

Does Judicial Review Apply to Decisions Made by Religious Groups?

By: Shaun Fluker

Case Commented On: *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, [2016 ABCA 255 \(CanLII\)](#)

September at the law school for me includes getting back to the basics of administrative law with the 2Ls as we begin another academic year in the JD curriculum. Early on we study Justice Rand's seminal 1959 judgment on abuse of discretion in *Roncarelli v Duplessis*, [\[1959\] SCR 121 \(CanLII\)](#) (as an aside for some interesting footage of media coverage on *Roncarelli* see [here](#) - thanks to my colleague Professor Martin Olszynski for passing this along), and then we move along to the doctrine of procedural fairness and the threshold question of when does a decision-maker exercising authority owe a duty of fairness. As it turns out, the Alberta Court of Appeal has very recently split over this threshold question in *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, [2016 ABCA 255 \(CanLII\)](#) and this is the subject of my comment here. The point of interest in *Wall* for administrative law is that the majority (written by Madam Justices Paperny and Rowbotham) rules the doctrine of procedural fairness applies to the impugned decision of the Highwood Congregation even though it is a non-statutory entity exercising power that is not sourced in legislation and does not purport to affect legal rights. Justice Wakeling provides a strong dissent on this point.

RW was a member of the Jehovah's Witnesses for 34 years and was expelled from the Highwood Congregation in March 2014 for engaging in drunkenness. The expulsion process consisted of a letter dated March 21, 2014 from the Judicial Committee of the Highwood Congregation directing RW to appear before it 3 days later to answer to the allegation. RW appeared before the Committee – which consisted of 3 elders of the Highwood Congregation – on March 24 and admitted to being intoxicated. The Committee gave its oral decision to expel RW the same day. RW appealed this decision to an Appeal Committee consisting of 3 elders from a neighbouring congregation. On April 5, 2014 the Appeal Committee met with the Judicial Committee and RW, and on the same day informed RW it was upholding the expulsion order. RW subsequently appealed to the Watch Tower and Bible Tract Society of Canada. The chair of the Judicial Committee informed RW that this appeal was also unsuccessful.

Because the Jehovah's Witnesses shun expelled members, RW's family and other members of the Jehovah's Witnesses are compelled to shun RW. As a result, RW has suffered severe personal and economic losses. The devastation to his family needs no elaboration here. RW was also a realtor and, as a result of the shunning, he lost a significant portion of his clients.

RW applied to the Court of Queen's Bench for judicial review of the Highwood Congregation's decision to expel him, seeking an order of certiorari to quash the March 24, 2014 decision of the Judicial Committee. The Congregation responded by arguing the Court has no jurisdiction to review the decision to expel RW. In April 2015 Mr Justice Wilson in chambers ruled the Court does have jurisdiction because the expulsion decision has severe adverse consequences for RW. The Congregation appealed to the Court of Appeal on this jurisdictional issue.

The legal question at issue in this case is whether the Court has jurisdiction to engage in judicial review of the decision made by a non-statutory entity exercising power that is not sourced in legislation. On the one hand, the answer to this question has to be no. In our legal system, the Court's inherent jurisdiction for judicial review is applied to ensure the Legislature, the Executive, and their delegates adhere to the limits of their authority, as well as exercise their powers reasonably and fairly. This is the essence of Justice Wakeling's dissent in *Wall*. Justice Wakeling observes the Highwood Congregation is not governed by legislation, and that its conduct is completely lacking in statutory flavour (at paras 68 – 74). Justice Wakeling points out that in those rare cases where the Court has engaged in the judicial review of non-statutory entities, it typically does so with sparse reasoning (at footnote 36) or the case also involves an adjudication of legal rights. Justice Wakeling also concludes the expulsion of RW does not affect any of his legal rights and is thus a non-justiciable issue (at paras 126 – 141).

On the other hand, if we look past the legal structure it is possible to identify reasons why judicial review of the Congregation's decision should be available to RW. This is a disciplinary proceeding with significant adverse consequences to RW and as such it is comfortable territory for judicial oversight. Indeed, several of the Supreme Court of Canada's seminal judgments in administrative law have concerned or been related to disciplinary proceedings: dismissal of a probationary police officer in *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311 (CanLII); prisoners' rights in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 (CanLII); termination of employment in *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII). Canadian courts have consistently given emphasis to adverse consequences suffered by an individual as a strong factor in deciding whether to grant relief in judicial review. This point is explicitly made by Justice Wilson at the chambers level in this case when he remarks "... I think this man has suffered in a way that does involve the court's jurisdiction" (from the transcript of proceedings in chambers, cited at para 62 in *Wall*). And concern with process is what most often catches the eye of a scrutinizing court in judicial review. There is no shortage of concern with process here: 3 days prior notice of a hearing that could lead to severe personal and economic consequences; no written reasons for the expulsion; elements of institutional bias with key officials having overlapping roles. In short, the expulsion process administered by the Congregation fails to meet even the lowest measure of procedural fairness expected of Canadian statutory tribunals in a disciplinary context.

The majority judgment in *Wall* concludes the Court has jurisdiction to review the decision of a non-statutory religious organization when a breach of procedural fairness or natural justice is alleged (at para 22). The majority relies on a short line of authorities for this conclusion (at paras 17 – 21), none of which directly grapples with the point that judicial review in Canada is directed only at statutory entities exercising administrative power sourced in legislation. Particularly in relation to the application of procedural fairness, the classic doctrinal statement that procedural fairness or natural justice applies to public authorities comes from Justice Le Dain in the Supreme Court's 1985 *Cardinal v Director of Kent Institution* decision (at para 14 – cited to Canlii):

This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every *public authority* making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. (emphasis added)

The decision that provides the strongest authority for the majority judgment in *Wall* seems to be the Supreme Court's 1992 judgment in *Lakeside Colony of Hutterian Brethren v Hofer*, [\[1992\] 3 SCR 165 \(CanLII\)](#) reviewing a decision of a hutterite colony to expel some of its members (cited by the majority in *Wall* at para 15). However, it is arguable that in the *Hofer* case the expulsion decision was a justiciable issue because legal rights were at stake in membership with the colony (acknowledged by the majority in *Wall* at para 15). Moreover the Supreme Court applies the doctrine of procedural fairness to the colony's decision, but it may be that the jurisdictional point raised in *Wall* was not argued extensively (Justice Wakeling notes the colony in *Hofer* conceded on this point, at para 105 in *Wall*).

I think the majority in *Wall* gets it right in result – that is, judicial review should be available for RW to challenge the fairness of the Congregation's expulsion process. However, the majority judgment fails to provide adequate reasoning to justify what appears to be a significant extension to the scope of judicial review in Canada. By ruling the Court has jurisdiction to review the decision of a non-statutory entity, exercising powers not sourced in legislation, and which do not implicate legal rights, the Court notably expanded the list of decision-makers potentially subject to judicial review. It would have been preferable for the majority to grapple more directly with the threshold point and better identify what makes this case justiciable.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter [@ABlawg](#)

