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## SUPREME COURT UPHOLDS RELIGIOUS AUTONOMY IN WALL DECISION

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### A. INTRODUCTION

On May 31, 2018, the Supreme Court of Canada (“SCC”) released its decision in *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall* (“Wall”)<sup>1</sup> concerning the courts’ jurisdiction to review the decision of the Highwood Congregation of Jehovah’s Witnesses (“Congregation”) to expel Mr. Wall from membership. The Wall decision overturns the Alberta Court of Queen’s Bench and the Alberta Court of Appeal’s decisions, which had both held that courts had the jurisdiction to review decisions made by religious groups regarding the discipline or expulsion of members where such decision was made in a manner that did not reflect principles of natural justice.<sup>2</sup> While the SCC did not entirely rule out the courts’ jurisdiction over decisions made by religious groups and other voluntary associations over membership matters on the basis of procedural fairness, it held that this jurisdiction was restricted to a defined set of circumstances.

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<sup>1</sup> 2018 SCC 26.

<sup>2</sup> For further information on the Alberta Court of Appeal’s decision, see Esther S.J. Oh, *Church Law Bulletin No. 48*, “Alberta Appeal Court Affirms Jurisdiction to Review Unfair Church Discipline,” online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/church/2017/chchlb48.pdf>>.

## B. BACKGROUND

The background facts of this case have been outlined in *Litigation Law Bulletin* No. 48.<sup>3</sup> Briefly stated, Mr. Wall was a member of the Congregation who had been “disfellowshipped” after the Congregation’s Judicial Committee determined that he was not sufficiently repentant for having failed to observe the accepted scriptural standards of the Congregation. Mr. Wall appealed the decision to the Congregation’s Appeal Committee and, subsequently, to the Watch Tower and Bible Tract Society of Canada, both of which were unsuccessful. Mr. Wall then made an application for judicial review, claiming that his property and civil rights were prejudiced because the decision to disfellowship him had caused him to be shunned by his family as well as by other Jehovah’s Witnesses, and that this had resulted in significant loss in his business income as a real estate agent. Both the Alberta Court of Queen’s Bench and the Alberta Court of Appeal held that the courts had jurisdiction to review the Congregation’s decision to expel Mr. Wall, leading the Congregation to appeal the decision to the SCC.

## C. THE COURT’S RULING

In its unanimous decision, the SCC held that the Congregation’s decision to expel Mr. Wall could not be reviewed by a court under judicial review for three reasons. First, it stated that judicial review is a public law concept reserved for state action, meaning that private parties cannot solve disputes between themselves through judicial review. Consequently, judicial review is restricted to public decision makers where there is “an exercise of state authority and where that exercise is of a sufficiently public character.”<sup>4</sup> As the Congregation was not exercising statutory authority, and as its decision to expel Mr. Wall did not have a sufficiently public character, judicial review was not available in this case.

The SCC noted a number of cases where Canadian courts have permitted judicial review of decisions made by religious groups and other voluntary associations, but stated that these cases did not recognize the “state authority” requirement of judicial review and should therefore not be taken as authority that private bodies are subject to judicial review. It stated that some of these cases relied on a misconception that private act corporations operated as a statutory grant of authority, while other cases concerning unincorporated voluntary associations questioned whether the decision in question was sufficiently public

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Supra* note 1 at para 14.

in nature but “fail[ed] to distinguish between “public” in a generic sense and “public” in a public law sense.”<sup>5</sup> The SCC clarified that a decision is public in nature where the decision involves “questions about the rule of law and the limits of an administrative decision maker’s exercise of power,” and that a decision impacting a broad segment of the public is not, in and of itself, sufficient to make it public in nature.<sup>6</sup>

The second reason provided by the SCC was that, where no underlying legal right is present, there is no free-standing right to procedural fairness concerning certain decisions made by religious groups and other voluntary associations. The SCC stated that an alleged breach of natural justice is insufficient to establish the court’s jurisdiction over such decisions. Rather, courts have jurisdiction to consider a religious group or voluntary association’s adherence to its own procedures and, in certain circumstances, the fairness of those procedures where there is “a legal right which a party seeks to have vindicated,” such as wrongful dismissal, or a property or contractual right.<sup>7</sup>

While Mr. Wall argued that a contractual right existed between himself and the Congregation, the SCC found no basis to show any intention to establish a legal, contractual right between Mr. Wall and the Congregation, as the Congregation had no written constitution, by-laws or rules that would otherwise constitute a contract enforceable by members. Mr. Wall also argued that his rights were at stake because the Congregation’s decision interfered with his client base and damaged his business as a real estate agent. However, the SCC found that Mr. Wall had no property right in maintaining his client base, and that he did not have “a right to the business of the members of the Congregation.”<sup>8</sup> In this regard, as Mr. Wall could not establish that his legal rights were at stake, the issue of membership on its own was found to be insufficient grounds to establish the court’s jurisdiction over the matter.

While these two reasons concerning the court’s jurisdiction were sufficient to allow the Congregation’s appeal and quash Mr. Wall’s originating application for judicial review, the SCC also provided additional comments concerning the issue of justiciability. Justiciability can limit the court’s engagement with decisions made by religious groups and voluntary associations by asking whether the issue is appropriate

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<sup>5</sup> *Ibid* at para 20.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid* at paras 24, 25, 27.

