Dalhousie Law Journal

Volume 44 | Issue 2 Article 1

8-2021

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Recommended Citation

Adam Schenk, "Insulated from Justice? Religious Expulsion Before Canadian Courts in the post-Highwood Era" (2021) 44:2 Dal LJ.

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Adam Schenk*

Insulated from Justice? Religious Expulsion Before Canadian Courts in the post-*Highwood* Era

Judicial consideration of religious disputes prompt concerns that the legal system may delve into issues of a spiritual nature that should enjoy some insulation from legal comment or intervention. These concerns are only heightened in instances where the dispute concerns the very serious issue of the expulsion of a member from their religious community. While necessary care is warranted in these sensitive circumstances, a blanket prohibition on legal intervention in instances of religious expulsion creates the possibility that a member of a religious community may experience the devastation of expulsion in an unfair and unjust manner. This paper, written prior to the Supreme Court of Canada's decision in Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga *but anticipating its outcome, argues that Canadian law lacks a proper framework to facilitate appropriate legal consideration of these sensitive disputes where such consideration is necessary.*

L'examen judiciaire des litiges religieux suscite des inquiétudes quant à la possibilité que le système juridique s'immisce dans des questions de nature spirituelle qui devraient être protégées de tout commentaire ou intervention juridique. Ces inquiétudes sont encore plus vives dans les cas où le litige porte sur la question très grave de l'expulsion d'un membre de sa communauté religieuse. Bien qu'une attention nécessaire soit justifiée dans ces circonstances délicates, interdire de manière générale l'intervention juridique dans les cas d'expulsion religieuse crée la possibilité qu'un membre d'une communauté religieuse fasse la douloureuse expérience de l'expulsion d'une manière injuste et inéquitable. Dans le présent article, rédigé avant la décision de la Cour suprême du Canada dans l'affaire Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral c. Aga*, mais anticipant son résultat, nous soutenons que le droit canadien ne dispose pas d'un cadre adéquat pour faciliter l'examen juridique approprié de ces différends sensibles lorsqu'un tel examen est nécessaire.*

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Introduction

Given Canada's cultural and religious diversity it is unsurprising that some Canadians choose to resolve disputes in accordance with religious principles rather than via secular forums of dispute resolution or adjudication. A variety of religious communities utilize quasi-judicial, internal processes to resolve community disputes, such as whether to expel a member from the community, in accordance with religious dogma. A party to one of these disputes, unhappy with the ultimate decision of the community's adjudicators, will occasionally initiate a legal claim hoping to receive a different result from a Canadian court. The ensuing cases are often challenging. Judges that are tasked with determining whether legal intervention in the internal decision of a religious community is appropriate must consider difficult questions regarding the limits of judicial oversight in a society where church and state have been clearly separated.

While Canadian courts are loath to interfere in internal religious affairs and will generally avoid intervention in religious disputes where possible, some cases will require the piercing of this veil to address severe injustices.[1] While the framework of administrative law provided practical tools for courts addressing these cases, the application of the principles of judicial review were deemed inappropriate in the legal consideration of the decisions of religious adjudicators in the Supreme Court of Canada's 2018 decision in *Highwood Congregation of Jehovah's Witnesses (Judicial*

1. Justice Muldoon concisely explains this unique context in *Reed v R*, [1989] 3 FC 259, 1989 CarswellNat 291 (WL Can) (Ont Div Crt), noting at para 8 that while "in any collision between religious practice and secular law, the secular state will jealously enforce its criminal law and other public law despite religious claims or objections…[however] so long as those [religious] passions do not cause, create or commit criminal offences or civil delicts, which are entirely within the state's power of legislation, the secular state will not, and ought not to intervene in religious affairs."

Committee) v Wall.[2] While the decision in *Highwood* was undoubtedly legally correct on this point, subsequent case law in this area, most notably the Ontario Court of Appeal's 2020 decision in *Aga v Ethiopian Orthodox Tewahedo Church of Canada,*[3] suggests that Canadian law still lacks an appropriate framework for the legal consideration of the decisions of religious adjudicators. As will be demonstrated, addressing these disputes through the lens of ordinary contract law is unhelpful and largely undesirable from the perspectives of the courts as well as religious communities and individual claimants. The current status of the law creates the potential for mistreatment of individual members of religious communities in the form of unfair expulsion without the possibility of any legal remedy. The ultimate solution to this issue may be specific guidance in this area from legislatures to better guide and equip judges tasked with hearing these difficult cases.

