COURT OF APPEAL FOR ONTARIO

CITATION: Birhane v. Medhanie Alem Eritrean Orthodox Tewahdo Church, 2024 ONCA 316
DATE: 20240425
DOCKET: M55020 (COA-22-CV-0276)

Lauwers J.A. (Motions Judge)

BETWEEN

Alem Birhane, Fekre Gabreselassie and Yohannes Ghebremedhin

Applicants
(Respondents/Moving Parties)

and

Medhanie Alem Eritrean Orthodox Tewahdo Church*, Andeberhan Kidane*, Futzum Aitzegheb*, Samuel Tekie Kelete*, Michael Tekeste and Kaleab Kelit Araia

Respondents
(Appellants/Responding Parties*)

Allan L. Morrison and Elham Beygi, for the respondents/moving parties

David Sischy and Yona Gal, for the appellants/responding parties

Heard: in writing

ENDORSEMENT

[1] The moving parties seek a stay of this court's order pending the outcome of their application for leave to appeal to the Supreme Court of Canada. This court's order was not taken out by either party and is not in the record. I proceed on the basis of this court's decision.

A. THE GOVERNING PRINCIPLES

[2] The test for a stay pending appeal is well established. The applicant must show:

1. there is a serious issue to be adjudicated on its proposed appeal;
2. it will suffer irreparable harm if the stay is not granted; and
3. the balance of convenience favours granting the stay.

[3] For a stay pending appeal to the Supreme Court, the first requirement, that there is a serious issue to be adjudicated, must be assessed in light of the Court's stringent leave criteria. The governing principles were set out in *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 620, 283 O.A.C. 321, at paras. 18-19:

> **18** Ordinarily, the threshold for showing a serious issue to be adjudicated is low. However, the criteria for granting leave to appeal to the Supreme Court of Canada add another layer to this component of the test. Under s. 40(1) of the *Supreme Court Act*, *R.S.C. 1985, c. S-26*, the Supreme Court of Canada typically grants leave to appeal only in cases of public or national importance. Thus, a provincial appellate court judge hearing a motion for stay pending leave to appeal to the Supreme Court of Canada must take account of the stringent leave requirements in the *Supreme Court Act*: see *Merck & Co. v. Nu-Pharm Inc. (2000), 5 C.P.R. (4th) 417* (F.C.A.) and *Ontario Public Service Employees Union v. Ontario (A.G.)* (2002), 158 O.A.C. 113.
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> **19** The Supreme Court of Canada itself decides when leave should be granted and does not give reasons for doing so. As Rothstein J.A. noted in *Merck*, this puts

> provincial appellate court judges in a "somewhat awkward position." Nonetheless, the stay test requires that I make some preliminary assessment of the merit of the leave motion.

[4] These principles have been followed consistently by this court: see e.g., *Iroquois Falls Power Corp. v. Ontario Electricity Financial Corp.*, 2016 ONCA 616, at para. 16; *Alectra Utilities Corp. v. Solar Power Network Inc.*, 2019 ONCA 332, at para. 10; *Sase Aggregate Ltd. v. Langdon*, 2023 ONCA 644, at para. 13.

[5] I consider the application of these principles after setting out the factual context and summarizing this court's decision.

B. THE FACTUAL CONTEXT AND THIS COURT'S DECISION

[6] These facts are largely quoted or paraphrased from the decision that the moving parties seek leave to appeal to the Supreme Court: 2023 ONCA 815, on appeal from the order of Vermette J. with reasons reported at 2022 ONSC 5732.

[7] The individual parties are all members of Medhanie Alem Eritrean Orthodox Tewahdo Church (the "local Church"). This is a hierarchical Church. The local Church is under the Eritrean Orthodox Tewahdo Church Diocese of North America (the "Diocese"), which is the ecclesiastical district to which the local Church belongs. The Diocese is under the Holy Synod Eritrean Orthodox Church (the "Synod"), whose governing ecclesiastical council is in Asmara, Eritrea. Their relations are governed by canon law, which is understood to be the law of the Church.

[8] The individual parties are members of the local Church. The responding parties served as volunteer board members. There is a dispute as to whether they continue to serve in that capacity. The moving parties, who were the respondents in the appeal to this court, are also members of the local Church and claim broad support from within its membership.

[9] Beneath the immediate dispute is a more fundamental conflict between the two groups. It has to do with the moving parties' challenge to the authority of the Diocese and the Synod. The moving parties objected to a decision of the Synod to excommunicate their former priest, and object to financial obligations that the Diocese has imposed on the local Church. It appears that the moving parties would prefer to withdraw from the Diocese. These broader issues were not before this court on appeal. Neither the Diocese nor the Synod were parties.

[10] The immediate dispute is over various internal governance issues, particularly whether the board is properly constituted, whether the local Church can be ordered to hold an overdue Annual General Meeting ("AGM"), and the impact of canon law – specifically 2016 diocesan resolutions (the "Canon Law Promulgation") – on the procedural rules governing the AGM. The Promulgation stipulated that: (1) the Diocese must review church bylaws prior to a church's AGM to ensure compliance with the covenant of the Diocese; (2) a representative of the Diocese must attend the AGM to verify the election process; and (3) the chair of the board of directors of the church must be a priest.

