SCC SAYS JUDGES HAVE NO BUSINESS REVIEWING DECISIONS OF VOLUNTARY ASSOCIATIONS

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The recent Supreme Court of Canada decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*[1] holds that judges have no business second-guessing decisions made by private voluntary associations through judicial review. The decision also has implications for the availability of judicial review generally. As such, any litigant considering judicial review would be well advised to first verify that the decision-maker and dispute at issue falls within the guidance set out by the Supreme Court in Wall.

Facts

In *Wall*, the respondent (a real estate agent) was disassociated from a religious association due to inappropriate behaviour (he was insufficiently repentant for two instances of drunkenness). Many of Wall's clients were members of the congregation, who were obliged to shun him following his "disfellowship". Wall's real estate business suffered as a result. He sought judicial review of the decision, arguing that his procedural fairness was violated by the committee who made the decision.

Both the Alberta Court of Queen's Bench and Alberta Court of Appeal found that courts had the jurisdiction to review the committee's decision. The Supreme Court disagreed, and held that judicial review was not available.

Judicial Review Not Appropriate For Wall

The Supreme Court held that Mr. Wall's issues were not amenable to judicial review and quashed his application. A unanimous Court found that the decision was not reviewable for three reasons:

1. the committee that disassociated Wall was not a public decision maker, but was instead comprised of private decision makers;[2]
2. there is no free-standing right to procedural fairness by private associations; [3] and
3. the decision was not justiciable (i.e. that decisions about theology should not be decided by the courts).[4]

Judicial Review Requires Public Law Issues

In reaching its conclusions, the Supreme Court provided general guidance on the supervisory role of the courts. The Supreme Court stated that the purpose of judicial review is to ensure the legality of state decision making.[5] Judicial review primarily concerns the relationship between the administrative state and the courts. Private parties cannot seek judicial review to resolve disputes that arise between them, and instead, such claims must be based on a valid cause of action (such as breach of contract).[6]

Not all decisions are therefore amenable to judicial review. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character.[7] Issues of private law and decisions concerning the exercising of private rights are not subject to judicial review.

The *Wall* Decision and Existing Authorities

The Supreme Court acknowledged that although the remedy of judicial review is aimed at government decision-makers, some Canadian courts have found that judicial review is available for decisions made by churches and other voluntary associations. The Supreme Court is critical of these decisions, saying that they "fail to recognize that judicial review is about the legality of state decision making".[8]

One such decision the Supreme Court considered was *Graff v. New Democratic Party*.[9] In *Graff,* a judge of the Ontario Superior Court of Justice found that the court had the ability to judicially review a political party's decision to exclude an individual from participating in its leadership race. The availability of judicial review was founded on the importance of the decision to the voting public. The court in *Graff* reasoned that where the decisions of private voluntary associations have a broad enough public impact then those decisions fall within the purview of public law and are, accordingly, judicially reviewable.[10]

The Supreme Court expressly rejected the reasoning in *Graff,* noting that it fails to distinguish between "public" in a general sense and "public" in a public law sense.[11]

The Supreme Court held that 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.[12] Simply because a decision impacts a broad segment of the population does not mean it is public in the administrative law sense of the term.[13] Judicial review is about the legality of state decision making.[14]

The Supreme Court also rejected past interpretations of an Ontario Court of Appeal decision, *Setia v. Appleby College*.[15] The decision in *Setia* did not concern political funding, but instead the ability to challenge a student's expungement from private school. The Ontario Court of Appeal did not permit the use of judicial review to challenge the decision, which is consistent with *Wall*.

In the past, however, courts had applied the reasoning in Setia to permit judicial review in instances where decision-making had attained "a serious public dimension".[16] The Supreme Court's decision in Wall appears

to have rejected the existence of such a category.

When Judicial Review is Available

Ultimately, after *Wall,* parties will have to demonstrate that decisions that they are seeking to judicially review truly involve matters of public law. A few examples (which are not limiting, but are demonstrative) include:

- Court supervision of tribunals;
- Public bodies making non-private decisions; and
- Charter issues arising from the conduct of the legislative, executive or administrative branches of government.

Why *Wall* and Why Now?

Earlier this year, the Supreme Court signalled in *Minister of Citizenship and Immigration v. Vavilov* that it intends to reconsider standards of review.[17] The release of *Wall* could be construed as the beginning of the Supreme Court undertaking a much-needed overhaul of administrative law in Canada. Our firm has frequently commented on the unpredictability of standard of review. Administrative law in Canada remains relatively young in its development.[18] By clarifying *when* judicial review is available in *Wall*, the Supreme Court is nicely foreshadowing its treatment of *how* judicial review is to be performed.

In the meantime, voluntary associations can take comfort that their decisions will not be subject to second-guessing by the courts in the form of judicial review. Those following Ontario politics may recall that several judicial review applications were brought against the Progressive Conservative Party of Ontario in 2017, alleging that the Party failed to follow its own procedures and the rules of natural justice when holding candidate nomination meetings in various ridings. The *Wall* decision makes similar cases unlikely to succeed in the future on jurisdictional grounds.

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[1] Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall, 2018 SCC 26 [Wall].[ps2id id='1' target='/]
[2] Ibid at paras 20-21.[ps2id id='2' target='/]
[3] Ibid at para 24.[ps2id id='3' target='/]
[4] Ibid at para 32.[ps2id id='4' target='/]
[5] Ibid at para 13.[ps2id id='5' target='/]
[6] Ibid.[ps2id id='6' target='/]
[7] Ibid at para 14.[ps2id id='7' target='/]
[8] Ibid at para 17.[ps2id id='8' target='/]

[9] 2017 ONSC 3578 at para 12 [*Graff*].[ps2id id='9' target='/]
[10] Ibid at para 18.[ps2id id='10' target='/]
[11] Wall at para 20.[ps2id id='11' target='/]
[12] Ibid at para 20.[ps2id id='12' target='/]
[13] Notably, in Trost v. Conservative Party of Canada, 2018 ONSC 2733, a three judge panel of the Ontario Superior Court of Justice (Divisional Court) came to the opposite conclusion from *Graff*. Trost was not referred to by the Supreme Court in its reasoning in Wall. To the extent that there is a discrepancy between *Graff* and Trost, the Supreme Court has settled it. Trost wins. A decision of a private voluntary association will not transform into a public law issue simply because there is broad public import to the decision.[ps2id id='13' target='/]
[14] Wall at paras 20 and 21.[ps2id id='14' target='/]
[15] 2013 ONCA 753 [Setia].[ps2id id='15' target='/]
[16] Setia, infra at para 34.[ps2id id='16' target='/]
[17] Minister of Citizenship and Immigration v. Vavilov, 2017 FCA 132, leave to appeal to S.C.C. granted, 37748 (May 10, 2018)[ps2id id='17' target='/]
[18] See e.g. the decision in Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31, which explores categories of standard of review, as an example of this stage of development.[ps2id id='18' target='/]

A Cautionary Note