SUPREME COURT OF CANADA

CITATION: Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral *v.* Aga, 2021 SCC 22

APPEAL HEARD: December 9, 2020
JUDGMENT RENDERED: May 21, 2021
DOCKET: 39094

BETWEEN:

Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral, Messale Engeda, Abune Dimetros and Hiwot Bekele
Appellants

and

Teshome Aga, Yoseph Beyene, Dereje Goshu, Tseduke Gezaw and Belay Hebest
Respondents

- and -

Canadian Muslim Lawyers Association, Association for Reformed Political Action (ARPA) Canada, Canadian Civil Liberties Association, Evangelical Fellowship of Canada, 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 and Canadian Centre for Christian Charities
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 58)	Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Martin and Kasirer JJ. concurring)

Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral,
Messale Engeda,
Abune Dimetros and
Hiwot Bekele *Appellants*

v.

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

and

Canadian Muslim Lawyers Association,
Association for Reformed Political Action (ARPA) Canada,
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2021 SCC 22

File No.: 39094.

2020: December 9; 2021: May 21.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Jurisdiction — Religious organization expelling members from congregation — Expelled members bring action challenging expulsions — Whether action raises a legal right giving superior court jurisdiction to review expulsions — Whether written constitution and bylaws of religious organization contractually binding and enforceable.

Five church members were expelled from the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral. They brought an action against the church and members of its senior leadership, seeking, among other relief, a declaration that their expulsion was null and void, as it violated the principles of natural justice. The church and members of its leadership brought a motion for summary judgment seeking to have the action dismissed, on the basis that the court had no jurisdiction to review or set aside the expulsion decision. They argued that there is no free-standing right to procedural fairness absent an underlying legal right, and the expelled members had no underlying legal right. The motion judge granted summary judgment and dismissed the action, determining that the expelled members failed to

allege or provide evidence of an underlying legal right. The Court of Appeal allowed the appeal by the expelled members, holding that the written constitution and bylaws of a voluntary organization constitute a contract setting out the rights and obligations of the members and the organization. It concluded that the parties entered into a mutual agreement to abide by the governing rules and that whether there had been a breach of contract on the basis of failure to comply with the rules was a genuine issue requiring a trial.

Held: The appeal should be allowed and the order of the motion judge restored.

A court's jurisdiction to intervene in the affairs of a voluntary association depends on the existence of a legal right which the court is asked to vindicate. Voluntary associations with constitutions and bylaws may be constituted by contract, but this is a determination that must be made on the basis of general contract principles, and objective intention to enter into legal relations is required. In this case, evidence of an objective intention to enter into legal relations is missing. As such, there is no contract, no jurisdiction and no genuine issue requiring a trial.

Courts have jurisdiction to intervene in decisions of voluntary associations only where a legal right is affected. Purely theological issues are not justiciable, but where a legal right is at issue, courts may consider questions that have a religious aspect in vindicating the legal right. Legal rights which can ground jurisdiction include private rights in property, contract, tort or unjust enrichment and statutory causes of action.

Natural justice is not a source of jurisdiction, although where there is a legal right at issue, natural justice may be relevant to whether a legal right was violated. Many voluntary associations will exercise some legal rights, for example, owning property or contracting for services. The question in a given case is whether the particular relief sought by the plaintiff is the vindication of a legal right. If not, then there is no cause of action or basis for relief.

Membership in a voluntary association is not automatically contractual. A contract exists only if the conditions of contract formation are met. Where a party alleges that a contract exists, they must show that there was an intention to form contractual relations. The common law holds to an objective theory of contract formation. With respect to the requirement of intention to create legal relations, the test is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. Courts may consider the surrounding circumstances, including the nature of the relationship among the parties and the interests at stake. These principles apply directly to whether a given voluntary association is constituted by contract.

Where property or employment is at stake, an objective intention to create legal relations is more likely to exist. Conversely, an objective intention to create legal relations may be more difficult to show in the religious context. While courts must have jurisdiction to give effect to legal rights — including legal rights held by members of religious associations and impermissibly affected in the operation of such associations

— courts should not be too quick to characterize religious commitments as legally binding in the first place.

The common law holds that some voluntary associations are constituted by a web of contracts between each member and every other. This is founded on an objective interpretation of what the parties intended. A voluntary association will be constituted by a web of contracts only where the conditions for contract formation are met, including objective intention.

There is no evidence in this case of an objective intention to enter into legal relations. The motion judge correctly held there is no contract. Becoming a member of a religious voluntary association, and even agreeing to be bound by certain rules, does not, without more, evince an objective intention to enter into a legal contract enforceable by the courts. Members of a religious voluntary association may undertake religious obligations without undertaking legal obligations. The absence of any evidence of an objective intention to enter into legal relations is fatal to the expelled members' claim.