<sup>8</sup> *Ibid* at para 30.

for a court to decide. As such, the SCC stated that even where judicial review would otherwise be available, courts should only consider issues that are justiciable. It further stated that decisions of justiciability are contextual, and that courts should ask whether they have the “institutional capacity and legitimacy to adjudicate the matter,” by ensuring,

“that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties’ positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute.”<sup>9</sup>

The SCC noted that it had considered the relevance of religion to the question of justiciability in previous decisions, stating that “courts should not decide matters of religious dogma,”<sup>10</sup> and quoting the SCC decision in *Syndicat Northcrest v Amselem*, which held that, “[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.”<sup>11</sup> The SCC added that the court may also lack the legitimacy and institutional capacity to even review a religious group’s procedural rules where those rules may require religious doctrine interpretation. It therefore upheld its previous findings that courts do not have the legitimacy or institutional capacity to deal with the merits of a religious tenet.

With regard to Mr. Wall’s and the Congregation’s arguments that their freedom of religion under the *Canadian Charter of Rights and Freedoms* (“*Charter*”) should inform the SCC’s decision, the SCC held that while the *Charter* can inform the development of common law, it does not apply directly to private litigation, but rather only to legislative, executive and administrative branches of government. As the action being challenged was not that of a state actor, the *Charter* did not directly apply to this dispute.

Therefore, the SCC quashed Mr. Wall’s originating application for judicial review.

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<sup>9</sup> *Ibid* at para 34.

<sup>10</sup> *Ibid* at para 36.

<sup>11</sup> 2004 SCC 47 at para 50.

## D. COMMENTARY

While the Wall decision narrows the scope of the court's jurisdiction by identifying the types of fact situations over which it will not exercise jurisdiction, it does not provide much clarity over instances in which the court *will* intervene. Rather, it simply identifies three situations when the court will *not* intervene in matters.

First, it is clear that judicial review is restricted to public decision makers where there is an exercise of state authority of a sufficiently public character. It clarifies that an impact on a broad segment of the public, in and of itself, is not sufficient to make a decision public, but rather it must involve questions about the rule of law and the limits of an administrative decision maker's exercise of power. As such, the SCC affirms the principle that religious groups and other voluntary associations are private, non-governmental bodies rather than state actors or public bodies, and therefore these entities have autonomy to make basic decisions as private bodies free from the statutory constraints that are imposed on public bodies.

Second, the Wall decision provides clarity on the court's stance towards the justiciability of decisions made by religious groups. The Wall decision confirms that matters concerning religious doctrine are beyond the scope of the court's jurisdiction and will not be subject to review. However, it clarifies that a dispute is not necessarily non-justiciable simply because it has a religious aspect to it. Rather, the non-justiciability of such disputes is constrained to matters involving religious doctrine, including where procedural rules involve the interpretation of religious doctrine. Having said that, the SCC states that courts may still review procedural rules that are "based on a contract between two parties, even where the contract is meant to give effect to doctrinal religious principles."<sup>12</sup>

Third, the Wall decision provides clarity on the limitation of courts to review decisions made by religious groups and other voluntary associations for procedural fairness. The SCC states that voluntary associations have no freestanding right to procedural fairness and that judicial oversight cannot be established solely on the basis of an alleged breach of natural justice. Courts therefore should not interfere in decisions of voluntary associations, even where procedural fairness and the principles of natural justice are alleged to

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<sup>12</sup> *Ibid* at para 38.

have been breached unless a legal right has been violated. The SCC distinguishes this decision from previous Supreme Court decisions, such as *Lakeside Colony of Hutterian Brethren v Hofer* (“*Lakeside Colony*”). While Mr. Wall had argued that *Lakeside Colony* permitted courts to “review the decisions of voluntary organizations for procedural fairness concerns where the issues raised were “sufficiently important”, even where no property or contractual right is in issue,”<sup>13</sup> the SCC in the Wall decision held that this was a misstatement, and that “[w]hat is required is that a *legal right* of sufficient importance – such as a property or contractual right – be at stake.”<sup>14</sup> In order to provide clarity on this point, the SCC identifies various examples of legal rights, including civil and property rights, contractual rights, and underlying legal rights, such as wrongful dismissal.

Although it did not explicitly reference corporate legislation in its decision, some new corporate legislation, such as the *Canada Not-for-profit Corporations Act* (as well as the pending Ontario *Not-for-Profit Corporations Act, 2010*), permit not-for-profit corporations the ability to discipline a member through their constating documents, provided that “the circumstances and the manner in which that power may be exercised” is set out in the articles and bylaws of the corporation.<sup>15</sup> As such, these types of corporate legislation would generally provide the courts the ability to review whether the procedure set out in the constating documents of the corporation and the applicable underlying corporate legislation had been complied with where a member of a corporation has been disciplined, no matter what the reason was for the discipline in the first place.

## E. CONCLUSION

Given the comments above, the Wall decision should be seen as relatively narrow in scope and limited in its application to the facts referenced in the case. Specifically, it applies to decisions made by religious organisations or other voluntary associations that do not have an enforceable “contract” or written agreement, such as a written constitution, letters patent, articles of incorporation, by-laws, or rules that would otherwise create a legal relationship with their members of a contractual nature. Organizations that have established legal relationships with their members, akin to that of a contract, should recognise that

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<sup>13</sup> *Supra* note 1 at para 27.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Canada Not-for-Profit Corporations Act*, SC 2009, c 23, s 158 [“CNCA”]; *Not-for-Profit Corporations Act, 2010*, SO 2010, c 15, s 51(1) [“ONCA”].

rights associated with such relationships, when contravened, may be subject to legal review for failure to follow the procedures of the organisation as set out in its constitution or as provided for within its corporate documentation. This would be in addition to the jurisdiction of the courts to review decisions that may impact other legal rights of the individual in question, such as matters of property. It will be interesting to see how the Wall decision is applied by the courts in the future, as the SCC's attempt to clarify matters in the limited facts of the Wall decision has left open questions that will themselves likely require further clarification and be expanded upon by the SCC and lower courts.



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