
SCC: VOLUNTARY ASSOCIATION MEMBERSHIP NOT AUTOMATICALLY CONTRACTUAL

*By Jacqueline M. Demczur, Esther S.J. Oh, and Sean S. Carter **

A. INTRODUCTION

IN A LONG-ANTICIPATED decision concerning the expulsion of five former members of a Toronto church, the Supreme Court of Canada (“SCC”) unanimously affirmed previous case law, stating that a court’s jurisdiction to intervene in the affairs of a voluntary association depends on the issues and particular facts of a case. With respect to membership in a voluntary association, the SCC confirmed that legal or contractual rights do not arise simply on the basis of membership in an organization that has a by-law, constitution or other rules that apply to members. The SCC also confirmed that natural justice, itself, does not give rise to legal rights in this situation and, as a result, the ability of a court to review membership decisions in voluntary associations is subject to an analysis of the facts.

The SCC’s decision also held that membership in a voluntary association that has a constitution and bylaws does not automatically create a contractual relationship reviewable by a court. Instead, in the context of a voluntary association, a determination of whether there is a contractual relationship must be made on the basis of general contract principles, including the requirement for objective intentions by the parties to enter into legal relations, which the SCC determined was missing in this case.

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The SCC’s judgment in [*Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*](#),¹ released on May 21, 2021, considered a dispute concerning the expulsion of five former members (the “Respondents”) of the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (the “Congregation”) by the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (the “Church Corporation”) and various church leaders (the Church Corporation and leaders together, the “Appellants”).

This *Bulletin* provides a focussed summary of the SCC’s decision, which sets out the court’s position on the jurisdiction of the courts to intervene in the affairs of voluntary associations. This *Bulletin* also reviews the SCC’s comments concerning the nature of contractual relationships created with voluntary associations.

B. BACKGROUND

1. The Parties

The Church Corporation is incorporated under the Ontario *Corporations Act* and is a local branch of a global Ethiopian Tewahedo Orthodox Church. The Congregation is an unincorporated association, and while the Respondents were members of the Congregation prior to their expulsion, they were never members of the Church Corporation within the meaning of the *Corporations Act*. For some reason the Church Corporation (not the Congregation) was not a named party in the proceedings.

The Congregation is governed by a 1977 Constitution, as well as the Bylaw Promulgated to Legally and Unitedly Administer the Ethiopian Orthodox Tewahedo Church in the Diaspora dated October 28, 1996 (“Bylaw”). While the Constitution was amended in 2017, the SCC found that the 1977 Constitution applied to the dispute. With regard to membership, Article 61 of the Constitution addresses “Rights and Obligations of the Faithful of the Parish Church” and Article 63 addresses “Decision Against Violation of This Ecclesiastical Constitution ... and Church Law”, which includes provisions regarding membership cancellation. Similarly, Article 44 of the Bylaw addresses “Rights and Obligations of the Laity”, and Article 47 addresses “Disciplinary Measures”, including the cancellation of membership and excommunication.

¹ 2021 SCC 22.

In order to become a member of the Congregation, it was necessary to complete and submit a membership application form. While a blank sample application form was appended as an exhibit to the affidavit of one of the Appellants, it contained no reference to the Constitution or the Bylaw.

2. Facts

In 2016, the Respondents had been appointed to a committee that included the individual Appellants to investigate a movement, considered by some to be heretical, within the broader church community. The guidelines of the committee provided that it was to be “guided by the rules and regulations of the Ethiopian Orthodox Tewahedo Church Synod in the Diaspora.”² Since the matter was “dogmatic and canon” in nature, the committee’s guidelines also provided that “the final decision will be made by the archbishop of the diocese”.³

Although the committee submitted a report on its findings to the Archbishop on March 13, 2016, the Archbishop did not accept or implement the findings. The Respondents expressed their dissatisfaction with the Archbishop’s decision, which led one of the Appellants, Messale Engeda, to send letters to each Respondent on October 26, 2016, warning that they would be expelled from the Congregation if they did not cease expressing their dissatisfaction with the Archbishop’s decision.

On May 24, 2017, the Respondents each received individual letters indicating that they had been expelled from membership in the Congregation. An enclosed notice from the Archbishop read that “according to the bylaw of our Church chapter 57, article 4 and chapter 55, article 1 you have been suspended from your membership of Toronto St. Mary Cathedral”. As a side comment, Bylaw Chapters 55 and 57 were not included in the Appellant’s record.

The Respondents brought an action against the Appellants, alleging that “[t]he Church failed to follow their own internal procedures and regulations in deciding to expel [the Respondents]” and “the [Appellants] have failed to comply with its own by-laws and constitution”,⁴ and arguing that the expulsion violated principles of natural justice, as they were not given particulars of the allegations against them, nor an opportunity to respond to the allegations or to have the decision reviewed internally. They further claimed that this breached the church’s internal procedures. They

² *Ibid*, para 9.