[11] The application judge ordered the local Church to hold an AGM pursuant to the *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15 (the "*NFPCA*") and the 2014 Bylaws, with a court-appointed neutral chair.

[12] This court's decision turned on the interrelationship between statute law and canon law. Miller J.A. held, at paras. 26-27:

> The finding that the local Church is organized as a single incorporated entity and is accordingly subject to the obligations imposed by corporate governance statutes is not dispositive of the key matters in dispute on this appeal. As the appellants argue, there is an apparent inconsistency in the application judge's reasoning. On the one hand, she found that the local Church is organized as an incorporated entity and that there is no parallel unincorporated entity. On the other hand, she found that the Canon Law Promulgation applies only to the Church congregation and thus has no bearing on the governance questions in issue.
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> This is an inconsistency, as the appellants argue, but the more significant problem is the assumption that canon law does not apply to the Incorporated Church. Whether a church is organized by way of incorporation has no bearing on whether it is also subject to canon law. The act of incorporation creates an additional set of legal obligations that need to be reconciled with ecclesiastical obligations, but it does not oust canon law categorically. The relationship between canon law and civil law can be a difficult matter, and courts have been reluctant to become involved in the internal affairs of religious organizations for several reasons.

[13] Miller J.A concluded, at para. 35:

> This aspect of the order creates unnecessary conflict with canon law. It is reasonably clear from the Diocese's letters that the Canon Law Promulgation conflicts with the

> 2014 Bylaws as to the requisite procedure for the next AGM. The local Church would ordinarily be able to amend the 2014 Bylaws to resolve this conflict before the next AGM. There is no statutory obligation that would prevent this. The only legal impediment is the order below. That aspect of the order fails to respect the priority afforded to canon law by the common law in internal church matters, even over procedural matters (see *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 38; *Mathai v. George*, 2019 ABQB 116, at paras. 10-13), and the deference owed to interpretations of canon law provided by a church's internal governing structure: Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State*, 1st ed. (Oxford: Oxford University Press, 2005) at pp. 329-34; *Lakeside Colony*, at paras. 63-64. The local Church ought instead to have been afforded an opportunity to bring its bylaws in line with the Canon Law Promulgation at a special or emergency meeting.

[14] The appeal was allowed in part. This court's decision required that the court-ordered AGM still take place, but the conditions stipulating that the AGM must accord with the 2014 Bylaws and have a court-appointed neutral chair were struck. The application judge's order, as varied by this court, set up the following process. The local Church was to hold a special or emergency meeting, in accordance with the 2014 Bylaws, for the purpose of voting on whether to amend the Bylaws to adopt the Canon Law Promulgation. This meeting was to have a court-appointed neutral chair. The parties were to be free to agree on a neutral chair subject to court-approval. They were to return to the application judge with a proposed name on consent for the court-appointed neutral chair, or, if there is no agreement, they were to return with proposed names from which the application judge was to

appoint the neutral chair. The local Church was then to hold an AGM in accordance with whatever bylaws result from the meeting.

[15] It is this court's order specifying this process that the moving parties seek leave of the Supreme Court to appeal.

C. THE PRINCIPLES APPLIED

[16] There is no doubt that the Supreme Court has delved into the relationship between the rules of voluntary associations having a religious purpose, on the one hand, and provincial statute and common law, on the other hand: see e.g., *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, [2021] 1 S.C.R. 868 and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750. The court handles these questions under the rubric of justiciability, albeit with a degree of diffidence, and adjudicates them in light of the commitment to freedom of religion in the *Canadian Charter of Rights and Freedoms*.

[17] There are numerous religious bodies in Ontario and in Canada whose dealings can raise questions about the relationship between religious organizations and civil law. Despite the inevitably local character of any given dispute, the general issue has a measure of public importance.

[18] That said, I would decline to stay the order sought to be appealed for four reasons. First, the factual situation is unclear and the evidence spotty. As

Miller J.A. noted, the application judge "found that there was an absence of evidence to support the appellants' claim that there were two organizations (an unincorporated congregation and an associated corporation)." Second, the evidence of the applicable canon law "is thin". Miller J.A. added that the "rules for resolving perceived conflicts between canon law and civil law in such situations might be underdeveloped from the perspective of civil law, and expert evidence may be needed to understand the relevant canon law." There was none. Third, the Diocese is not a party even though it is the canon law legislator.

[19] Fourth, if the process prescribed by this court is followed, that is, the local Church is afforded an opportunity to bring its bylaws in line with the Canon Law Promulgation at a special or emergency meeting, and the AGM later occurs, then there is, on the one hand, a prospect that the immediate dispute will be resolved. On the other hand, if the "more fundamental conflict between the two groups" – that the moving parties seek to withdraw the local Church from the Diocese – lurches into view through the process leading to the AGM, then this case cannot resolve the issues between the parties in the absence of both the Diocese and the Synod, neither of which are parties. Another legal proceeding would be required.

[20] In short, the materials are underdeveloped, the events in the immediate dispute are yet mid-stream, and the true nature of the fundamental conflict has not yet clearly revealed itself. In my view, these uncertainties make it unlikely that the Supreme Court will grant leave to appeal.

[21] I deny the moving parties' stay application.

"P. Lauwers J.A."