



**SUPREME COURT OF CANADA**

**CITATION:** Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26

**APPEAL HEARD:** November 2, 2017  
**JUDGMENT RENDERED:** May 31, 2018  
**DOCKET:** 37273

**BETWEEN:**

**Judicial Committee of the Highwood Congregation of Jehovah's Witnesses  
(Vaughn Lee — Chairman and Elders James Scott Lang and Joe Gurney) and  
Highwood Congregation of Jehovah's Witnesses**  
Appellants

and

**Randy Wall**  
Respondent

- and -

**Canadian Council of Christian Charities, Association for Reformed Political  
Action Canada, Canadian Constitution Foundation, Evangelical Fellowship of  
Canada,  
Catholic Civil Rights League, Christian Legal Fellowship, World Sikh  
Organization of Canada, Seventh-day Adventist Church in Canada, Justice  
Centre for Constitutional Freedoms, Church of Jesus Christ of Latter-day Saints  
in Canada,  
British Columbia Civil Liberties Association and Canadian Muslim Lawyers  
Association**  
Interveners

**CORAM:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,  
Brown and Rowe JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 40)

Rowe J. (McLachlin C.J. and Abella, Moldaver,  
Karakatsanis, Wagner, Gascon, Côté and Brown JJ.  
concurring)

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HIGHWOOD CONGREGATION v. WALL

**Judicial Committee of the Highwood Congregation of  
Jehovah's Witnesses (Vaughn Lee — Chairman and  
Elders James Scott Lang and Joe Gurney) and  
Highwood Congregation of Jehovah's Witnesses**

*Appellants*

v.

**Randy Wall**

*Respondent*

and

**Canadian Council of Christian Charities,  
Association for Reformed Political Action Canada,  
Canadian Constitution Foundation,  
Evangelical Fellowship of Canada,  
Catholic Civil Rights League,  
Christian Legal Fellowship,  
World Sikh Organization of Canada,  
Seventh-day Adventist Church in Canada,  
Justice Centre for Constitutional Freedoms,  
Church of Jesus Christ of Latter-day Saints in Canada,  
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**Indexed as: Highwood Congregation of Jehovah's Witnesses (Judicial  
Committee) v. Wall**

**2018 SCC 26**

File No.: 37273.

2017: November 2; 2018: May 31.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Courts — Jurisdiction — Judicial review — Private parties — Whether superior court can review decision by religious organization regarding membership — Availability of judicial review to resolve disputes between private parties — Whether right to procedural fairness arises absent underlying legal right — Whether ecclesiastical issues justiciable.*

The Highwood Congregation of Jehovah’s Witnesses is a voluntary, religious association. A member must live according to accepted standards of conduct and morality. A member who deviates and does not repent may be asked to appear before a Judicial Committee of elders and may be disfellowshipped. In 2014, W was disfellowshipped after he engaged in sinful behaviour and was considered to be insufficiently repentant. The decision was confirmed by an Appeal Committee. W filed an originating application for judicial review pursuant to Rule 3.15 of the *Alberta Rules of Court* seeking an order of *certiorari* quashing the Judicial Committee’s decision on the basis that it was procedurally unfair. The Court of Queen’s Bench dealt with the issue of jurisdiction in a separate hearing. Both the

chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction to consider the merits of the application.

*Held:* The appeal should be allowed and the originating application for judicial review should be quashed.

Review of the decisions of voluntary associations, including religious groups, on the basis of procedural fairness is limited for three reasons. First, judicial review is limited to public decision makers, which the Judicial Committee is not. Not all decisions are amenable to a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Judicial review is a public law concept that allows courts to ensure that lower tribunals respect the rule of law. Private parties cannot seek judicial review to solve disputes between them and public law remedies such as *certiorari* may not be granted in litigation relating to contractual or property rights between private parties. 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 nor would incorporation by a private Act operate as a statutory grant of authority to churches so constituted. The present case raises no issues about the rule of law. The Congregation in no way is exercising state authority.

