

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## ETHIOPIAN ORTHODOX TEWAHEDO CHURCH OF CANADA ST. MARY CATHEDRAL V. AGA, 2021 SCC 22

Supreme Court of Canada, Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ, 21 May 2021

Whether expelled church members could rely on the constitution of the church as a contract.

**Key words: Unincorporated Association, Canada, Church, Member Contract, Expulsion, Natural Justice**

1. This was an appeal from the Ontario Court of Appeal *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10. The Supreme Court judgment was delivered by Rowe J with the other justices concurring.
2. A local branch of a global Ethiopian Tewahedo Orthodox Church consisted of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (Church Corporation), incorporated under the Corporations Act, R.S.O. 1990, c. C.38 owning the building and land and a congregation, which itself was an unincorporated association.
3. Five church members (expelled members) were expelled from the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral and were never members of the Church Corporation.
4. The expelled members brought an action against the Church Corporation and members of the leadership of the church. There were various claims including that their expulsions violated the principles of natural justice as 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 claimed that this was in breach of the internal procedures governing the church.
5. The Church Corporation 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 was 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.
6. On appeal, the Church Corporation and members of its leadership argued that the Constitution and the Bylaw governing disciplinary measures were contractually binding and enforceable, and there was therefore a justiciable issue to be tried. The appeal court endorsed the notion 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” (at [16]). The Court of Appeal found evidence of an underlying contract between the parties in the membership form, which included acknowledgement of monthly contributions to the church. Therefore, the matter was a genuine issue requiring a trial.

7. The matter was then appealed to the Supreme Court of Canada. The Church Corporation and members of its leadership argued that there was no genuine issue requiring trial because membership decisions of a religious association are not subject to the review of a court, absent an underlying legal right. Further, charitable donations should not be construed as contractual consideration supporting contractual relations.

8. The starting point of the Court was (at [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.

9. The Court identified cases stretching back to 1877 which established that courts do not interfere in voluntary association affairs without an underlying legal right such as rights in property, contract, tort or unjust enrichment and statutory causes of action.

10. A contract between the members of a voluntary association is not automatic and only exists if the conditions of contract formation such as offer, acceptance, consideration and intention to be legally bound were found. The Court cautioned that 'courts should not be too quick to characterize religious commitments as legally binding in the first place' (at [42]).

11. A number of cases were argued before the Court where a 'web of contracts' was found to exist between voluntary association members. The Court distinguished these cases as ones where the conditions of contract formation were met. It also distinguished a line of trade union cases where courts had held that they 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 granting legal personality (at [47]).

12. The Court found that in this matter that there was 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' (at [50]). The Supreme Court said (at [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.

13. The expelled members did not have any legal basis to bring their case before the courts.

## IMPLICATIONS



Several parties appeared as interveners in this case: 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

In Australia, the courts are not readily persuaded to find a contract between the members and officers in an unincorporated association. The Australian High Court case of Cameron v Hogan confirmed that associations which are 'social, sporting, political, scientific, religious, artistic or humanitarian in character', and not formed 'for private gain or material advantage', are usually formed on the basis of mutual consent. Unless there is some clear, positive indication that the members wish to relate to each other in a legal fashion, the rules of the association will not be treated as an enforceable contract in contrast to the rules of incorporated bodies such as companies.

Since Cameron v Hogan, a significant number of cases have distinguished or otherwise declined to follow this precedent of the High Court. A trenchant criticism is found in McKinnon v Grogan [1974] 1 NSWLR 295, 298 where Wootten J said that 'citizens are entitled to look to the courts for the same assistance in resolving disputes about the conduct of sporting, political and social organisations as they can expect in relation to commercial institutions'. According to Wootten J at 298, if disputes are not settled by the courts, this would create a 'legal-no-man's land, in which disputes are settled not in accordance with justice and the fulfilment of deliberately undertaken obligations, but by deceit, craftiness, and an arrogant disregard of rights'. The decision in John Setka v Noah Carroll & Ors [2019] VSC 571 casts doubts on the reliability of those cases about political party internal disputes that have sought to depart from or distinguish Cameron v Hogan.

Refer generally to Robert Tong (2012) Judicial intervention in the affairs of unincorporated religious associations in New South Wales. Professional Doctorate thesis, Queensland University of Technology.

## VIEW THE CASE



This case may be viewed at <https://www.canlii.org/en/ca/fca/doc/2021/2021fca145/2021fca145.html>

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