

Raising the Bar

The Supreme Court of Canada Limits the Scope of Judicial Review

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The Supreme Court of Canada has rendered a significant decision that clarifies whether a court should exercise its judicial review jurisdiction where decisions for which review is sought are private, not public, in character.

In [*Highwood Congregation of Jehovah's Witnesses \(Judicial Committee\) v. Wall*](#), the Supreme Court unanimously held that courts do not have jurisdiction to judicially review the decisions of private volunteer organizations—in this case, religious groups. This decision is important because it differs from a number of decisions, especially in Ontario, in which the courts followed a different approach and took judicial review jurisdiction over a wide range of arguably private disputes.

Randy Wall was a member of the Highwood Congregation of Jehovah's Witnesses. Mr. Wall appeared before the Congregation's judicial committee of elders to address allegations that he failed to meet accepted "standards of conduct and morality." Despite admitting his "sinful behaviour", he was insufficiently repentant and "disfellowshipped." He could attend meetings, but he could only speak to his immediate family and, even then, only about non-spiritual matters. Mr. Wall unsuccessfully appealed the committee's decision through the Congregation's internal review procedures. The matter proceeded before the courts, which found for Mr. Wall and held that they had jurisdiction to judicially review those decisions.

The Supreme Court of Canada allowed the Congregation's appeal, emphasising throughout its reasons that the essential purpose of judicial review is to determine the legality of state decision making. The Court elaborated on that function by discussing three conditions that must be present for a court to claim the jurisdiction to judicially review an administrative decision, none of which were present in the case before it:

- there must be an exercise of state authority which is of a sufficiently public character and the decision maker must be a public actor;
- there must be an underlying legal right to review a public decision for a denial of procedural fairness (it is not freestanding);
- regardless, only matters that are justiciable can fall within the court's jurisdiction.

1. The Scope of "Public Law"

Judicial review is a public law concept meant to ensure the legality of state decision making. As a result, "not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction."

The Supreme Court found that lower courts (including in Ontario) have overreached their judicial review jurisdiction by misconstruing the above purpose. The Supreme Court noted that those lower court decisions relied on two mistaken principles.

First, the Supreme Court corrected the "misconception" that "incorporation by a private Act operates as a statutory grant of authority to churches so constituted." Rather, private Acts merely confer powers or benefits upon one or more bodies or persons, or exclude them from the "general application of the law."

Second, the Court took issue with the concept that courts can take judicial review jurisdiction broadly "where a decision has a broad public impact" and is therefore "of a sufficient public character." More recently, this argument has been relied upon by Ontario's lower courts to take jurisdiction to judicially review the decisions of private bodies (including soccer associations). The Supreme Court addressed those cases:

[20] [...] 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.

2. The Scope of Procedural Fairness

The Supreme Court stated clearly that there is no freestanding right to procedural fairness without an underlying cause of action. The Court found that each case relied upon by the lower courts for that proposition involved an underlying legal right.

Courts do not have jurisdiction merely because the issues raised before them are “sufficiently important” in “some abstract sense.” The Supreme Court stated that, “[w]hat is required is that a legal right of sufficient importance—such as a property or contractual right—be at stake.”

In this case, no contract formed between the parties. Moreover, Mr. Wall’s economic interest in the client base was irrelevant as he did not have a right to the Congregation’s business.

3. What is “justiciable”?

The Supreme Court added that even where judicial review is available, courts can only consider issues that are justiciable. In order for a court to take jurisdiction, the court must be an appropriate forum to decide the issue. No clear rules can define the scope of justiciability. Instead, each case has to be considered flexibly and contextually.

Looking at facts, the Supreme Court found the issues before it were non-justiciable. Courts should not “decide matters of religious dogma,” as they do not have the legitimacy or institutional capacity to do so. The Court concluded that, “[i]n the end, religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.”

Conclusion

The Supreme Court’s decision in *Highwood* represents a potentially significant narrowing of the court’s approach to taking public law jurisdiction over certain cases. Especially in Ontario, the Court’s comments on the meaning of what constitutes a true “public law” issue and the purposes of administrative law seem to be a strong statement contrary to the growing tendency to claim jurisdiction over private decisions that, as the Supreme Court put it, merely affect the public in a “generic” sense.

In the same vein, the Supreme Court’s analysis injects a welcome amount of certainty into a characteristically uncertain area of law. The three conditions enunciated by the Court will help to determine whether a party can avail itself of judicial review before lengthy proceedings. As a result, *Highwood* should help to limit the reliance on judicial review in what are properly seen as private law interactions.

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