Cases Cited

Applied: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750; **considered:** *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Hofer v. Hofer*, [1970] S.C.R. 958; **referred to:** *Ahenakew*

v. MacKay (2004), 71 O.R. (3d) 130; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, aff'd [1997] O.J. No. 3754 (QL); *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141; *Dunnet v. Forneri* (1877), 25 Gr. 199; *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481; *Polish Alliance of Association of Toronto Ltd. v. The Polish Alliance of Canada*, 2017 ONCA 574, 32 E.T.R. (4th) 64; *Scotsburn Co-operative Services Ltd. v. W. T. Goodwin Ltd.*, [1985] 1 S.C.R. 54; *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29; *Kernwood Ltd. v. Renegade Capital Corp.* (1997), 97 O.A.C. 3; *Smith v. Hughes* (1871), L.R. 6 Q.B. 597; *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99, 34 B.C.L.R. (6th) 248; *Balfour v. Balfour*, [1919] 2 K.B. 571; *Eng v. Evans* (1991), 83 Alta. L.R. (2d) 107; *Foran v. Kottmeier*, [1973] 3 O.R. 1002; *Pinke v. Bornhold* (1904), 8 O.L.R. 575; *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229; *E. v. English Province of Our Lady of Charity*, [2012] EWCA Civ 938, [2013] Q.B. 722; *Percy v. Board of National Mission of the Church of Scotland*, [2005] UKHL 73, [2006] 2 A.C. 28; *Berry v. Pulley*, 2002 SCC 40, [2002] 2 S.C.R. 493; *The Satanita*, [1895] P. 248, aff'd *Clarke v. Earl of Dunraven*, [1897] A.C. 59; *Orchard v. Tunney*, [1957] S.C.R. 436; *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(a).

Corporations Act, R.S.O. 1990, c. C.38.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 20.04(2)(a).

Rules of the Supreme Court of Canada, SOR/2002-156, r. 47.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 62(3).

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APPEAL from a judgment of the Ontario Court of Appeal (van Rensburg, Paciocco and Thorburn JJ.A.), 2020 ONCA 10, 150 O.R. (3d) 516, 442 D.L.R. (4th) 257, [2020] O.J. No. 68 (QL), 2020 CarswellOnt 138 (WL Can.), setting aside a decision of Nishikawa J., Ont. S.C.J., No. CV-18-589955, February 26, 2019. Appeal allowed.

Philip H. Horgan and *Raphael T. R. Fernandes*, for the appellants.

Anthony Colangelo, for the respondents.

Shahzad Siddiqui, for the intervener the Canadian Muslim Lawyers Association.

John Sikkema, for the intervener the Association for Reformed Political Action (ARPA) Canada.

Cara Zwibel, for the intervener the Canadian Civil Liberties Association.

Written submissions only by *Albertos Polizogopoulos*, for the interveners the Evangelical Fellowship of Canada and the Catholic Civil Rights League.

Jayden MacEwan, for the intervener the Watch Tower Bible and Tract Society of Canada.

Wesley J. McMillan, for the intervener the British Columbia Humanist Association.

Kevin L. Boonstra, for the intervener the Seventh-day Adventist Church in Canada.

Derek Ross, for the intervener the Christian Legal Fellowship.

Mannu Chowdhury, for the intervener the National Council of Canadian Muslims.

Adam Goldenberg, for the intervener Egale Canada Human Rights Trust.

Written submissions only by *Barry W. Bussey*, for the intervener the Canadian Centre for Christian Charities.

The judgment of the Court was delivered by

ROWE J. —

[1] The respondents were expelled from the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral after a dispute arose about a movement within the church which some considered to be heretical. The respondents brought an action against the appellants, the church and members of its senior leadership, seeking a declaration that their expulsion was null and void, and other relief. The appellants brought a motion for summary judgment seeking to dismiss the action against them on the basis that the court had no jurisdiction to review or set aside the expulsion decision. The motion judge granted the motion for summary judgment in favour of the appellants and dismissed the action. The respondents appealed, and the Court of Appeal for Ontario allowed the appeal: 2020 ONCA 10, 150 O.R. (3d) 516.

[2] On appeal to this Court, the appellants argue that the decisions of a religious voluntary association cannot be reviewed by a court absent an underlying legal right, and the Court of Appeal erred in effectively holding that membership itself constitutes an underlying legal right grounding jurisdiction, deviating from *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750.