I. *The status of the law pre*-Highwood

The judicial approach to considering decisions of internal adjudicators of religious communities was heavily reliant on the framework of administrative law, in particular its principles ensuring procedural fairness is afforded to the affected individual,[4] prior to the decision in *Highwood.* This provided a practical, fair and familiar way for courts to address internal adjudicative decisions of religious groups. Simply grabbing your judicial review glasses off the shelf to assess the case and determining whether intervention was necessary, in the same manner as you would consider the decision of an administrative tribunal, was an elegantly simple option for Canadian judges. Applying the principles of procedural fairness meant that religious members would be afforded the necessary rights to respond

2. 2018 SCC 26 [*Highwood*].

3. 2020 ONCA 10 [*Aga*]. This article was completed in its entirety prior to the Supreme Court's eventual decision in this case, *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22.

4. A complete review of the concept of procedural fairness is far outside the scope of this paper, but the principles underlying procedural fairness as noted in para 22 in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCR 817, 1999 CanLII 699 (SCC) capture its basic essence:

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors [considered in determining the appropriate procedural rights] is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

to whatever allegations had been made against them by their community, thereby ensuring some basic element of justice in these internal processes. In her summation of some of the early case law surrounding the discipline of church laypeople generally and religious expulsion particularly, Professor MH Ogilvie identifies some of the valuable principles that ensured fairness for individuals subjected to religious tribunals:

> The principles of natural justice are required to be followed in all matters of lay discipline, whether or not the constitution or customary practices of the religious institution so provide; thus, lay members under discipline must be told the full case against them, receive the right to reply, and be heard by an unbiased tribunal.
>
> When a decision is made to expel a member, it must be carried out in accordance with the proper procedures of that institution and the civil court will intervene to order that such procedures be followed. Membership rights in a religious institution can be removed only for cause, and where they have been improperly withdrawn, a civil court will intervene in the internal life of the institution to restore them or to order a proper hearing of the issues.[5]

In order to find that the very practical framework of administrative law and its principles of procedural fairness were legally applicable to religious disputes, however, it was necessary to explain how the courts had jurisdiction to apply these administrative law principles in this unique context. Administrative law is a branch of public law, whereas religious expulsion is a very private matter,[6] and this lack of congruity meant that some very stretched legal reasoning was necessary to bring religious disputes under the umbrella of administrative law. Two of the methods utilized to come under this umbrella are demonstrated in the decision in *Lindenburger v United Church of Canada.*[7] *Lindenburger* dealt with the circumstances surrounding the breakdown of the relationship between Reverend Lindenburger and the United Church congregation which he pastored.[8] The motion of the United Church to have Reverend

5. M H Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed (Toronto: Irwin Law, 2017) at 328 [citations omitted].

6. The limited application of administrative law was succinctly described in *Karahalios v Conservative Party of Canada,* 2020 ONSC 3145 at para 177 [*Karahalios*]; Justice Perell notes that "judicial review, however, is for the review of the exercise of public power and, therefore, judicial review is not available outside of the public sector sphere" [citations omitted].

7. [1985] OJ No 1195 (QL), 10 OAC 191, (Ont Div Crt) [*Lindenburger*]. This decision was upheld by the Ontario Court of Appeal in *Lindenburger v United Church of Canada*, 1987 CarswellOnt 899 (WL Can), 20 OAC 381.

8. *Lindenburger, supra* note 7 at para 17. The dismissal of employees of religious communities, particularly from positions that are spiritual in nature, lies outside the scope of this paper but has also presented unique questions and challenges with which Canadian courts have grappled.

Lindenburger's request for judicial review quashed on the grounds that the courts lacked jurisdiction was dismissed by the Divisional Court.[9] Justice Rosenberg explained multiple routes via which jurisdiction could be found and the principles of administrative law therefore applicable:

> The right to intervene in church affairs should be rarely exercised by the Court. However, since the church is a creature of statute of both the federal and provincial Legislatures and it is common knowledge that it ministers to the spiritual needs of a large segment of the Canadian public, it has a sufficient public character that it should be amenable to the process of certiorari. At a minimum it has a duty of procedural fairness in dealing with its members. Accordingly, there might be some circumstances where the Court would intervene. For these reasons, the motion to quash fails.[10]

While the statutory nature of the United Church of Canada is unique, and would not provide an avenue for a finding of jurisdictional authority for many religious communities, the argument that religious communities are sufficiently public in character and therefore attract a duty of procedural fairness pursuant to the principles of administrative law has far broader possible application. The court in *Lindenburger* does not go into particular detail regarding the test to be met regarding public character, with Justice Rosenberg in the above passage suggesting that the test is simply serving a "large segment" of the Canadian public. This test is as minimal in its detail as it is broad in its potential application and *Lindenburger* is unsurprisingly relied upon in a number of subsequent decisions as authority for the application of the principles of judicial review in the scrutinizing of church decisions.[11]

