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Judicial Review is about the Legality of State Decision-Making

By: Shaun Fluker

Case Commented On: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 (CanLII)

The Supreme Court of Canada has reversed the Alberta Court of Appeal decision in *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses,* 2016 ABCA 255 (CanLII) which ruled the Highwood Congregation decision to expel one of its members was subject to judicial review on the basis of an alleged breach of procedural fairness. In this unanimous judgment, the Supreme Court ruled that the Court of Appeal stretched the reach of judicial review too far in holding that this mechanism of judicial oversight applies to a decision of a non-state actor.

Wall was expelled from the Highwood Congregation, and having been unsuccessful in having the expulsion overturned by appeal mechanisms internal to the Congregation, Wall applied for certiorari at the Court of Queen's Bench to have the expulsion quashed. The chambers justice issued a preliminary ruling that the court had jurisdiction to review the expulsion, and this jurisdictional decision was then upheld by the Court of Appeal in *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses,* 2016 ABCA 255 (CanLII), which has now been reversed by the Supreme Court. A longer overview of the facts in this case can be found in my earlier ABlawg post on the Court of Appeal decision.

The Supreme Court confirms that judicial review is only available to scrutinize the legality of state decision-making, and more particularly only in relation to the exercise of state authority which is 'of a sufficient public character' (at paras 13-15). This point of what constitutes a decision of sufficient public character has been addressed in a number of recent decisions and typically arises in cases where a public authority who would otherwise be subject to judicial review is making a decision which can be construed as more commercial than statutory in nature, which thus takes the decision out of the realm of judicial review. The Supreme Court cites *Air Canada v Toronto Port Authority*, 2011 FCA 347 (CanLII) for this, and I would add the earlier Federal Court of Appeal decision in *Irving Shipbuilding Inc. v Canada (Attorney General)*, 2009 FCA 116 (CanLII) as well.

Simply because the decision is made by a statutory authority is not sufficient to attract the prospect of judicial review, but the absence of a statutory basis for the decision or the decision-maker is sufficient to exclude the prospect of judicial review. The Supreme Court extinguishes two lines of jurisprudence which have suggested judicial review is available with respect to non-state decision-making. One line of cases involves decisions made by entities incorporated by a private Act, and the Court notes that such private Acts are not laws of general application and thus do not grant authority of sufficient public character (at para 18). The other line of cases

involves an impugned decision which has been held to be sufficiently public in nature by having a broad impact on the community, and here the Honourable Justice Rowe, writing for the Court, concludes:

> In my view, these cases do not make judicial review available for private bodies. Courts have questioned how a private Act — like that for the United Church of Canada — that does not confer statutory authority can attract judicial review: see *Greaves v. United Church of God Canada*, 2003 BCSC 1365 (CanLII), 27 C.C.E.L. (3d) 46, at para. 29; *Setia*, at para. 36 [*Setia v. Appleby College*, 2013 ONCA 753 (CanLII)]. The problem with the cases that rely on *Setia* is that they hold that where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable: *Graff*, at para. 18; *West Toronto United Football Club*, at para. 24. These cases fail to distinguish between "public" in a generic sense and "public" in a public law sense. In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. 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. Again, judicial review is about the legality of state decision making. (at para 20)

In summary, judicial review is not available to challenge the legality of decisions by non-state actors.

Wall had initially applied for judicial review of the decision by the Highwood Congregation to expel him, so the fact that the Highwood Congregation is a non-state actor without any statutory basis would be enough to end this matter. However, the Alberta Court of Appeal was somewhat ambiguous in its reasoning as to whether it was asserting jurisdiction solely on the availability of judicial review or whether it has jurisdiction to review the decision of a non-statutory entity when a breach of procedural fairness or natural justice is alleged (2016 ABCA 255 (CanLII) at para 22). I suggested in my earlier post that the Court of Appeal's reasons were too short on this point because of the potential to significantly extend the reach of the doctrine of procedural fairness beyond its traditional application to the exercise of public authority.