Second, there is no free-standing right to procedural fairness absent an underlying legal right. Courts may only interfere to address procedural fairness concerns related to the decisions of religious groups or other voluntary associations if

legal rights are at stake and the claim is founded on a valid cause of action, for example, contract, tort or restitution. 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. It is not enough that a matter be of importance in some abstract sense. W has no cause of action. No basis has been shown that W and the Congregation intended to create legal relations. No contractual right exists. The Congregation does not have a written constitution, by-laws or rules to be enforced. The negative impact of the disfellowship decision on W's client base as a realtor does not give rise to an actionable claim. The matters in issue fall outside the courts' jurisdiction.

Third, even where review is available, the courts will consider only those issues that are justiciable. The ecclesiastical issues raised by W are not justiciable. Justiciability relates to whether the subject matter of a dispute is appropriate for a court to decide. There is no single set of rules delineating the scope of justiciability. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter. Even the procedural rules of a particular religious group may involve the interpretation of religious doctrine, such as in this case. The courts have neither legitimacy nor institutional capacity to deal with contentious matters of religious doctrine.

### **Cases Cited**

**Distinguished:** *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481; *Pederson v. Fulton*, 1994 CanLII 7483; *Lutz v. Faith Lutheran Church of Kelowna*, 2009 BCSC 59; *Hart v. Roman Catholic Episcopal Corp. of the Diocese of Kingston*, 2011 ONCA 728, 285 O.A.C. 354; *Shergill v. Khaira*, [2014] UKSC 33, [2015] A.C. 359; *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Hofer v. Hofer*, [1970] S.C.R. 958; *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555;

**disapproved:** *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191; *Davis v. United Church of Canada* (1992), 8 O.R. (3d) 75; *Graff v. New Democratic Party*, 2017 ONSC 3578; *Erin Mills Soccer Club v. Ontario Soccer Assn.*, 2016 ONSC 7718, 15 Admin. L.R. (6th) 138; *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881, 327 O.A.C. 29; **considered:** *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605; *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481; **referred to:** *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29; *Greaves v. United Church of God Canada*, 2003 BCSC 1365, 27 C.C.E.L. (3d) 46; *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586; *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229; *Mott-Trille v. Steed*, [1998] O.J. No. 3583, rev'd 1999 CanLII 2618; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *Syndicat Northcrest v. Amselem*, 2004

SCC 47, [2004] 2 S.C.R. 551; *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

### **Statutes and Regulations Cited**

*Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 3.9, 3.15, 3.17.

*Canadian Charter of Rights and Freedoms*, ss. 2(a), 32.

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 9.

*Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2, 3(3).

*Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b).

*Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)(2).

*United Church of Canada Act* (1924), 14 & 15 Geo. 5, c. 100.

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Moon, Richard. "Bruker v. Marcovitz: Divorce and the Marriage of Law and Religion" (2008), 42 *S.C.L.R.* (2d) 37.

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APPEAL from a judgment of the Alberta Court of Appeal (Paperny, Rowbotham and Wakeling JJ.A.), 2016 ABCA 255, 43 Alta. L.R. (6th) 33, 404 D.L.R. (4th) 48, 12 Admin. L.R. (6th) 302, 365 C.R.R. (2d) 40, [2017] 2 W.W.R. 641, [2016] A.J. No. 899 (QL), 2016 CarswellAlta 1669 (WL Can.), affirming a decision by Wilson J., Court of Queen's Bench of Alberta, File No. 1401-10225, April 16, 2015. Appeal allowed.

*David M. Gnam and Jayden MacEwan*, for the appellants.

*Michael A. Feder and Robyn Gifford*, for the respondent.

*Barry W. Bussey and Philip A. S. Milley*, for the intervener the Canadian Council of Christian Charities.

*John Sikkema and André Schutten*, for the intervener the Association for Reformed Political Action Canada.

*Mark Gelowitz and Karin Sachar*, for the intervener the Canadian Constitution Foundation.

*Albertos Polizogopoulos*, for the interveners the Evangelical Fellowship of Canada and the Catholic Civil Rights League.