³ *Ibid*.

⁴ *Ibid*, para 13.

therefore sought orders declaring: (1) their expulsion null and void; (2) their s. 2(a) *Canadian Charter of Rights and Freedoms* freedom of religion had been violated; (3) the committee’s findings were valid and enforceable; and (4) that the appellants “announce the findings to the Congregation and render a decision based on findings according to church law”,⁵ among other relief.

The Appellants brought a motion for summary judgment, requesting the court to dismiss the Respondents’ claims. The Appellants took the position that there was “no free standing right to procedural fairness absent an underlying legal right”, and that the claim should be dismissed because the Respondents had no underlying legal right.

3. Judicial History

The motion judge found no genuine issue requiring a trial and granted the motion for summary judgement dismissing the action. The motion court held that the matter fell within the application of the SCC’s decision in *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall* (“Wall”),⁶ and that the Respondents had failed to allege or provide evidence of an underlying legal right. It therefore dismissed the Respondents’ action, finding that the Constitution and Bylaw did not constitute contracts, as they lacked the essential element of a contract, (*i.e.* mutual intent to be bound to the terms of the contract) because the Respondents had not been aware of the Bylaw or its terms until the legal proceeding. While the Congregation required prospective members to complete a membership application form, that form did not indicate members are to be bound by the terms of the Bylaw.

The Court of Appeal for Ontario overturned the trial court’s decision, holding in part that there was evidence of an underlying contract. In this regard, the Court of Appeal for Ontario stated, “[v]oluntary associations do not always have written constitutions and by laws. But when they do exist, they constitute a contract setting out the rights and obligations of members and the organization”.⁷ The Court of Appeal also found that the Respondents had applied for membership, completed membership forms, offered consideration to the Congregation in the form of monthly payments and that, upon approval of their applications, the members entered into a mutual agreement

⁵ *Ibid*, para 12.

⁶ 2018 SCC 26. For further details 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” (28 June 2018), online: Carters Professional Corporation <<https://www.carters.ca/pub/bulletin/church/2018/chchlb54.pdf>>.

⁷ *Aga v Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10, para 40.

to be part of the Congregation and comply with the governing rules, “whether or not they were specifically aware of the terms”.⁸

C. THE SCC’S DECISION

The SCC stated the only salient and substantive issue before the Court in this appeal was whether the Court of Appeal erred in its finding that there was an underlying contract between the parties, and whether there was, therefore, a genuine issue requiring a trial. In finding that the Court of Appeal did err in its finding, the SCC noted that “many informal agreements that people undertake do not result in a contract”, for example mutual undertakings between friends to attend weekly activities together or members of a household to divide the household chores.⁹ However, the SCC found that unless there is an objective intention to create legal relations, including an intention to be subject to the courts to enforce their commitments or impose damages, there is no contract.

With respect to voluntary associations, the SCC stated that the associations are “vehicles to pursue shared goals”¹⁰ that may have rules, including a constitution and bylaws as practical measures through which those shared goals can be pursued; however, these rules do not in and of themselves give rise to contractual relations among their members. “The members of the local minor hockey league, or a group formed to oppose development of green spaces, or a bible study group, for example, do not enter into enforceable legal obligations just because they have joined a group with rules that members are expected to follow.”¹¹

The SCC stated that there will be no genuine issue requiring trial under rule 20.04(2)(a) of Ontario’s *Rules of Civil Procedure* “when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment” as set out in *Hryniak v. Mauldin*,¹² which is not summarised in this *Bulletin* because of space constraints. The SCC then affirmed established case law in stating that “courts have jurisdiction to intervene in decisions of voluntary associations only where a legal right is affected.”¹³ Confirming *Wall*, the SCC stated that while purely theological issues are not justiciable, “where a legal right is at issue courts may need to consider questions that have a religious aspect in vindicating the legal right”, and that “there is no free standing right to procedural fairness with respect to decisions taken by

⁸ *Ibid*, para 47

⁹ *Supra* note 1, para 21.

¹⁰ *Ibid*, para 23.

¹¹ *Ibid*.

¹² 2014 SCC 7, [2014] 1 S.C.R. 87.

¹³ *Supra* note 1, para 27.

voluntary associations [...] natural justice is not a source of jurisdiction”.¹⁴ These legal rights referenced by the SCC include private rights (*i.e.* rights in property, contract, tort or unjust enrichment) as well as statutory causes of action.