[3] Jurisdiction to intervene in the affairs of a voluntary association depends on the existence of a legal right which the court is asked to vindicate. Here, the only viable candidate for a legal right justifying judicial intervention is contract. The finding of a contract between members of a voluntary association does not automatically follow from the existence of a written constitution and bylaws. Voluntary associations with constitutions and bylaws *may* be constituted by contract, but this is a determination that must be made on the basis of general contract principles, and objective intention to enter into legal relations is required. In this case, evidence of an objective intention to enter into legal relations is missing. As such, there is no contract, there is no jurisdiction, and there is no genuine issue requiring a trial. I would therefore allow the appeal and restore the order of the motion judge granting summary judgment and dismissing the action.

I. Facts

A. *The Parties*

[4] The corporate appellant, the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral ("Church Corporation"), is incorporated under the *Corporations Act*, R.S.O. 1990, c. C.38. The Church Corporation owns the church building and land, and is a local branch of a global Ethiopian Tewahedo Orthodox Church. The individual appellants include members of the leadership of the church: Messale Engeda is the Head Priest and Administrator, and Abune Dimetros is the Archbishop.

[5] The respondents are all former members of the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral ("Congregation"). The Congregation is an unincorporated association. The respondents are not and were never members of the Church Corporation within the meaning of the *Corporations Act*.

B. *The Constitution and Bylaw*

[6] The respondents rely on the 1977 Constitution and the Bylaw Promulgated to Legally and Unitedly Administer the Ethiopian Orthodox Tewahedo Church in the Diaspora, dated October 28, 1996 ("Bylaw"). The Constitution was amended in 2017 ("Revised Constitution"), but it is the 1977 Constitution that applies to this dispute. The 1977 Constitution is in the Amharic language. No translation of the 1977 Constitution was provided, but the appellants provided a chart that compares the 1977 Constitution and the Revised Constitution.

[7] According to this chart, Articles 61 and 63 of the Revised Constitution correspond to Articles from the 1977 Constitution. Article 61 of the Revised 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", and includes provisions on the cancellation of membership. The Bylaw also addresses "Rights and Obligations of the Laity" at Article 44, and "Disciplinary Measures", including the cancellation of membership and excommunication, at Article 47.

C. *Expulsion of the Respondents from the Congregation*

[8] To become a member of the Congregation, one must complete and submit a membership application form. A blank sample application form is appended as an exhibit to the affidavit of one of the appellants. The application form provided is in both English and Amharic. It contains a blank line labelled "Monthly membership contribution". The English translation contains no reference to the Constitution or the Bylaw.

[9] In 2016, the five respondents and six others, including the appellants Abune Dimetros and Messale Engeda, were appointed to an *ad hoc* committee to investigate a movement some considered to be heretical. The guidelines of the committee provide that "[t]he committee will be guided by the rules and regulations of the Ethiopian Orthodox Tewahedo Church synod in the Diaspora" and that "[t]his matter is dogmatic and canon in nature and therefore the final decision will be made by

the archbishop of the diocese". The guidelines list the names of nine signatories, including some of the individual appellants and some of the respondents. The committee produced a report and made certain findings. The report was submitted to the Archbishop on March 13, 2016.

[10] The Archbishop did not accept or implement the findings of the committee. This led to a dispute. On October 26, 2016, the appellant Messale Engeda sent a letter to each of the respondents, warning them that steps would be taken to expel them from the Congregation if they did not cease expressing dissatisfaction with the decisions of the Archbishop.

[11] On May 24, 2017, each of the respondents received an identical letter advising them that they had been expelled from membership in the Congregation, in accordance with notices of expulsion from the Archbishop enclosed in the letters. The 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". The contents of Bylaw Chapters 55 and 57 are not in the record. The appellants' record contains only Chapters 1 through 12.

D. *Legal Proceedings*

[12] The respondents brought an action against the appellants. Among other things, they plead that their expulsions violate the principles of natural justice, for

example: 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 have the decision reviewed internally. They claim this was in breach of the internal procedures governing the church. The respondents sought an order declaring the decision to expel them null and void, an order declaring that their rights under s. 2(a) of the *Canadian Charter of Rights and Freedoms* had been violated by the appellants, an order declaring the findings of the committee valid and enforceable, an order that the appellants announce the findings to the Congregation and render a decision based on findings according to church law, and various other relief.

[13] The statement of claim does not explicitly allege breach of contract. However the respondents do plead 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".

II. Judicial History

A. *Summary Judgment Motion*

[14] The appellants brought a motion for summary judgment, seeking that the respondents' claims be dismissed. The appellants' position was that there is no free-standing right to procedural fairness absent an underlying legal right, and the respondents have no underlying legal right here.