*Derek Ross* and *Deina Warren*, for the intervener the Christian Legal Fellowship.

*Balpreet Singh Boparai* and *Avnish Nanda*, for the intervener the World Sikh Organization of Canada.

*Gerald Chipeur, Q.C.*, and *Jonathan Martin*, for the interveners the Seventh-day Adventist Church in Canada and the Church of Jesus Christ of Latter-day Saints in Canada.

*Jay Cameron*, for the intervener the Justice Centre for Constitutional Freedoms.

*Roy Millen* and *Ariel Solose*, for the intervener the British Columbia Civil Liberties Association.

*Shahzad Siddiqui* and *Yavar Hameed*, for the intervener the Canadian Muslim Lawyers Association.

The judgment of the Court was delivered by

ROWE J. —

I. Overview

[1] The central question in this appeal is when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness. In 2014, the appellant, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, disfellowshipped the respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him before the Alberta Court of Queen's Bench. The court first dealt with the issue of whether it had jurisdiction to decide the matter. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction and could proceed to consider the merits of Mr. Wall's application.

[2] For the reasons that follow, I would allow the appeal. Mr. Wall sought to have the Judicial Committee's decision reviewed on the basis that the decision was procedurally unfair. There are several reasons why this argument must fail. First, judicial review is limited to public decision makers, which the Judicial Committee is not. Second, there is no free-standing right to have such decisions reviewed on the basis of procedural fairness. In light of the foregoing, Mr. Wall has no cause of action, and, accordingly, the Court of Queen's Bench has no jurisdiction to set aside the Judicial Committee's membership decision. Finally, the ecclesiastical issues raised by Mr. Wall are not justiciable.

## II. Facts and Judicial History

[3] The Highwood Congregation of Jehovah's Witnesses ("Congregation") is an association of about one hundred Jehovah's Witnesses living in Calgary, Alberta. The Congregation is a voluntary association. It is not incorporated and has no articles of association or by-laws. It has no statutory foundation. It does not own property. No member of the Congregation receives any salary or pecuniary benefit from membership. Congregational activities and spiritual guidance are provided on a volunteer basis by a group of elders.

[4] To become a member of the Congregation, a person must be baptized and must satisfy the elders that he or she possesses a sufficient understanding of relevant scriptural teachings and is living according to accepted standards of conduct and morality. Where a member deviates from these scriptural standards, elders meet and encourage the member to repent. If the member persists in the behaviour, he or she is asked to appear before a committee of at least three elders of the Congregation.

[5] The committee proceedings are not adversarial, but are meant to restore the member to the Congregation. If the elders determine that the member does not exhibit genuine repentance for his or her sins, the member is "disfellowshipped" from the Congregation. Disfellowshipped members may still attend congregational meetings, but within the Congregation they may speak only to their immediate family and limit discussions to non-spiritual matters.

[6] Randy Wall became a member of the Congregation in 1980. He remained a member of the Congregation until he was disfellowshipped by the Judicial Committee.

[7] Mr. Wall unsuccessfully appealed the Judicial Committee's decision to elders of neighbouring congregations (Appeal Committee) and to the Watch Tower Bible and Tract Society of Canada. After the Congregation was informed that the disfellowship was confirmed, Mr. Wall filed an originating application for judicial review pursuant to Rule 3.15 of the *Alberta Rules of Court*, Alta. Reg. 124/2010, seeking an order of *certiorari* quashing and declaring void the Judicial Committee's decision. In his application, Mr. Wall claimed that the Judicial Committee breached the principles of natural justice and the duty of fairness, and that the decision to disfellowship him affected his work as a realtor as his Jehovah's Witness clients declined to work with him.

[8] An initial hearing was held to determine whether the Court of Queen's Bench had jurisdiction. The chambers judge found that the court did have jurisdiction as Mr. Wall's civil rights might have been affected by the Judicial Committee's decision: File No. 1401-10225, April 16, 2015. The judge also noted that expert evidence could be heard regarding the interpretation by Jehovah's Witnesses of Christian scripture as to what is sinful and the scriptural criteria used by elders to determine whether someone said to have sinned has sufficiently repented.

