SCC supports right to shun

On May 31, 2018, the Supreme Court of Canada released its decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*.[1] The decision centered around the role of the courts—specifically, whether courts can review the actions of religious organizations when those religious organizations are accused of acting unfairly. Courts established under section 96 of the *Constitution Act, 1867* have a built-in ability (called "inherent jurisdiction") to review the actions of public bodies. The Supreme Court reinforced two principles:

1. That courts should rarely exercise oversight of religious groups, and
2. That courts should not get involved in disputes over religious doctrine.

Background

Randy Wall is a realtor who joined the Highwood Congregation of Jehovah's Witnesses in 1980. The Highwood Congregation is a group of about 100 Jehovah's Witnesses who live in Calgary, Alberta.

In March 2014, a committee of the Highwood Congregation asked Mr. Wall to appear before them and address concerns of drunkenness, which the Congregation's rules did not allow. Such committee meetings are non-adversarial and are meant to restore the member to the Congregation. To be restored, the member must show remorse and a willingness to follow the rules again. Because Mr. Wall failed to do this, he was "disfellowshipped" from the Congregation.

Disfellowshipping was a serious consequence for Mr. Wall. Other members of the Congregation had to shun him by breaking off contact. Because around half of Mr. Wall's clients were members of the Congregation, this impacted him severely. As a result, he appealed the decision first to a regional committee and then to a national committee of Jehovah's Witnesses. He lost both appeals. As a last resort, Mr. Wall asked the Alberta Court of Queen's Bench to exercise its power of judicial review.

Judicial review is the power that courts have to review decisions of government agencies. A court can overturn a decision if the government actor who made the decision acted unfairly or went beyond what they were allowed to do. Judicial review normally only applies to decisions of government agencies, but in some cases can apply to decisions of other types of organizations. In Mr. Wall's case, the presiding judge decided to first hold a separate hearing to determine if the court had the authority to review the decision which disfellowshipped him.

A different judge conducted the hearing and concluded that the court had the authority to hear the case. Although courts can normally only review government decisions, the judge

made an exception because of the severe economic impact the decision had on Mr. Wall.

The Congregation appealed the decision of the Alberta Court of Queen's Bench to the Alberta Court of Appeal, which agreed with the judge below. Finally, the Congregation appealed the decision to the Supreme Court of Canada. The Supreme Court overturned the lower courts and put an end to Mr. Wall's case. It gave three reasons for doing so. The first two related to the courts' jurisdiction—the powers given to it by law. The third reason relates to the courts' discretion to hear matters that it is not well-equipped to decide.

The Supreme Court found that courts do not have jurisdiction to perform judicial review of non-government action. The Supreme Court further found that courts have no jurisdiction to review membership decisions that do not involve legal rights. It also observed that the kind of decision under review was not appropriate for courts to decide on.

The purpose of judicial review is to supervise government, not private actors

The first reason concerned the nature of judicial review. The Supreme Court said that the Congregation was not the type of organization that judicial review is meant for. Normally, courts only have the authority to review decisions made by government actors. Private parties cannot use judicial review. Instead, they have to use other legal remedies, such as contract law or tort law.

Mr. Wall had used two groups of cases from lower courts to argue that judicial review could apply to the decision of a religious organization One group of cases used judicial review where a church had been created by a private act. The other group of cases allowed judicial review where a voluntary association made a decision that had a broad public impact.

The Supreme Court said that all of these cases failed to recognize what judicial review was about. Judicial review is about applying the rule of law to government decision makers and making sure that when a legislature delegates its powers to a government body, the government body does not go beyond the power that is delegated to it.

In other words, it is not enough that an organization has been created by a statute or that it makes decisions with a broad impact. For judicial review to be available, the organization has to be exercising power that a legislature has delegated to it.

Because the Highwood Congregation was not exercising state power, the courts had no authority to use judicial review.

Church membership is not a legal contract

The second reason was that the claims Mr. Wall made were not the type of claims that judicial review is normally meant for. The lower courts had allowed Mr. Wall to bring his case because they thought the issue was of "sufficient importance."[2] Specifically, they held that the Congregation's decision impacted Mr. Wall's property and civil rights. The Supreme Court rejected this argument as well. It found that no legal rights existed in Mr. Wall's case because he had voluntarily joined the religious congregation.

Mr. Wall had presented several cases involving churches which supported the argument that his legal rights were affected. But the Supreme Court found that those cases were actually based on other issues, such as wrongful dismissal—an employment law concept. Courts can review decisions of organizations when they raise issues of contract law or tort law, which deal with relations between private bodies, not a private body and a government actor.

In *Wall*, however, the Supreme Court said that mere membership in a religious organization, with nothing more, does not create a contract between the member and the organization. Because there was no formal contract between Mr. Wall and the Congregation, no civil or property rights arose through his membership in the Congregation. Although Mr. Wall lost much of his business with other members of the Congregation, he had no legal right to that business. The Supreme Court then said that there was no reason for the courts to intervene.

Judges are not theologians

The last remarks the Supreme Court made were about *justiciability*: whether the issue was generally appropriate for the courts to decide. There are no hard and fast rules for deciding whether an issue is justiciable, but courts will look holistically at several factors. These include whether it would be a good use of the courts' time and resources, whether the court has the necessary facts and evidence to decide, and whether the parties will be able to present their positions well.[3]

The Supreme Court gave examples of issues that are not justiciable, which included a dispute over the greatest hockey player of all time, a member who is kicked out of a weekly bridge club, or cousin who failed to receive a wedding invitation.[4] These kinds of disputes may be important to those involved but are not for the courts to decide.

The Supreme Court said that disputes that require a court to interpret religious doctrines or act as a theologian are not justiciable issues. Although Mr. Wall claimed that the Congregation treated him unfairly, the process by which he was disfellowshipped was based on scripture. Because courts do not have the ability to interpret scripture, they could not decide if the process of disfellowshipping was fair in this case.

Conclusion

Wall did not make any ground-breaking changes, but rather checked the progress of other lower courts that had been using judicial review to interfere in religious organizations. First, judicial review will not be allowed where a religious organization is performing its normal functions and not exercising state power. Moreover, there will be *no* reason for courts to interfere at all unless there is an actual legal right—for example, a right created by a written contract. Second, courts will not interfere if doing so would require the court to settle a matter of religious doctrine. Judges are not well-equipped to be theologians and should not decide a case that requires them to act like one, whether considering judicial review or assessing the *Charter*-protected freedom of religion.

[1] 2018 SCC 26 .

[2] *Ibid* at para 27.

[3] *Ibid* at para 34.

[4] *Ibid* at para 35.