[15] Justice Sandra Nishikawa granted the motion for summary judgment and dismissed the action, determining that there was no genuine issue requiring trial on the record before her under rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Nishikawa J. held that this case falls squarely within the application of *Wall,* and that the respondents had failed to allege or provide evidence of an underlying legal right. She stated that the statement of claim does not allege breach of contract and in any event neither the Constitution nor the Bylaw constitutes a contract. An essential element of a contract is a mutual intent to be bound to its terms, but the respondents were not aware of the Bylaw or the terms until this proceeding. While Congregation members are required to complete an application form, the form does not mention being bound to the Bylaw.

B. *Court of Appeal for Ontario, 2020 ONCA 10, 150 O.R. (3d) 516*

[16] On appeal, the respondents argued that the Constitution and the Bylaw governing disciplinary measures are contractually binding and enforceable, and there is therefore a justiciable issue to be tried. The Court of Appeal noted that the jurisdiction of a court to address a voluntary association's own procedures requires an underlying legal right to be adjudicated, such as a contractual right. The Court of Appeal then stated that "[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": para. 40. It cited *Ahenakew v. MacKay* (2004), 71 O.R. (3d) 130 (C.A.), for the proposition that voluntary

associations are "a complex of contracts between each and every other member. The terms of these contracts are to be found in the constitution and by-laws of the voluntary association": para. 40, citing *Ahenakew*, at paras. 20 and 26. The Court of Appeal noted that in *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555, this Court considered the rights of a member of a real estate board who had been expelled from the organization, and held 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*'": para. 42 (emphasis in original), citing *Senez*, at p. 566.

[17] Applying the law, the Court of Appeal concluded that there was evidence of an underlying contract between the parties. The Court of Appeal stated that the respondents applied to be members of the Congregation, completed membership forms, and offered consideration in the form of monthly payments. Upon approval of their applications, they entered into 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. The Court of Appeal also concluded that there is evidence that the respondents would have been aware of the Constitution and the Bylaw: as members of the investigation committee, the respondents were advised that the committee would be guided by the rules and regulations of the Ethiopian Orthodox Tewahedo Church synod in the Diaspora, and four of the respondents "signed the guidelines specifically confirming their receipt and acceptance of this term": para. 48. The Court of Appeal also stated that there was evidence that the Church Corporation and its leadership recognized its contractual obligations to abide by the rules when seeking to expel a member, such as

the letters sent to the respondents upon their expulsion. However, the Court of Appeal concluded that on the record, it was not possible to determine if there had been a breach of contract on the basis of failure to comply with the rules. Accordingly, what the rules of expulsion are and whether or not they were followed was a genuine issue requiring a trial.

III. Submissions of the Parties

[18] The appellants argue that there is no genuine issue requiring trial because *Wall* dictates that membership decisions of a religious association are not subject to the review of a court, absent an underlying legal right. The Court of Appeal erred in stating, as a blanket rule, that where a voluntary association has a written constitution or bylaws, these constitute a legally binding contract, because *Wall* held that standard contractual analysis applies, and that mutual intention to form contractual relations is required. The appellants also raise a number of other issues: they argue that charitable donations should not be construed as contractual consideration; that the claims and remedies pursued by the respondents are not justiciable due to the religious nature of the dispute; that the relief claimed by the respondents violates the *Charter*; and that by finding that there was consideration and mutual intention to form contractual relations, the Court of Appeal overturned the motion judge's factual findings without applying the palpable and overriding error standard.

[19] The respondents point out that, unlike in *Wall*, the church in this case has a constitution and bylaws. The respondents submit that the Court of Appeal was alive

to this distinction and correctly held that becoming a member of such a voluntary association entails agreement to the terms of the constitution and bylaws, following *Wall* and *Senez*. The respondents also address the other issues raised by the appellants.

IV. Issue on Appeal

[20] The only issue before this Court is: did the Court of Appeal err in holding that there is an underlying contract and therefore a genuine issue requiring a trial? For the reasons below, I conclude that it did. This disposes of all the issues as framed by the appellants. I would also dismiss the fresh evidence motion, for reasons explained below.

V. Law

[21] The law concerning the formation of contractual relations embodies practical wisdom. Many informal agreements that people undertake do not result in a contract. There are, for example, mutual undertakings between friends ("in the new year, we'll go to the gym together three times a week") or between members of a household ("you do the groceries, I'll clean the kitchen").

[22] Without more, neither of these agreements creates a contract. What is missing is an objective intention to create legal relations. In neither of these examples do the parties (reasonably understood) intend to be subject to adjudication as to the

performance of their commitments or to the imposition of remedies such as damages or specific performance.