II. *The impact of* Highwood

The major issue with the pre-*Highwood* framework was that a very practical house had been built on a very weak legal foundation. There was obvious utility in adopting the principles of administrative law in considering the decisions of religious adjudicators, but the legal justification for adopting these principles in this context was questionable at best. While the application of the principles of procedural fairness in private disputes may be desirable, and perhaps ultimately just, it is typically the place of the parties involved in a private disagreement to determine that certain

9. Justice Barr dissented in the ultimate decision in the case but did not disagree with the majority of the Divisional Court on the issue of jurisdiction to impose the principles of procedural fairness (see *ibid* at para 80).

10. *Lindenburger, supra* note 7 at para 19.

11. See for instance *Davis v United Church of Canada (1991),* 8 OR (3d) 75 at paras 46-49, 92 DLR (4th) 678; *Mott-Trille v Steed (1996)*, 27 OR (3d) 486 at para 12, [1996] OJ No 202 (QL).

principles should govern their dispute unless the legislature has decided to impose these principles explicitly upon them via statute. While Canadian law does provide for some bleeding of legal principles from public law into private law, such as the permissible influence of the values of the *Canadian Charter of Rights and Freedoms*[12] in the interpretation and application of private causes of action and their remedies,[13] it does not simply follow that courts should impose principles of public law in the realm of private law without justification.

It is on the problematic application of the principles of administrative law in a private context that the decision in *Highwood* truly turns. Mr. Wall was expelled from the Highwood Congregation of Jehovah's Witnesses by the Congregation's Judicial Committee after it determined that expulsion was warranted in light of Wall's admittance of sinful behaviour and insufficient repentance of his wrongdoing. After exhausting the appeal opportunities available to him within the larger Jehovah's Witnesses community, Wall applied for judicial review of the Judicial Committee's decision.[14] Both the Alberta Court of Queen's Bench and the Alberta Court of Appeal[15] found that the courts had jurisdiction to hear the application for judicial review. The Court of Appeal's holding was very much in line with the reasoning developed in *Lindenburger* and other decisions within this line of cases. The Supreme Court summarized the majority ruling of the Court of Appeal as follows:

> The majority held that the courts may intervene in decisions of voluntary organizations concerning membership where property or civil rights are at issue. The majority also held that even where no property or civil rights are engaged, courts may intervene in the decision of voluntary associations where there is a breach of the rules of natural justice or where the complainant has exhausted internal dispute resolution processes.[16]

The Supreme Court disagreed with the Alberta Court of Appeal and took the opportunity to clearly state that judicial review is not available for decisions of private religious communities. Speaking for a unanimous court, Justice Rowe clarified that there is no freestanding right to procedural

12. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
13. The influence of *Charter* values on private causes of action based in the common law was confirmed and explained by the Supreme Court in *Hill v Church of Scientology*, [1995] 2 SCR 1130 at paras 94-101, 1995 CanLII 59 (SCC).
14. *Highwood, supra* note 2 at para 1.
15. *Wall v Highwood Congregation of Jehovah's Witnesses (Judicial Committee)*, 2016 ABCA 255 at para 29.
16. *Highwood, supra* note 2 at para 9. See *ibid* at para 19 for a discussion of cases involving pre-Highwood judicial review for voluntary associations such as political parties, sports clubs and schools.

fairness in the decisions of private religious communities to expel a particular member and that "simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term."[17] This firmly closed the door on the extremely broad public character test utilized in *Lindenburger*. Justice Rowe's reasoning was undoubtedly correct and clarified the nature of judicial review and the very particular contexts in which its principles apply. Administrative law resides firmly in the realm of public, not private, law.

While the Supreme Court rejected Wall's request for a remedy pursuant to judicial review, this did not close off the possibility of a remedy based on a private law cause of action. Courts will be appropriately wary of legal actions grounded in religious disputes but this does not mean that any dispute that is religious in nature will go unheard. In order for courts to consider these disputes, the claimants, like any other party initiating a private law claim, must be able to identify a legal right that has been violated by the religious community. If a claimant is unable to identify a discernible legal right, noted Justice Rowe, then the courts have no authority to comment on the procedures of a religious community in expelling one of its members.[18] This is no more and no less than the rights afforded to every other Canadian; outside of the extraordinary recognition of a new type of private claim, a lack of a recognized cause of action means that the courts are unable to grant any type of remedy to an aggrieved party.