[9] The majority of the Court of Appeal of Alberta dismissed the Congregation's appeal, affirming that the Court of Queen's Bench had jurisdiction to hear Mr. Wall's originating application for judicial review: 2016 ABCA 255, 43 Alta. L.R. (6th) 33. The majority held that the courts may intervene in decisions of voluntary organizations concerning membership where property or civil rights are at issue. The majority also held that even where no property or civil rights are engaged, courts may intervene in the decisions of voluntary associations where there is a breach of the rules of natural justice or where the complainant has exhausted internal dispute resolution processes.

[10] The dissenting judge would have allowed the Congregation's appeal on the basis that the Judicial Committee is a private actor, and as such is not subject to judicial review, and that in any event, Mr. Wall's challenge of the Judicial Committee's decision did not raise a justiciable issue.

### III. Question on Appeal

[11] This appeal requires the Court to determine whether it has jurisdiction to judicially review the disfellowship decision for procedural fairness concerns.

### IV. Analysis

[12] Courts are not strangers to the review of decision making on the basis of procedural fairness. However, the ability of courts to conduct such a review is subject

to certain limits. These reasons address three ways in which the review on the basis of procedural fairness is limited. First, judicial review is reserved for state action. In this case, the Congregation's Judicial Committee was not exercising statutory authority. Second, there is no free-standing right to procedural fairness. Courts may only interfere to address the procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake. Third, even where review is available, the courts will consider only those issues that are justiciable. Issues of theology are not justiciable.

A. *The Availability of Judicial Review*

[13] The purpose of judicial review is to ensure the legality of state decision making: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at paras. 24 and 26; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 237-38; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, at paras. 14-15. Judicial review is a public law concept that allows s. 96 courts to “engage in surveillance of lower tribunals” in order to ensure that these tribunals respect the rule of law: *Knox*, at para. 14; *Constitution Act, 1867*, s. 96. The state's decisions can be reviewed on the basis of procedural fairness or on their substance. The parties in this appeal appropriately conceded that judicial review primarily concerns the relationship between the administrative state and the courts. Private parties cannot seek judicial review to solve disputes that may arise between

them; rather, their claims must be founded on a valid cause of action, for example, contract, tort or restitution.

[14] Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising “a power central to the administrative mandate given to it by Parliament”, but is rather exercising a private power (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[15] Further, while the private law remedies of declaration or injunction may be sought in an application for judicial review (see, for example, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1., s. 2(1)(2); *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2 and 3(3)), this does not make the reverse true. Public law remedies such as *certiorari* may not be granted in litigation relating to contractual or property rights between private parties: *Knox*, at para. 17. *Certiorari* is only available where the decision-making power at issue has a sufficiently public character: D. J. M. Brown and J. M. Evans,



with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1:2252.

[16] The Attorney General has a right to be heard on an originating application for judicial review, and must be served notice where an application has been filed: *Alberta Rules of Court*, Rules 3.15 and 3.17. Other originating applications have no such requirements: *ibid.*, Rule 3.9. This suggests that judicial review is properly directed at public decision making.

[17] Although the public law remedy of judicial review is aimed at government decision makers, some Canadian courts, including the courts below, have continued to find that judicial review is available with respect to decisions by churches and other voluntary associations. These decisions can be grouped in two categories according to the arguments relied on in support of the availability of judicial review. Neither line of argument should be taken as authority for the broad proposition that private bodies are subject to judicial review. Both lines of cases fail to recognize that judicial review is about the legality of state decision making.