[23] This is so not merely for individuals dealing with one another. It is also true for individuals coming together in voluntary associations. Such associations are vehicles to pursue shared goals. To this end, many such associations will have rules, sometimes even a constitution, bylaws and a "governing" body to adopt and apply the rules. These are practical measures by which to pursue shared goals. But, they do not in and of themselves give rise to contractual relations among the individuals who join. 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.

[24] The practical wisdom embodied in the common law is that much of what we agree to in our day-to-day lives does not result in a contract. Where there is no contract, or other obligation known to law, there is no justiciable interest and no cause of action.

A. *Genuine Issue Requiring Trial: If There Is No Jurisdiction, Then There Is No Genuine Issue Requiring A Trial*

[25] This Court explained in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, 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. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result": para. 49. While the onus is on the moving party to establish the existence or lack thereof of a genuine issue requiring a trial, "[e]ach side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried": *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11, citing *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (C.J. (Gen. Div.)), at p. 434, aff'd [1997] O.J. No. 3754 (QL) (C.A.), and *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141, at para. 32.

[26] The appellants' position on the motion for summary judgment was that the court had no jurisdiction to review or set aside the decision to expel the respondents. Obviously, if the court has no jurisdiction, then there is no genuine issue requiring a trial. While the onus was on the appellants as the moving parties to prove the absence of jurisdiction, and therefore the absence of a genuine issue requiring a trial, the respondents were required to "put their best foot forward" and adduce their best evidence to establish the evidentiary foundation for jurisdiction, and by extension a genuine issue requiring a trial.

B. *Jurisdiction: If There Is No Contract or Other Legal Right, Then There Is No Jurisdiction*

[27] Courts have jurisdiction to intervene in decisions of voluntary associations only where a legal right is affected. This proposition is not new. In *Dunnet v. Forneri* (1877), 25 Gr. 199, the Ontario Court of Chancery held that religious bodies are "considered as voluntary associations; the law recognizes their existence, and protects them in their enjoyment of property, but unless civil rights are in question it does not interfere with their organization": p. 206 (emphasis added). In *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586, at p. 591, Crocket J. wrote that "unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order". The point was reiterated in *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, at p. 174, and most recently in *Wall*, at para. 24, where this Court held that "[j]urisdiction depends on the presence of a legal right which a party seeks to have vindicated".

[28] Thus, while purely theological issues are not justiciable (*Wall*, at paras. 12 and 36), where a legal right is at issue, courts may need to consider questions that have a religious aspect in vindicating the legal right. As this Court explained in *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 41, "[t]he fact that a dispute has a religious aspect does not by itself make it non-justiciable". Rather, as the trial judge in that case correctly held, "a claim for damages based on a breach of a civil obligation, even one with religious aspects, remains within the domain of the civil courts": *Bruker*, at para. 32. For example, courts adjudicating disputes over church property may need

to consider adherence to the church's internal rules, even where those rules are meant to give effect to religious commitments: *Wall*, at para. 38.

[29] The legal rights which can ground jurisdiction include private rights — rights in property, contract, tort or unjust enrichment — and statutory causes of action: *Wall*, at paras. 13 and 25. This is borne out by the cases in which courts have intervened in voluntary associations. In *Lakeside*, this Court provided relief to members of a religiously-based agricultural colony who had been expelled and thus deprived of their right to live in the colony and to be supported by it. Gonthier J. noted, at p. 174, that these rights had both proprietary and contractual aspects. Similar rights were at stake in *Hofer v. Hofer*, [1970] S.C.R. 958, as well as a claim for a division of the colony's assets. Courts also have the jurisdiction to determine whether the deprivation of a person's ability to earn their livelihood was a breach of contract, as in *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481 (C.A.), and to decide between competing claims to property, as in *Polish Alliance of Association of Toronto Ltd. v. The Polish Alliance of Canada*, 2017 ONCA 574, 32 E.T.R. (4th) 64. By contrast, in *Wall*, because there was no legal right attached to the plaintiff's membership in his religious congregation, the courts had no jurisdiction to determine whether he was properly expelled.

[30] It follows that, as this Court held in *Wall*, at para. 24, "there is no free-standing right to procedural fairness with respect to decisions taken by voluntary associations". In other words, natural justice is not a source of jurisdiction. Rather,

where there is a legal right at issue, natural justice may be relevant to whether that legal right was violated. In *Lakeside*, the plaintiffs' contractual rights to remain in the colony were at issue; the colony's failure to provide natural justice was a basis for finding that those contracts had been breached. Similarly, in *Senez*, the plaintiff stood in a contractual relationship with the corporation of which he was a member. As a result, the corporation's failure to adhere to the terms of this contract in expelling him — which included an obligation to observe natural justice — constituted a breach. While *Senez* concerned a corporation, not a voluntary association, the role of natural justice in the contract is nonetheless instructive.