The Supreme Court thus goes on to address the jurisdiction of Canadian courts to review decisions of non-statutory entities for procedural fairness, in the context of an action other than judicial review. In this regard, the Supreme Court rules that there is no free standing right to procedural fairness:

> Even if Mr. Wall had filed a standard action by way of statement of claim, his mere membership in a religious organization — where no civil or property right is granted by virtue of such membership — should remain free from court intervention. Indeed, there is no free standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures. (at para 24)

The Supreme Court distinguishes all of the authorities cited by the Court of Appeal and Wall as support for the application of procedural fairness to decisions of religious and voluntary organizations, including *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165 (CanLII) which concerned the review of a decision of a Hutterite colony to expel some of its members. The Supreme Court finds that in each of these cases there was an underlying legal (contractual or property) right at stake for the applicant (at paras 25-28), and that here, Wall is unable to show prejudice to a legal right as a result of the expulsion to give rise to an actionable claim (at para 31).

The Supreme Court also provides what it calls (at para 32) "supplementary comments" on the issue of justiciability in this case, since it was also addressed by the Court of Appeal and the parties before the Court. My colleague Jonnette Watson Hamilton commented on my earlier ABlawg post, observing it was odd that Justice Wakeling, in dissent at the Court of Appeal, also felt the need to engage with justiciability, even after concluding that the matter was determined on jurisdiction alone. I would say Professor Watson Hamilton's comment applies equally to the Supreme Court's decision. The only reason I can see for why the Supreme Court ventures into the troubled waters of justiciability is to use this decision as an opportunity to state that Canadian courts should not intervene in disputes over the merits of religious doctrine. A discussion of justiciability is not needed here to determine the jurisdictional point on judicial review.

For me, the principle of justiciability is essentially about whether there is sufficient legal content in a dispute to warrant judicial intervention. The Supreme Court references the common definition of justiciability provided by Professor Lorne Sossin in his oft-cited text on the subject: *Boundaries of Judicial Review: The Law of Justiciability in Canada*, which is a tantalizingly circular definition: if a dispute is appropriate for judicial determination then it is justiciable (at paras 32, 33). The Court also emphasizes that justiciability is a flexible, open-ended concept whose application depends on context and whether the court has legitimacy and institutional capacity to determine the matter (at paras 33-36).

Justiciability is a principle with the very difficult (and perhaps impossible, as critics would say) task of purporting to ensure that the judicial branch only deals in the law and stays out of politics. I treat references to justiciability by courts with a heavy dose of suspicion, in part because the concept is so amorphous, but also because it seems like in the hard cases – precisely the ones where we would hope justiciability can do its work – the principle fails to deliver in a convincing way.

In *Wall*, the Supreme Court gives us an easy illustration of the line drawing exercise (as did Justice Wakeling in dissent at the Court of Appeal), observing that the resolution of a dispute about the greatest hockey player of all time is not justiciable. I may feel Bobby Orr holds the title and others may say it is Wayne Gretzky, but each of us is at liberty to assert whomever we like. No person has a legal right that others agree with them on who holds this title.

The line drawing is far less compelling in the hard cases, and the Supreme Court conveniently avoids giving us an illustration of how justiciability should be applied in these more difficult

ones. I remember, for example, the dispute in *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 (CanLII) over the implementation of the *Kyoto Protocol Implementation Act*, SC 2007 c 30 (repealed) where the Federal Court ruled that the failure (refusal) of the Harper minority government to implement the Act was non-justiciable, including the issue of a climate change plan that was expressly non-compliant with the terms of the Act. The Federal Court reasoned it was not appropriate for the judiciary to get involved in the regulatory affairs of the Executive and that other lines of accountability were available to provide a remedy. All compelling reasons, but with its declaration of non-justiciability the Federal Court glossed over the strongest legal component of the case, which was that the Executive had expressly refused to comply with the terms of a statute duly enacted by Parliament. Justiciability could have gone either way in that case.

Justiciability is not particularly helpful in *Wall* either. The Supreme Court points to several authorities which rule that the merits of a religious doctrine are not justiciable (at paras 36, 37), but in this case Wall was not seeking a remedy in relation to the merits of religious doctrine. Wall was challenging an allegedly unfair disciplinary process which resulted in a severe personal impact. As I noted in my previous ABlawg post, fairness in disciplinary proceedings is familiar territory for the judiciary, and if we put aside who the decision-maker was in this case it is hard to see how the courts would not have the legitimacy and capacity to rule on the process issues here. Which takes us back to the actual ruling in this case – that the application for judicial review must fail because the impugned decision-maker is not a state actor.

This post may be cited as: Shaun Fluker "Judicial Review on the Vires of Subordinate Legislation" (11 June, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/06/Blog_SF_Wall_June2018.pdf.