[18] The first line of cases relies on the misconception that incorporation by a private Act operates as a statutory grant of authority to churches so constituted: *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191 (Div. Ct.), at para. 21; *Davis v. United Church of Canada* (1992), 8 O.R. (3d) 75 (Gen. Div.), at p. 78. The purpose of a private Act is to “confer special powers or benefits upon one or more persons or body of persons, or to exclude one or more persons or body of

persons from the general application of the law”: Canada, Parliament, House of Commons, *House of Commons Procedure and Practice* (2nd ed. 2009), by A. O’Brien and M. Bosc, at p. 1177. Thus, by its nature, a private Act is not a law of general application and its effect can be quite limited. The federal *Interpretation Act*, R.S.C. 1985, c. I-21, s. 9, states that “[n]o provision in a private Act affects the rights of any person, except only as therein mentioned and referred to.” For instance, *The United Church of Canada Act* (1924), 14 & 15 Geo. 5, c. 100, gives effect to an agreement regarding the transfer of property rights (from the Methodist, Congregationalist and certain Presbyterian churches) upon the creation of the United Church of Canada; it is not a grant of statutory authority.

[19] A second line of cases that allows for judicial review of the decisions of voluntary associations that are not incorporated by any Act (public or private) looks only at whether the association or the decision in question is sufficiently public in nature: *Graff v. New Democratic Party*, 2017 ONSC 3578, at para. 18 (CanLII); *Erin Mills Soccer Club v. Ontario Soccer Assn.*, 2016 ONSC 7718, 15 Admin. L.R. (6th) 138, at para. 60; *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881, 327 O.A.C. 29, at paras. 17-18. These cases find their basis in the Ontario Court of Appeal’s decision in *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481. The court in *Setia* found that judicial review was not available since the matter did not have a sufficient public dimension despite some indicators to the contrary (such as the existence of a private Act setting up the school) (para. 41).

[20] 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, 27 C.C.E.L. (3d) 46, at para. 29; *Setia*, at para. 36. 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.

[21] Part of the confusion seems to have arisen from the courts’ reliance on *Air Canada* to determine the “public” nature of the matter at hand. But, what *Air Canada* actually dealt with was the question of whether certain public entities were acting as a federal board, commission or tribunal such that the judicial review jurisdiction of the Federal Court was engaged. The proposition that private decisions of a public body will not be subject to judicial review does not make the inverse true. Thus it does not follow that “public” decisions of a private body — in the sense that

they have some broad import — will be reviewable. The relevant inquiry is whether the legality of state decision making is at issue.

[22] The present case raises no issues about the rule of law. The Congregation has no constating private Act and the Congregation in no way is exercising state authority.

[23] Finally, Mr. Wall submitted before this Court that he was not seeking judicial review, but in his originating application for judicial review this is what he does. In his application, he seeks an order of *certiorari* that would quash the disfellowship decision. I recognize that Mr. Wall was unrepresented at the time he filed his application. These comments do not reflect that the basis for my disposition of the appeal is a matter of form alone or is related to semantic errors in the application. However, the implications of granting an appeal must still be considered. This appeal considers only the question of the court's jurisdiction; it is not clear what other remedy would be sought if the case were returned to the Court of Queen's Bench for a hearing on the merits. However, as I indicate above, judicial review is not available.

B. *The Ability of Courts to Review Decisions of Voluntary Associations for Procedural Fairness*

[24] 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.

[25] The majority in the Court of Appeal held that there was such a free standing right to procedural fairness. However, the cases on which they relied on do not stand for such a proposition. Almost all of them were cases involving an underlying legal right, such as wrongful dismissal (*McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481 (C.A.); *Pederson v. Fulton*, 1994 CanLII 7483 (Ont. S.C. (Gen. Div.)), or a statutory cause of action (*Lutz v. Faith Lutheran Church of Kelowna*, 2009 BCSC 59). Another claim was dismissed on the basis that it was not justiciable as the dispute was ecclesiastical in nature: *Hart v. Roman Catholic Episcopal Corp. of the Diocese of Kingston*, 2011 ONCA 728, 285 O.A.C. 354.

