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Highwood Congregation of Jehovahâ€™s Witnesses (Judicial Committee) v Wall

Until recently, there was some uncertainty as to whether, in some circumstances, the decisions of private organizations might be subject to judicial review.

For example, in *West Toronto Football Club v Ontario Soccer Association*, the Ontario Divisional Court held that some decisions of the private Ontario Soccer Association could be reviewed, as it exercises a compulsory power over anyone who wishes to play soccer in Ontario. Conversely, in *Milberg v North York Hockey League*, the Ontario Superior Court held that it did not have jurisdiction to judicially review the decision of the North York Hockey League, as the League was not exercising a statutory power or power of decision. Last week, the Supreme Court of Canada clarified this area of administrative law in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*: in its unanimous decision, written by Justice Rowe, the Supreme Court held that "judicial review is reserved for state action". Given the confusion in the lower courts, this is significant.

Randy Wall was a member of the Highwood Congregation of Jehovah's Witnesses in Calgary. He was "disfellowshipped" (i.e., expelled) by the Judicial Committee of the Congregation for having not shown sufficient repentance regarding two instances of drunkenness and one instance in which he verbally abused his wife. The consequence of Mr. Wall being disfellowshipped was that the entire Congregation was required to shun him – including his family and the preponderance of his business clientele. Mr. Wall appealed the decision unsuccessfully to an Appeal Committee composed of neighbouring elders. He subsequently applied for judicial review. The critical issue before the courts was: under what circumstances do the courts have jurisdiction to review the decisions of private decision-makers?

Both the chambers judge and the majority of the Alberta Court of Appeal found that the Committee's decision was subject to judicial review. The Court of Appeal held that "a court has jurisdiction to review the decision of a religious organization when a breach of the rules of natural justice is alleged". While this *dictum* certainly has implications from a *Charter*

perspective, what is more interesting – and ultimately what the Supreme Court focused on – is how this makes little sense in the context of administrative law.

The Supreme Court disagreed with the Court of Appeal, holding that "[j]udicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character". This is quite a step for the jurisdiction of administrative law; with a deft blow, Justice Rowe limited the reach of judicial review significantly – and appropriately.

As Justice Rowe noted, the purpose of judicial review is to address "the legality of state decision making" and must only be used to prevent abuses of the rule of law. It follows that regardless of the level of significance to the public, if the decision being made is not an exercise of state power, the rule of law is not engaged, and administrative law has no business interfering. To channel the spirited dissent in the Court of Appeal decision: what right do the courts have to review the decision of a private bridge club to expel its members?

The Supreme Court also explained how to determine the public character of a decision. Justice Rowe confirmed that the correct test for determining whether a decision is of "sufficiently public character" is set out in *Air Canada v Toronto Port Authority* ("*Air Canada*"), which asks reviewing courts to consider a list of non-exhaustive factors to see if the decision qualifies as public:

- The character of the matter for which review is sought;
- The nature of the decision-maker and its responsibilities;
- The extent to which a decision is founded in and shaped by law as opposed to private discretion;
- The body's relationship to other statutory schemes or other parts of government;
- The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
- The suitability of public law remedies;
- The existence of compulsory power; and,
- An 'exceptional' category of cases where the conduct has attained a serious public dimension.

The Court clarified the test significantly so as to restrict the scope of judicial review. The decision in *Air Canada* was ambiguous as to whether the test determines the public law status of **any** decision or only of decisions arising out of state authority. Some cases – for example, *West Toronto Football Club*

– had applied the *Air Canada* test to find that decisions of private decision-makers could be judicially reviewed if their decision has enough of an impact on a “broad segment of the public”. Justice Rowe put an end to this: the *Air Canada* test is only used to determine whether a public actor – in the public law sense – is acting in a public capacity.

This decision is a refreshing example of the Supreme Court successfully untying a knot in administrative law. This test should result in a substantial increase in certainty when the courts are evaluating whether a decision-maker is subject to judicial review. Let’s hope the Supreme Court is as effective in its re-evaluation of the *Dunsmuir* principles, which govern the standards of review, later this year.