While the Court's reasoning concerning the necessity of a discernible legal right is as accurate as the Court's reasoning regarding the inapplicability of judicial review, the facts at issue in *Highwood* present a context in which individual members of a religious community may be subject to significant injustices to which the Canadian justice system cannot, at least as the law exists presently, provide a remedy. Wall had been a member of the Highwood Congregation for thirty-four years before being disfellowshipped,[19] a very significant commitment unlikely to be maintained by someone who does not place substantial personal value on their relationship with their faith community. Indeed, the circumstances that Wall had endured while still endeavouring to maintain his membership in his religious community, including a requirement prior to his own expulsion to shun his teenage daughter after she had been previously expelled from the Congregation, were accurately suggested by Patrick Hart in his analysis of the Alberta Court of Appeal's decision in *Highwood*

17. *Ibid* at para 21.
18. *Ibid* at para 24.
19. *Ibid* at para 6.

as possibly "strik[ing] some as heart-wrenching."[20] It is unlikely that Wall would have even attempted to endure such difficulties unless the personal importance of his affiliation with his religious community was deep and significant.

While Wall's relationship with his community appeared to be significant in depth, the legal organization of the Highwood Congregation was tremendously shallow:

> The Congregation is a voluntary association. It is not incorporated and has no articles of association or by-laws. It has no statutory foundation. It does not own property. No member of the Congregation receives any salary or pecuniary benefit from membership. Congregational activities and spiritual guidance are provided on a volunteer basis by a group of elders.[21]

Not dissimilar to many other religious communities across Canada, the Highwood Congregation had not chosen to incorporate, meaning that possible legal remedies available to members of not-for-profit corporations were not available to Wall. The net result of the informal nature of the Highwood Congregation, coupled with the Supreme Court's elimination of resort to the principles of administrative law, was that Wall was left without any legal right on which he could rely. The Court was therefore unable to provide any type of remedy concerning Wall's expulsion, regardless of whether or not they thought a remedy would be just.[22]

III. *The misfit between religion and the law of contract*

The Supreme Court's decision in *Highwood* seemingly leaves members of a religious community that are unhappy with a decision of the community's internal adjudicators with a single option, namely an argument that the decision breached the contract that existed between the individual and the community. For a number of reasons, however, the relationship between individual adherents and their religious communities will often be the proverbial square peg that does not neatly fit into the round hole of Canadian contract law.

There are a number of very basic, well-established principles of contract law that will have application to any legal claim made on the basis of breach of contract. Some of these principles speak to the interpretation

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20. Patrick Hart, "Justice for (W)all: Judicial Review and Religion" (2017) 43:1 Queen's LJ 1 at 6 [citations omitted].
21. *Highwood, supra* note 2 at para 3.
22. While not perfectly synonymous circumstances, one cannot help but recall the vexation resulting from the common law's inability to provide just outcomes prior to the development of the law of equity.

of contracts, while others govern the prerequisites that must exist in order for a contract to have been created in the first place. As any first-year Canadian law student will readily explain, contracts require the basic foundation of offer, acceptance, and consideration. There is also the separate, but related, requirement that the parties must intend to create a legal relationship.[23] In many contractual disputes, particularly those involving formal, written contracts between sophisticated parties, these basic elements are clearly met and do not require significant consideration (no pun intended) by the parties or their lawyers. In less formal contexts, however, these requirements may not have been so obviously met, thus creating a significant obstacle for a plaintiff. While there is a wide range of formalism in Canadian religious communities, it is not unusual for some communities, such as the Highwood Congregation, to utilize very legally informal structures and relationships with its members.[24] As suggested by the Court in *Highwood,* this will create an uphill battle for members of religious communities to make what at present appears to be the only legal argument available to them, namely that their expulsion was improper insofar as it breached the contract that existed between the parties. If a member cannot establish the basic elements demanded by Canadian law, then there is no contract capable of being breached.

The Court in *Highwood* considered (somewhat in the abstract) whether a contractual relationship existed between Wall and the Congregation. In their analysis, the Court noted the difficulties in establishing the intent to form a contractual relationship and suggested that courts would be reluctant to find that a contract has been formed in this particular context:

> Mr. Wall argues that a contractual right (or something resembling a contractual right) exists between himself and the Congregation. There was no such finding by the chambers judge. No basis has been shown that Mr. Wall and the Congregation intended to create legal relations. Unlike many other organizations, such as professional associations, the Congregation does not have a written constitution, by-laws or rules that would entitle members to have those agreements enforced in accordance with their terms. In *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229 (Alta. C.A.), at paras. 22-25, the Court of Appeal of Alberta ruled that membership in a similarly constituted congregation did not grant any

23. John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 112-113. Certainty of terms, or consensus ad idem, is also, of course, a fundamental element for the formation of a contract.