[26] In addition, it is clear that the English jurisprudence cited by Mr. Wall similarly requires the presence of an underlying legal right. In *Shergill v. Khaira*, [2014] UKSC 33, [2015] A.C. 359, at paras. 46-48, and *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.), the English courts found that the

voluntary associations at issue were governed by contract. I do not view *Shergill* as standing for the proposition that there is a free-standing right to procedural fairness as regards the decisions of religious or other voluntary organizations in the absence of an underlying legal right. Rather, in *Shergill*, requiring procedural fairness is simply a way of enforcing a contract (para. 48). Similarly, in *Lee*, Lord Denning held that “[t]he jurisdiction of a domestic tribunal, such as the committee of the Showmen’s Guild, must be founded on a contract, express or implied” (p. 1180).

[27] Mr. Wall argued before this Court that *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, could be read as permitting 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. This is a misreading of *Lakeside Colony*. What is required is that a *legal right* of sufficient importance — such as a property or contractual right — be at stake: see also *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586. It is not enough that a matter be of “sufficient importance” in some abstract sense. As Gonthier J. pointed out in *Lakeside Colony*, the legal right at issue was of a different nature depending on the perspective from which it was examined: from the colony’s standpoint the dispute involved a property right, while from the members’ standpoint the dispute was contractual in nature. Either way, the criterion of “sufficient importance” was never contemplated as a basis to give jurisdiction to courts absent the determination of legal rights.

[28] Mr. Wall argues that a contractual right (or something resembling a contractual right) exists between himself and the Congregation. There was no such finding by the chambers judge. No basis has been shown that Mr. Wall and the Congregation intended to create legal relations. Unlike many other organizations, such as professional associations, the Congregation does not have a written constitution, by-laws or rules that would entitle members to have those agreements enforced in accordance with their terms. In *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229, at paras. 22-25, the Court of Appeal of Alberta ruled that membership in a similarly constituted congregation did not grant any contractual right in and of itself. The appeal can therefore be distinguished from *Hofer v. Hofer*, [1970] S.C.R. 958, at pp. 961 and 963, *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555, at pp. 566 and 568, and *Lakeside Colony*, at p. 174. In all of these cases, the Court concluded that the terms of these voluntary associations were contractually binding.

[29] Moreover, *mere* membership in a religious organization, where no civil or property right is formally granted by virtue of membership, should remain outside the scope of the *Lakeside Colony* criteria. Otherwise, it would be devoid of its meaning and purpose. In fact, members of a congregation may not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization, since “[a] religious contract is based on norms that are often faith-based and deeply held”: R. Moon, “*Bruker v. Marcovitz: Divorce and the Marriage of Law and Religion*” (2008), 42 *S.C.L.R.* (2d) 37, at p. 45. Where one party alleges that a contract exists, they would have to show that there was an intention to

form contractual relations. While this may be more difficult to show in the religious context, the general principles of contract law would apply.

[30] Before the chambers judge, Mr. Wall also argued his rights are at stake because the Judicial Committee's decision damaged his economic interests in interfering with his client base. On this point, I would again part ways with the courts below. Mr. Wall had no property right in maintaining his client base. As Justice Wakeling held in dissent in the court below, Mr. Wall does not have a right to the business of the members of the Congregation: Court of Appeal reasons, at para. 139. For an illustration of this, see *Mott-Trille v. Steed*, [1998] O.J. No. 3583 (C.J. (Gen. Div.)), at paras. 14 and 45, rev'd on other grounds, 1999 CanLII 2618 (Ont. C.A.).

[31] Had Mr. Wall been able to show that he suffered some detriment or prejudice to his legal rights arising from the Congregation's membership decision, he could have sought redress under appropriate private law remedies. This is not to say that the Congregation's actions had no impact on Mr. Wall; I accept his testimony that it did. Rather, the point is that in the circumstances of this case, the negative impact does not give rise to an actionable claim. As such there is no basis for the courts to intervene in the Congregation's decision-making process; in other words, the matters in issue fall outside the courts' jurisdiction.