The SCC found that the only legal right that could potentially exist in the case at hand was a contractual right. It found that “membership in a voluntary association is not automatically contractual. Rather, a contract exists only if the conditions of contract formation, including intention to create legal relations, are met.”¹⁵ It then stated that the test for an intention to create legal relations is an objective test that considers whether the parties’ conduct would have led a reasonable person to conclude that they intended to be bound – the question is “what intention is objectively manifest in the parties’ conduct.”¹⁶ The SCC then stated that where property or employment matters are at stake, an objective intention to create legal relations is more likely to exist. Conversely, it also stated that an objective intention to create legal relations may be “more difficult to show in the religious context”.¹⁷ It therefore concluded that some, but not all, voluntary associations are constituted by contract, and that “courts should not be too quick to characterize religious commitments as legally binding in the first place.”¹⁸

The SCC then turned to “web of contracts” cases, being decisions based on the fact that voluntary associations generally lack legal personality and which, in turn, bar members wronged by such an association from bringing action directly against the association (unless otherwise provided for by statute). However, the common law provides that some voluntary associations are constituted by a web of contracts between each of the members. In these instances, the SCC found that if it can be shown that the voluntary association’s members objectively intended to form contractual relations, then offer, acceptance, and consideration between each and every member with the association can often be implied. Conversely, a web of contracts between members may not exist where a statute confers legal personality on the voluntary association, such as in the case of unions. In this regard, a member who joins a union could therefore form a contract with the union itself, without the need to maintain that each member had a contract with every other member.

¹⁴ *Ibid*, paras 28, 30.

¹⁵ *Ibid*, para 33.

¹⁶ *Ibid*, para 38.

¹⁷ *Ibid*, para 41.

¹⁸ *Ibid*, para 42.

In summarizing the law in its closing comments, the SCC affirmed that:

[...] courts can only intervene in the affairs of a voluntary association to vindicate a legal right, such as a right in property or contract. Membership in a voluntary association is not automatically contractual. Even a written constitution does not suffice. Membership is contractual only where the conditions for contract formation are met, including an objective intention to create legal relations. Such an intention is more likely to exist where property or employment are at stake. It is less likely to exist in religious contexts, where individuals may intend for their mutual obligations to be spiritually but not legally binding. A voluntary association will be constituted by a web of contracts among the members only where the conditions for contract formation are met.¹⁹

In the case at hand, the SCC found no evidence of an objective intention to enter into legal relations, concluding that “there is nothing that can be characterized as an objective intention to make an offer on the part of any of the appellants, and nothing that can be characterized as an objective intention to accept on the part of any of the respondents, or vice versa.”²⁰ It therefore found that, “[a]s the motion judge correctly held, there is therefore no contract, no jurisdiction, and no genuine issue requiring a trial.” The Court therefore allowed the appeal, set aside the order of the Court of Appeal, and restored the order of the motion judge granting summary judgment and dismissing the action.

D. CONCLUSION

This decision underscores the courts’ reluctance to intervene in the affairs of voluntary associations, particularly those of a religious nature as in this case as well as in the *Wall* decision. In this regard, following the approach set out in *Wall*, the courts will intervene only where an underlying legal right, such as a contractual, property or employment right, has been affected. By contrast, the courts will not determine matters of a purely theological nature. In considering the justiciability of a matter based on an alleged violation of a contractual right, this SCC decision shows that courts will look to the parties’ objective intentions to form a contractual relationship in determining whether or not a contract exists.

As a further comment, in circumstances involving multiple entities, it is important that the correct entities be named parties to a legal action, and remain in that capacity – especially when those entities carried out the actions under dispute. This issue was never raised at the original trial court level, but it is central to proceedings before the court that ‘every necessary and proper party’ be named, as explained in Rule 5.03

¹⁹ *Ibid*, para 49.

²⁰ *Ibid*, para 52.

of Ontario's *Rules of Civil Procedure*. In this case the Church Corporation was named as a defendant in the original proceeding, even though the dispute involved the actions of the Congregation which removed the Respondents as members of the Congregation (and not of the Church Corporation).

The SCC decision is also a reminder that it is important for charities and not-for-profits to clearly set out internal governance processes, such as those relating to membership admissions and termination, in their governing documents, including their by-laws. Where there is an intention to have members agree to be bound the terms of the bylaw or other type of internal governance documents, the membership application form to be signed by members should clearly reference this. In addition, a copy of the by-laws (or other operative internal governance document) should either be provided or made available to each member so that members have the opportunity to review and be made aware of their terms at the outset.

If a disagreement later arises concerning an alleged breach of a by-law provision, courts will look to these governing documents to determine whether a voluntary association has strictly complied with the processes that have been set out in those documents, provided it is first confirmed that a contractual relationship is found to exist. Litigation is a lengthy and expensive process, where the successful parties most often only receive a portion of their actual legal costs. Taking proactive steps, such as those described above, can reduce the chance of ultimately unnecessary litigation arising, thereby saving valuable resources and ensuring that they will be directed towards carrying out the organization's purposes and programs.



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