[31] Of course, many voluntary associations will exercise some legal rights, for example, owning property or contracting for services. The question to be answered in a given case is not whether the voluntary association exercises legal rights in general, but whether the particular relief sought by the plaintiff is the vindication of a legal right. If not, then there is simply no cause of action (*Wall*, at para. 13) and no basis for relief.

[32] In the present case, the only viable candidate for a legal right — and the only one referred to by the Court of Appeal or argued by the parties — is contract. I therefore turn to address when contracts exist within voluntary associations.

C. *Contracts in Voluntary Associations: If There Is No Intention to Enter Into Legal Relations, Then There Is No Contract*

[33] In this section, I will explain when contracts exist within voluntary associations. In short: 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. As a result, some but not all voluntary associations are constituted by contract.

(1) The Conditions of Contract Formation

[34] As this Court held in *Wall*, at para. 29, "Where one party alleges that a contract exists, they would have to show that there was an intention to form contractual relations. While this may be more difficult to show in the religious context, the general principles of contract law would apply" (emphasis added). These principles are decisive of the present appeal.

[35] A contract is formed where there is "an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration": *Scotsburn Co-operative Services Ltd. v. W. T. Goodwin Ltd.*, [1985] 1 S.C.R. 54, at p. 63. The common law holds to an objective theory of contract formation. This means that, in determining whether the parties' conduct met the conditions for contract formation, the court is to examine "how each party's conduct would appear to a reasonable person in the position of the other party": *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, at para. 33.

[36] For present purposes, it will suffice to focus on the requirement of intention to create legal relations. As G. H. L. Fridman explains, "the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": *The Law of Contract in Canada* (6th ed. 2011), at p. 15; see also S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 105. This requirement can be understood as an aspect of valid offer and acceptance, in the sense that a valid offer and acceptance must objectively manifest an intention to be legally bound: *Crystal Square*, at paras. 49-50.

[37] The test for an intention to create legal relations is objective. The question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound: *Kernwood Ltd. v. Renegade Capital Corp.* (1997), 97 O.A.C. 3; *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, at p. 607. In answering this question, courts are not limited to the four corners of the purported agreement, but may consider the surrounding circumstances: *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99, 34 B.C.L.R. (6th) 248, at para. 17; *Crystal Square*, at para. 37.

[38] Under the objective test, the nature of the relationship among the parties and the interests at stake may be relevant to the existence of an intention to create legal relations. For example, courts will often assume that such an intention is absent from an informal agreement among spouses or friends: *Balfour v. Balfour*, [1919] 2 K.B.

571 (C.A.); *Eng v. Evans* (1991), 83 Alta. L.R. (2d) 107 (Q.B.). The question in every case is what intention is objectively manifest in the parties' conduct.

[39] These principles apply directly to whether a given voluntary association is constituted by contract. As Stephen Aylward writes in *The Law of Unincorporated Associations in Canada* (2020), at §1.32, "[t]he key to the formation of the association is an intention to form contractual relations on the part of its members. This is the critical distinction between informal social activities and an association of legal significance." The local stamp club or bridge night might have rules, but without more, nobody would suppose that the members intend them to be legally enforceable. Now, while the circumstances that may give rise to such an intention will vary from case to case, it is possible to make two general observations that bear on the present matter.

[40] First, where property or employment is at stake, an objective intention to create legal relations is more likely to exist: J. R. S. Forbes, *The Law of Domestic or Private Tribunals* (1982), at pp. 20-21. When parties make an agreement that governs their right to remain in their home, or their ability to make a living, a reasonable observer would likely understand that the parties intended such an agreement to be enforceable. Thus, in *Hofer* and *Lakeside*, where the parties' agreement provided both for their right to live in the colony and for their right to be supported by it, this supported a finding that the parties had meant for the agreement to be legally binding. This was also the case in *McCaw*, where the parties' agreement determined whether the minister

could earn his livelihood within the church, and in *Foran v. Kottmeier*, [1973] 3 O.R. 1002 (C.A.), where a nurses' registry distributed assignments of work to its members.