24. Even in religious communities that have incorporated it does not necessarily follow that this will result in the legal formalizing of the relationships between members and their religious community. For instance, in *Aga, supra* note 3 at para 10 the plaintiffs were not members of the Cathedral's corporation despite the Cathedral's process for membership in the community.

> contractual right in and of itself. The appeal can therefore be distinguished from *Hofer v. Hofer*, [1970] S.C.R. 958 (S.C.C.), at pp. 961 and 963, *Senez c. Montreal Real Estate Board*, [1980] 2 S.C.R. 555 (S.C.C.), at pp. 566 and 568, and *Lakeside Colony*, at p. 174. In all of these cases, the Court concluded that the terms of these voluntary associations were contractually binding.
>
> Moreover, *mere* membership in a religious organization, where no civil or property right is formally granted by virtue of membership, should remain outside the scope of the *Lakeside Colony* criteria. Otherwise, it would be devoid of its meaning and purpose. In fact, members of a congregation may not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization, since "[a] religious contract is based on norms that are often faith-based and deeply held": R. Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008), 42 *S.C.L.R.* (2d) 37, at p. 45. 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.[25]

It is very easy to envision circumstances in which an aggrieved member of a religious community may have significant difficulties proving the existence of a contract between themselves and their community. If a hypothetical church attendee never formalizes their membership within the community, either in writing, via religious ceremony or ritual, or otherwise, it will be difficult to demonstrate that any type of offer to form a contract was made and accepted. In a similar vein, not all religious communities demand a formal financial commitment from members, preferring instead to provide an opportunity for non-obligatory contributions. If this same hypothetical church attendee is not able to give financially to the church as a result of a fixed income and is unable to contribute to the community in other forms, such as helping with the upkeep of the church property or assisting in service preparations, there is seemingly a lack of consideration as the religious community is not receiving anything from this attendee that is likely to be recognized as consideration by a Canadian court.[26] Yet this attendee

25. *Highwood, supra* note 2 at para 29.

26. It is not suggested here that the membership and presence of physically, mentally, financially or otherwise limited persons is not meaningful for religious communities or that these individuals cannot provide anything to other members, only that their limitations may prevent them from making contributions that could be legally recognized as consideration. The legal hurdle to establish consideration in Canadian contract law is quite low, as even the provision of something of trivial value such as a peppercorn may suffice (see McCamus, *The Law of Contracts, supra* note 23 at 226). Despite this low hurdle, it is nevertheless difficult to envision a secular court ascribing even trivial value in the context of contract law to something as ethereal as, for instance, participation in collective religious worship or prayer.

may place significant personal value on their relationship with the church, however that relationship may be described, and would be devastated to be expelled from the community for some alleged indiscretion without any element of procedural fairness. In these hypothetical circumstances, however, there appears to be no recourse to the courts, as there is clearly no freestanding right to procedural fairness post-*Highwood* and there is no reasonable argument of breach of contract.

Even if this hypothetical church attendee were able to demonstrate offer, acceptance and consideration, there is still the significant obstacle of proving that there was an intention between the parties to enter into a contractual relationship. Of all the stumbling blocks, this is likely the most significant for two major reasons. First, the finding of an intention to create legal relations in the context of a religious community and its member is unlikely given the courts' reluctance to find that a legal relationship has been established in social circumstances,[27] a position that is reflected by the Supreme Court's analysis in *Highwood.* It is especially unlikely the closer the context is to "mere" religious membership as opposed to circumstances of communal religious living where financial and commercial considerations are intertwined with spiritual affiliation.[28] Second, the courts are concerned with the very real implications of finding that a contract exists in the context of religious membership, namely the unenviable task of properly interpreting the contract, considering which terms of the contract are properly enforceable and which are not, and choosing the appropriate remedies if the contract's terms are breached. These tasks would present significant and awkward challenges that would pull judges far deeper into the internal workings of a religious community than they would wish, making a finding that the parties had the intent to create a legal relationship in this context all the more unlikely.