### C. *Justiciability*



[32] This appeal may be allowed for the reasons given above. However, I also offer some supplementary comments on justiciability, given that it was an issue raised by the parties and dealt with at the Court of Appeal. In addition to questions of jurisdiction, justiciability limits the extent to which courts may engage with decisions by voluntary associations even when the intervention is sought only on the basis of procedural fairness. Justiciability relates to the subject matter of a dispute. The general question is this: Is the issue one that is appropriate for a court to decide?

[33] Lorne M. Sossin defines justiciability as

a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.

*(Boundaries of Judicial Review: The Law of Justiciability in Canada (2nd ed. 2012) at p. 7)*

Put more simply, “[j]usticiability is about deciding whether to decide a matter in the courts”: *ibid.*, at p. 1.

[34] There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider “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" (*ibid.*).

[35] By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding: Court of Appeal reasons, at paras. 82-84, per Wakeling J.A.

[36] This Court has considered the relevance of religion to the question of justiciability. In *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 41, Justice Abella stated: "The fact that a dispute has a religious aspect does not by itself make it non-justiciable." That being said, courts should not decide matters of religious dogma. As this Court noted in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50, "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion." The courts have neither legitimacy nor institutional capacity to deal with such issues, and have repeatedly declined to consider them: see *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733, at para. 33 (CanLII); *Amselem*, at paras. 49-51.

[37] In *Lakeside Colony*, this Court held (at p. 175 (emphasis added)):

In deciding the membership or residence status of the defendants, the court must determine whether they have been validly expelled from the colony. It is not incumbent on the court to review the merits of the decision to expel. It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without *mala fides*. This standard goes back at least to this statement by Stirling J. in *Baird v. Wells* (1890), 44 Ch. D. 661, at p. 670:

The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*.

The foregoing passage makes clear that the courts will not consider the merits of a religious tenet; such matters are not justiciable.

[38] In addition, sometimes even the procedural rules of a particular religious group may involve the interpretation of religious doctrine. For instance, the *Organized to Do Jehovah's Will* handbook (2005) outlines the procedure to be followed in cases of serious wrongdoing: "After taking the steps outlined at Matthew 18:15, 16, some individual brothers or sisters may report to the elders cases of unresolved serious wrongdoing" (p. 151). The courts lack the legitimacy and institutional capacity to determine whether the steps outlined in Matthew have been followed. These types of procedural issues are also not justiciable. That being said, courts may still review procedural rules where they are based on a contract between two parties, even where the contract is meant to give effect to doctrinal religious principles: *Marcovitz*, at para. 47. But here, Mr. Wall has not shown that his legal rights were at stake.

[39] Justiciability was raised in another way. Both the Congregation and Mr. Wall argued that their freedom of religion and freedom of association should inform this Court's decision. The dissenting justice in the Court of Appeal made comments on this basis and suggested that religious matters were not justiciable due in part to the protection of freedom of religion in s. 2(a) of the *Canadian Charter of Rights and Freedoms*. As this Court held in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603, the *Charter* does not apply to private litigation. Section 32 specifies that the *Charter* applies to the legislative, executive and administrative branches of government: *ibid.*, at pp. 603-4. The *Charter* does not directly apply to this dispute as no state action is being challenged, although the *Charter* may inform the development of the common law: *ibid.*, at p. 603. In 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.

#### V. Disposition

[40] I would allow the appeal and quash the originating application for judicial review filed by Mr. Wall. As the appellants requested that no costs be awarded, I award none.

*Appeal allowed.*

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*Solicitors for the respondent: McCarthy Tétrault, Vancouver.*

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*Solicitor for the intervener the Association for Reformed Political Action Canada: Association for Reformed Political Action Canada, Ottawa.*

*Solicitors for the intervener the Canadian Constitution Foundation: Osler, Hoskin & Harcourt, Toronto.*

*Solicitors for the interveners the Evangelical Fellowship of Canada and the Catholic Civil Rights League: Vincent Dagenais Gibson, Ottawa.*

*Solicitor for the intervener the Christian Legal Fellowship: Christian Legal Fellowship, London, Ontario.*

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