[41] Second, and conversely, the existence of an objective intention to create legal relations may be "more difficult to show in the religious context": *Wall*, at para. 29. In *Pinke v. Bornhold* (1904), 8 O.L.R. 575 (H.C.J.), the plaintiff had been expelled, without notice, from membership in a church to which he had made donations. In dismissing his claim for relief, the court held, at p. 578, that "[t]he plaintiff's subscriptions to the church and parsonage were voluntary. His civil rights were, therefore, not affected by the resolution of the trustees expelling him from membership." More recently, the Court of Appeal of Alberta considered a claim from individuals who had been expelled from a congregation of Jehovah's Witnesses. The court rejected the claim, holding that "whatever labour and other contributions were given by the appellants, were purely voluntary and would not provide the appellants with a property interest": *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229 (C.A.), at para. 21. In the religious context, even the use of concepts such as authority and duty need not reflect an intention to create legal relations: the parties may be speaking of religious obligations rather than legal ones. While an objective intention to enter into legal relations is possible in a religious context — for example, a contract of employment between a minister of religion and their church — each case must be judged on its own particular facts: *E. v. English Province of Our Lady of Charity*, [2012] EWCA Civ 938, [2013] Q.B. 722, at para. 29; *Percy v. Board of National Mission of the Church of Scotland*, [2005] UKHL 73, [2006] 2 A.C. 28.

[42] The upshot is this. Courts must have jurisdiction to give effect to legal rights — including legal rights held by members of religious associations and impermissibly affected in the operation of such associations (as the intervener Egale Canada Human Rights Trust observed). However, courts should not be too quick to characterize religious commitments as legally binding in the first place (as the intervener the Association for Reformed Political Action (ARPA) Canada observed).

(2) Web of Contracts Cases

[43] I pause here to say a few words about the so called "web of contracts" cases, and clarify how such cases should be understood and applied. As explained above, contracts exist in voluntary associations only where the conditions of contract formation are met. As a result, not all voluntary associations are constituted by contract. However, the Court of Appeal appeared to take a different view. Referring to *Senez* and *Ahenakew*, it held that membership in a voluntary association that has a written constitution and bylaws itself constitutes a contract. This theory "would effectively eliminate any requirement for a future court to justify intervention in disputes in religious organizations": M. H. Ogilvie, "Case Comments: *Lakeside Colony of Hutterian Brethren* v. *Hofer*" (1993), 72 *Can. Bar Rev.* 238, at p. 248. If mere membership in a voluntary organization with written rules created a "legal right" of the kind referred to in *Wall*, then court intervention would be automatic and all-pervasive. The requirement of a legal right would be meaningless: *Wall*, at para. 29. As I will explain, the case law does not support this view.

[44] In *Senez*, a member of an incorporated real estate board was expelled and sued the board for damages. His employment depended on remaining a member, and he was legally obliged to pay dues to the board. There was, therefore, no question that the constitution and bylaws of the board were legally binding as between the board and the member. The question for this Court was whether an expulsion in breach of the corporation's bylaws was a delict (subject to a short limitation period under the applicable law) or a breach of contract (subject to a longer limitation period). It is in this context that Beetz J. held, at p. 567, that "the obligation of the corporation to provide the agreed services and to observe its own by-laws, with respect to the expulsion of a member as in other respects, is . . . of a contractual nature". In short, *Senez* was about characterizing the legally binding rules of a corporation. It was not about whether the rules of an unincorporated association are legally binding in the first place.

[45] It is true that, at pp. 570-71, Beetz J. referred to cases about voluntary associations, such as labour unions constituted by contract. These cases turn on the fact that voluntary associations lack legal personality, except where the legislature has expressly or by implication conferred it on them: *Berry v. Pulley*, 2002 SCC 40, [2002] 2 S.C.R. 493, at para. 46; Aylward, at §1.3. A member who has been wronged by such an association cannot bring an action directly against the association, unless this has been provided for by statute. To fill this legal void, the common law developed the theory that some voluntary associations are constituted by a web of contracts between

each member and every other: *The Satanita*, [1895] P. 248 (C.A.), aff'd *Clarke v. Earl of Dunraven*, [1897] A.C. 59 (H.L.).

[46] In cases such as *Lakeside* and *Hofer*, the existence of a web of contracts can be understood as founded on an objective interpretation of what the parties intended. Offer, acceptance, and consideration are all required, but under general contract law principles, these may often follow where an objective intention is present. Where it is shown that the members of the association objectively intended to form contractual relations, offer, acceptance, and consideration between each and every member can often be implied from the circumstances. An example of such a case is *The Satanita*, where participants in a yacht race were held to have formed contracts with each other in the following way:

> A certain number of gentlemen formed themselves into a committee and proposed to give prizes for matches sailed between yachts at a certain place on a certain day, and they promulgated certain rules, and said: "If you want to sail in any of our matches for our prize, you cannot do so unless you submit yourselves to the conditions which we have thus laid down. And one of the conditions is, that if you do sail for one of such prizes you must enter into an obligation with the owners of the yachts who are competing, which they at the same time enter into similarly with you, that if by a breach of any of our rules you do damage or injury to the owner of a competing yacht, you shall be liable to make good the damage which you have so done." If that is so, then when they do sail, and not till then, that relation is immediately formed between the yacht owners.
>
> (*The Satanita*, at p. 255, per Lord Esher M.R.)