Canadian courts are now seemingly unable to address some significant injustices that may take place within religious communities as a result of the removal of the application of principles of judicial review to religious disputes and the inherent challenges in making a claim based on contract in the context of religious expulsions (and the challenges identified here

27. McCamus, *The Law of Contracts, supra* note 23 at 136.

28. Hutterite colonies in particular present challenging circumstances for the courts where spiritual affiliation and commercial activities may be intertwined and expulsion carries both spiritual and financial ramifications for expelled members. See for example *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165, 1992 CanLII 37 (SCC). The intersection of business and religious engagement was also address in *Highwood*, *supra* note 2 at para 30, with the Court holding that Wall did not have any legal right to be allowed to carry on business with members of the religious community from which he had been expelled.

are not being suggested as an exhaustive list). There should be concern whenever significant injustices occur that the legal system is entirely unable to address. While it is important for courts to not unnecessarily delve into the internal disputes of religious communities, it does not follow that all internal decisions, particularly decisions as serious as expulsion, should be free from any type of legal scrutiny. In several cases where interference in religious decision-making was considered by the courts, reference to the principles of procedural fairness was often accompanied by a reference to natural justice.[29] These references to natural justice suggest that refusal to scrutinize the decision of a religious community simply by virtue of its religious nature runs contrary to a basic right to justice held by each member of a society. One wonders whether the unfortunate result of the *Highwood* decision is that religious adherents have been distanced from access to justice within their own communities.

IV. *The potential impact of* Aga

While a claim based on breach of contract is a problematic option for those who feel they have been improperly expelled from their religious community, this single route may be even further limited depending on the ultimate outcome in *Aga v Ethiopian Orthodox Tewahedo Church of Canada*.[30]

The facts in *Aga* are unique even within the uncommon category of cases dealing with religious expulsion. The plaintiffs are five members of the congregation of the Ethiopian Orthodox Tewahedo Church of Canada (also known as St. Mary's Cathedral), all of whom had been a part of the congregation for more than twenty years. The plaintiffs all sat on a committee tasked with investigating an alleged heretical movement within the church community.[31] The committee presented several recommendations to the administration of the diocese based on their findings.[32] The archbishop chose not to implement the committee's recommendations, much to the displeasure of the plaintiffs, who publicly voiced their objections.[33] After warnings to stop their public attacks on the archbishop's decision, the plaintiffs were informed, via both a personal letter from the archbishop and a letter from the Cathedral's legal counsel, that they had been expelled from the Cathedral.[34]

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29. This is noted in *Hart v Roman Catholic Episcopal Corp of the Diocese of Kingston*, 2011 ONCA 728 at para 19.
30. *Aga, supra* note 3.
31. *Ibid* at para 22.
32. *Ibid* at para 24.
33. *Ibid* at paras 25-27.
34. *Ibid* at paras 27-29. Given the Cathedral's position that there was no unique legal relationship

The plaintiffs initiated legal action against the Cathedral. They alleged that the procedures regarding expulsion laid out in the constitution and by-laws of the greater Ethiopian Orthodox Tewahedo Church in the Diaspora (referred to hereafter as "the Church") had not been followed.[35] The Cathedral moved for summary judgment, successfully arguing that there was no contractual relationship between itself and the plaintiffs, resulting in a dismissal of the claim.[36] The Ontario Court of Appeal reversed this decision unanimously. During the writing of this article, leave to appeal the decision of the Ontario Court of Appeal in *Aga* was granted by the Supreme Court and the case was heard on 9 December 2020.[37]

The evidence presented on the motion for summary judgment seemingly satisfied a number of the criteria for the creation of a contract. The Court of Appeal appeared to identify that offer, acceptance, and consideration had been demonstrated:

> In this case, the appellants were not simply adherents of the faith. They applied to be members of the Congregation and offered consideration in the form of monthly payments. They completed the required membership forms.[38]
>
> Upon approval of their applications, the appellants became members of the Congregation. 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.[39]

Short of becoming a member of a religious community's not-for-profit corporation where one exists, this is likely as formal a membership process as one could expect to find for the admittance of new members to a religious community. If the Supreme Court ultimately reinstates the decision of the motions judge on this point, it is difficult to envision a factual scenario that *would* establish a contractual relationship regarding the membership of an individual within their religious community.

While satisfying the criteria of offer, acceptance and consideration is helpful for the plaintiffs, this does not displace the burden of establishing

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between itself and its expelled members, it is interesting that the need was felt to send each of the members a letter from a lawyer.

