LITIGATION - CANADA

Supreme Court of Canada rules that religious association decisions not open to judicial review

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AUTHORS

David McCutcheon

Dina I Awad

Adam Ollenberger

Introduction

In *The Conservative Party of Canada v Trost*(1) the Ontario Divisional Court held that judicial review was not available to review decisions made by private entities that do not exercise statutory authority (for further details please see "Judicial review and private entities: court confirms limits of remedy"). On 31 May 2018 the Supreme Court of Canada confirmed this conclusion in its decision in *Judicial Committee of the Highwood Congregation of Jehovah's Witnesses v Wall*.(2) The court held that because a voluntary association does not exercise statutory authority, its decisions cannot be judicially reviewed. There is simply no state action which may be reviewed for legality.

Facts

Mr Wall was a member of the Highwood Congregation of Jehovah's Witnesses in Calgary, Alberta. He worked as a realtor and his clients were primarily other members of the Jehovah's Witnesses. In March 2014 Wall appeared before a committee of elders of the congregation and was asked to repent for his sins, including instances of drunkenness relating to stress caused by his daughter's disfellowship from the congregation. The committee of elders concluded that Wall was insufficiently repentant and in April 2014 he was disfellowshipped from the congregation. His livelihood suffered as a result.

Lower court decisions

Wall applied for judicial review of the congregation's decision to disfellowship him. At first instance, and on appeal, the Ontario Divisional Court found that it had jurisdiction to hear the application for judicial review on the basis that the courts may, where a breach of natural justice is alleged or a significant property or civil right is engaged, review decisions made by voluntary associations.

Supreme Court of Canada decision

The Supreme Court of Canada overturned the lower court decisions and held that the congregation's decision could not be judicially reviewed. It gave the following reasons for this.

Judicial review limited to public decision makers

The court noted that judicial review is a public law remedy and that its purpose "is to ensure the legality of state decision making".(3) Judicial review is rooted in Section 96 of the Constitution Act and the rule of law. In defining the scope of judicial review, the court stated that:

> *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. 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. Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority. (Inline citations removed.)(4)

The court found that allowing judicial review of decisions of voluntary associations to proceed is incorrect. More specifically, judicial review is not available to review the decisions of churches incorporated pursuant to a private act or of voluntary associations on the basis that the decisions are "sufficiently public in nature".(5) The court expressly disapproved of courts relying on the Ontario Court of Appeal's decision in *Setia v Appleby College*(6) as a basis for holding that decisions with a sufficiently broad public impact could be judicially reviewed. There is a distinction between the meaning of 'public':

- in the sense of raising "questions about the rule of law and the limits of an administrative decision maker's exercise of power";(7) and
- in the manner of ordinary speech.

Administrative law remedies are available only for the former.

No cause of action

The second ground for dismissing Wall's application was that there was no legal basis for the congregation's decision to be reviewed. While "there is no free standing right to procedural fairness with respect to decisions taken by voluntary associations",(8) this does not preclude private law remedies from being sought. However, such remedies depend on an underlying legal right involved, such as a contract or an organisation's written constitution and bylaws. Membership in a voluntary or religious association or a significant personal impact caused by a decision is not sufficient by itself to create jurisdiction for the courts to review that conduct.

The court also clarified that its decision in *Lakeside Colony of Hutterian Brethren v Hofer*(9) does not permit courts to review decisions of voluntary organisations for procedural fairness where no property or contractual rights are engaged, even if the issues raised are "sufficiently important". Rather, a legal right of sufficient importance (eg, a property or contractual right) must be at stake. In this case, because the congregation was an unincorporated association with no constitution, there was no contractual or other basis for Wall's membership. The fact that the decision may have had a significant economic impact on Wall did not create a legal right any more than exclusion from any other group might.

Justiciability

The third ground for dismissing Wall's application was that the elders' decision was not justiciable – that is, it was an inappropriate matter for a court to decide.(10) While determining whether a dispute is justiciable requires a contextual and flexible analysis, the fundamental issue is whether:

- a court is properly able to adjudicate the dispute through an adversarial process, supported by evidence; and
- the resulting decision would be legitimate and an effective use of scarce public resources.

The courts do not have the legitimacy or the institutional capacity to decide matters of religious dogma. The court closed as follows: "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".(11)

Comment

While the courts may still review decisions of private entities where causes of action are based on a contract or other underlying legal right, the Supreme Court of Canada has closed the door on judicial review for all private entities, not merely religious associations, by holding that it is available solely for exercises of statutory authority. While clarity is welcome in this area of law, further explanation as to the nature of judicial review and the powers of the Canadian superior courts would have been useful. For example, the Supreme Court of Canada distinguished between matters that are public because they arise from an exercise of statutory authority which is reviewable to ensure compliance

with the rule of law and matters that are public because they have broad impact on multiple people. However, the foundation of this distinction is unclear. The court's reference to Section 96 of the Constitution Act and the rule of law may not provide a sufficiently nuanced explanation. For example, the Supreme Court of Canada has previously recognised that judicial review has its basis in the inherent jurisdiction of the courts.(12) Inherent jurisdiction is a flexible concept that does not, on its face, require a strict limitation. As such, a deeper review of the interplay between the inherent jurisdiction of the courts and the scope of judicial review might have been useful.

Nevertheless, it is welcome news that the Supreme Court of Canada has resolved this issue. As a takeaway, litigants seeking to review decisions of private entities must now be able to identify a basis in private law to warrant a civil remedy. Otherwise, the courts must decline to intervene.

For further information on this topic please contact David McCutcheon, Dina I Awad or Adam Ollenberger at Dentons by telephone (+1 416 863 4511) or email (david.mccutcheon@dentons.com, dina.awad@dentons.com or adam.ollenberger@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) (2018 ONSC 2733).

(2) (2018 SCC 26).

(3) *Id* at Paragraph 13.

(4) *Id* at Paragraph 14.

(5) *Id* at Paragraph 19.

(6) (2013 ONCA 753).

(7) (2018 SCC 26) at Paragraph 20.

(8) *Id* at Paragraph 24.

(9) ([1992] 3 SCR 165).

(10) (2018 SCC 26) at Paragraph 32.

(11) *Id* at Paragraph 39.

(12) See, for example, *Ontario v Criminal Lawyers' Association of Ontario* (2013 SCC 43) at Paragraph 22.