[47] By contrast, an objective intention to form legal relations may not give rise to a web of contracts between each member and every other where legal personality

has been conferred on an association by statute. In *Orchard v. Tunney*, [1957] S.C.R. 436, this Court held that unions were constituted by a web of contracts among their members. This structure was necessary at the time to provide some recourse to aggrieved union members, but was overtaken by subsequent statutory reform: *Berry*, at paras. 37-39. Following *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.), this Court held in *Berry* that by conferring significant rights and obligations on trade unions under statute, legislatures had implicitly intended to give them legal personality. A member who joins a union could therefore form a contract with the union itself. To maintain that each member had a contract with every other had become a legal fiction that was "no longer necessary": *Berry*, at para. 54. In *Ahenakew*, at para. 32, the Court of Appeal for Ontario held that the legislature had implicitly granted legal personality to political parties in the same way. The extent to which this reasoning applies to other kinds of unincorporated associations will depend on the statutory scheme in question, and if there is an applicable statutory regime at all: *Berry*, at para. 51; *Polish Alliance*, at para. 21.

[48] All of these cases are about the legal structure of associations whose rules are manifestly meant to be legally binding. This is true both of cases where these rules constitute a web of contracts among the members and of cases where the legislature has displaced the web of contracts by giving the association legal personality. None of these cases hold that an association's rules — whether written or not — always constitute a contract, regardless of the intentions of the members. Like any other

contract, the existence of a web of contracts requires an intention to create legal relations.

D. *Conclusion*

[49] In sum, 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.

VI. Application

[50] On this record, there is no evidence of an objective intention to enter into legal relations. As the motion judge correctly held, there is therefore no contract, no jurisdiction, and no genuine issue requiring a trial.

[51] The motion judge found that the respondents failed to provide evidence of a contract, noting that an essential element of a contract is a mutual intent to be bound

by its terms. The respondents argued on the summary judgment motion that the Constitution and the Bylaw constituted a legally binding contract, but the motion judge found that the respondents were not even aware of the Bylaw or its terms when they became members. More importantly, becoming a member of a *religious* voluntary association — and even agreeing to be bound by certain rules in that religious voluntary association — does not, without more, evince an objective intention to enter into a legal contract enforceable by the courts. Members of a religious voluntary association may undertake religious obligations without undertaking legal obligations.

[52] Here, there is no evidence of an objective intention to enter into legal relations, and this is fatal to the respondents' claim. Regardless of whether or not the respondents committed to pay any money upon becoming members of the Congregation (which is disputed, as discussed below), and regardless of the fact that some of the respondents signed the guidelines of the investigation committee which reference the rules and regulations of the church (many years after the contract was supposedly formed, I add), absent an objective intention to enter into contractual relations, none of this matters. On the record before me, 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.

[53] There is therefore no need to address the issue of whether the respondents made donations or paid membership fees, and if so, whether these payments could

constitute consideration. There is also no need to address the issue of whether the Constitution or Bylaw, if they constituted terms of a contract, would have given rise to a requirement to adhere to certain decision-making procedures, including a duty of procedural fairness, or any of the other issues raised by the appellants.

VII. Fresh Evidence Motion

[54] Prior to the hearing, the appellants brought a motion to adduce fresh evidence pursuant to s. 62(3) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, and Rule 47 of the *Rules of the Supreme Court of Canada*, SOR/2002-156. The motion was deferred to the panel hearing the appeal.

[55] The fresh evidence is an affidavit sworn by Hiwot Gudeta, one of the individual appellants (named as Hiwot Bekele in the title of proceedings). The affidavit provides evidence that the church treats financial contributions as charitable donations, and has appended as exhibits the membership application forms of the five respondents, which show no commitment to make financial contributions to the church. The affidavit also includes as exhibits the notice of appeal and factums of the parties from the Court of Appeal, and the statement of claim and reasons of the Court of Appeal, which are already in the record.

[56] The test to admit fresh evidence on appeal is set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . . .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[57] I would decline to admit the fresh evidence. It is relevant only to the issue of consideration, and specifically whether the respondents ever committed to make any financial contributions upon becoming members, and how the appellants would have understood such payments. Given the absence of evidence of objective intention to enter into legal relations, this is not a decisive issue and the evidence could not have affected the result. The motion is dismissed without costs.

VIII. Disposition

[58] The appeal is allowed, the order of the Court of Appeal is set aside, and the order of the motion judge granting summary judgment and dismissing the action is restored. The appellants will have their costs throughout.

Appeal allowed with costs throughout.

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