35. *Ibid* at para 3.
36. *Ibid* at paras 5-6.
37. *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral, et al v Teshome Aga, et al*, 2020 CanLII 40630 (SCC), 2020 CarswellOnt 8480 (WL Can). Reference to the Supreme Court's judgment (again, rendered after the completion of this article) is at note 4.
38. The lack of evidence regarding the proper completion of the forms and the contributions made by the plaintiffs was at issue before the Supreme Court. The analysis in this paper works from the assumption that they were properly completed.
39. *Aga, supra* note 3 at paras 46-47.

that the parties intended to create a contractual relationship. The Ontario Court of Appeal did not consider this issue with any depth or specificity, instead relying on the existence of the Church's by-laws and constitution as creating a contract between the parties:

> Voluntary 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. In *Ahenakew v. MacKay* (2004), 71 O.R. (3d) 130 (Ont. C.A.), at paras. 20 and 26, this court affirmed 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."[40]

This analysis puts the cart before the horse. The existence of possible terms of a potential contract does not simply establish that the parties intended to form a contract, and on this point alone the Supreme Court could well substitute the decision of the Ontario Court of Appeal with that of the motions judge that there was no contractual relationship between the parties.[41] This would, of course, leave the plaintiffs without a cause of action and therefore without a remedy.

While the finding that a contract was formed between the parties would entitle the plaintiffs to some type of just remedy, likely in the form of an order directing the Cathedral to follow the expulsion process contemplated in the Church's by-laws and constitution, the ultimate impact of this ruling as a precedent would be very problematic. It could invite extensive future breach of contract claims initiated by aggrieved adherents against their religious communities in a variety of contexts, forcing the courts into contractual analyses in awkward and challenging circumstances as well as inserting judges far more deeply into religious disputes than is desirable. Canadian courts, as clarified in the Supreme Court's decision in *Bruker v*

40. *Ibid* at para 40. This is sometimes referred to as the web of contracts theory.

41. The web of contracts theory has also been relied upon in recent non-religious cases, notably in disputes between the Conservative Party of Canada and individuals pursuing candidacy for their various leadership positions: see *Karahalios, supra* note 6 at paras 180-181 and *Melek v Conservative Party of Canada*, 2021 ONSC 1959 at paras 13-15. While a rejection of the web of contracts theory by the Supreme Court in their eventual decision in *Aga* would have ramifications for its use in non-religious disputes as well, parties to these disputes may still be able to avail themselves of a contractual argument, with a proper contractual analysis centred on the intention of the parties and the particular context and circumstances in which the parties have engaged with each other. A court may find, for instance, that it was the intention of a political party and its prospective leadership applicant to create a contractual relationship, with the party's written constitution and by-laws forming terms of that contract, and a contractual argument is therefore available without reliance on the web of contracts theory. Simply from a practical standpoint, one can see that a contract-based argument is far more appropriate in this more professional context as compared to a dispute between a religious adherent and their faith community.

Marcovitz, have the capacity to interpret and enforce contracts based on religious principles, but will be careful to only do so in the appropriate contexts and circumstances.[42] The contractual disputes that a finding of a contract in *Aga* would invite as a precedent are far from desirable both for the courts and religious communities.

None of the conceivable outcomes in *Aga* are likely to find a balance that ultimately meets the needs of religious communities or their individual adherents. The ultimate solution therefore may well lie outside of the hands of the courts.

V. *A route forward*

A solution may be more readily provided by legislatures than by the courts. Ontario, for instance, has long resisted the formal acknowledgment of religious adjudication of any type, most notably in the decision not to acknowledge or address religious arbitration in Ontario's *Arbitration Act*[43] by the government of Dalton McGuinty in response to the desire within some segments of the Muslim community to establish arbitration centres based on sharia law.[44] The net result of three factors—the lack of legislative input on religious dispute resolution, the Supreme Court's decision in *Highwood* that removed the application of judicial review principles and the lack of congruity between religious disputes and the law of contract—is a legal vacuum. Within this vacuum, religious members can be unfairly punished to the point of expulsion from the religious community by internal adjudicators without legal recourse. While an appropriate level of insulation between the legal and religious realms in Canada is certainly necessary, the tremendous personal toll that expulsion from a religious community can have on a community member suggests that where such expulsion has been determined in an inappropriate fashion, judicial intervention is merited. The constitutional protection of freedom of religion in the *Charter* should not mean that religious communities can decide on issues of expulsion without the guarantee of any process offering something resembling procedural fairness and be almost entirely insulated from any type of potential legal scrutiny.

