”¹⁵

E. CONCLUSION

The Court of Appeal’s decision in this case is unique in that it found that individuals who were not corporate members of the Church Corporation, but who were instead members of the Congregation (as a “voluntary association”), had legally protected rights in the Church Corporation (despite the fact they were not members of the Church Corporation). It is unclear whether the court would have made a different decision if there had not been such an intricately close relationship between the governance and operations of the Church Corporation and the Congregation.

Further, this decision affirms previous case law indicating that the governing documents (such as constitutions and by-laws) of voluntary associations (including religious organizations and others) are contractually binding documents between the association and its members. These rights, in turn, attract the basic requirements of procedural fairness, including “notice, opportunity to make representations, and an unbiased tribunal,”¹⁶ where removal of a member is contemplated. As such, voluntary associations should carefully draft the provisions of their governing documents and should also carefully comply with the requirements outlined in those governing documents, particularly when steps are taken to discipline or remove members or make other decisions impacting membership rights.

¹⁵ *Ibid*, para 64.

¹⁶ *Ibid*, para 41.