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42. 2007 SCC 54. Speaking for the majority, Justice Abella highlights at para 47 that the context in question in that case was a formal separation agreement developed with the assistance of legal counsel, bringing the religious obligation in that agreement "appropriately under a judicial microscope."
43. *Arbitration Act*, 1991, SO 1991, c 17.
44. Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014) at 159-160. Professor Moon notes that the failure to regulate religious arbitration has in all likelihood driven these processes to be even more secretive, making abuses that may be occurring that much harder to detect and address.

The imposition of some basic principles of procedural fairness in the internal determination of religious disputes would undoubtedly attract a legal challenge on the basis that this imposition violates the religious freedoms protected under section 2(a) of the *Charter*,[45] but there is certainly a reasonable argument to be made that such a breach would be justified under section 1[46] pursuant to the test from *R v Oakes*.[47] Limited impositions of basic elements of procedural fairness would help further the important objective of protecting religious adherents from mistreatment while minimally infringing on the ability of religious communities to handle their own affairs. These procedural protections for individual adherents would support the protection of religious freedoms as an inherently *personal* right, a perspective that has been stressed in previous jurisprudence regarding section 2(a).[48] While this potential imposition in the internal affairs of religious organizations would no doubt be opposed by a number of religious communities determined to safeguard their autonomy, limited legislation providing very basic procedural safeguards is far less of an imposition than the application of the ordinary law of contract if a contract were found to exist between members and their communities. Some religious communities may in fact discover that these legislative safeguards, rather than undermining the community's autonomy, are in fact harmonious with existing procedures and religious perspectives on morality and fairness.

Hypothetical legislation would have to be necessarily limited to the imposition of a right to procedural fairness only, not a right of substantive review of the expulsion decision itself, which would pull the judiciary too significantly into the religious realm.[49] This would provide a reasonable compromise and stimulate transparency in the expulsion process while still honouring the rights of religious communities to make decisions based on their interpretation and application of their own religious dogma. This is not a perfect solution, as it would still allow for inappropriate

45. *Charter, supra* note 12, s 2(a): "2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion."

46. *Ibid*, s 1: "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society."

47. *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC).

48. Most notably *Syndicat Northcrest v Amselem*, 2004 SCC 47 at paras 42-43.

49. The need to limit the intervention of the courts in regards to substantive religious issues is well demonstrated in the decision in *Syndicat Northcrest v Amselem, ibid.* While this case dealt with a personal religious practice rather than a decision of a religious community, the Supreme Court's disapproval of the courtroom as a forum for the interpretation of religious dogma (Syndicat Northcrest devolved into a "battle of the experts" between rabbinical authorities) should wisely be applied in the latter context as well.

interpretations and applications of religious doctrine resulting in unfair expulsions, but it could at least ensure some basic due process for an impugned individual, and would ultimately be a vast improvement on the law as it currently exists.

The importance of ensuring that some type of procedural fairness is afforded in internal decisions of religious expulsion is highlighted by the concurring reasons of Justice Henry in the *Lindenburger* decision. Justice Henry concludes his reasons by underscoring the importance of fairness and transparency in the quasi-judicial decisions of religious communities:

> I cannot leave this case without a final comment on the issue that has been raised by Mr. Lindenburger, that is the manner in which the case has been handled. I do not suggest that the church bodies concerned are required to conduct themselves in a manner similar to that required of a Court. I say only that in a circumstance such as that revealed in this case the simplest rule is, to ensure at the end of the day, whatever the final decision, that it can be said that the minister is told in clear terms the case he has to meet and be given a fair and full opportunity to meet it. The less complicated the proceedings the better and one would hope there would not be undue resort to legalistic thinking; there is no reason why men of goodwill cannot, on both sides, conduct themselves in a fair manner. That is all that the law and the spirit of Christianity requires of them.[50]

While Justice Henry's argument in favour of the importance of procedural fairness is persuasive, it rests on a faulty assumption which highlights the importance of artificially ensuring procedural fairness in this context. Contrary to Justice Henry's assertion, there are countless reasons why generally well-meaning individuals cannot, and do not, conduct themselves in a fair manner. This has necessitated the creation of law, the courts, and the appointment of judges such as Justice Henry to impose fairness where it has been improperly withheld. In the context of religious disputes, which often touch on issues that are extremely personal, it is not surprising that the maintenance of fairness may give way to emotional responses and decisions, which in some instances may result in the devastating expulsion of members of a religious community. In order to ensure a fair process, the courts need to be properly empowered with the authority to intervene. With clear legislative guidance, and judges remaining constantly mindful of the care that should be exercised when addressing religious disputes, the Canadian judicial system will be able to ensure that a fair process has been observed before an individual is expelled from their religious community.

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50. *Lindenburger, supra* note 7 at para 16.