S.C.C. File No. 37273

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

JUDICIAL COMMITTEE OF THE HIGHWOOD CONGREGATION OF JEHOVAH'S WITNESSES (VAUGHN LEE – CHAIRMAN AND ELDERS JAMES SCOTT LANG AND JOE GURNEY) AND THE HIGHWOOD CONGREGATION OF JEHOVAH'S WITNESSES

APPELLANTS
(Appellants)

and

RANDY WALL

RESPONDENT
(Respondent)

and

**SEVENTH-DAY ADVENTIST CHURCH IN CANADA,
CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS IN CANADA,
CANADIAN COUNCIL OF CHRISTIAN CHARITIES,
THE ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA,
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
THE CANADIAN CONSTITUTION FOUNDATION,
THE CHRISTIAN LEGAL FELLOWSHIP,
THE EVANGELICAL FELLOWSHIP OF CANADA AND THE CATHOLIC CIVIL RIGHTS LEAGUE (JOINTLY),
THE WORLD SIKH ORGANIZATION OF CANADA,
THE JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS AND
CANADIAN MUSLIM LAWYERS ASSOCIATION**

INTERVENERS
(Interveners)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW OF ARGUMENT

1. The *raison d'être* of courts is to enforce law. Absent legislative, contractual or common law rights, there is no law for courts to enforce and hence the courts have no jurisdiction.[1]

2. There is no common law right to natural justice as a freestanding cause of action that applies to all human relations. Rather, the right to procedural fairness only comes as a corollary of existing, substantive rights.

3. The essence of judicial review is judicial supervision of public bodies' treatment of individuals.

4. Private bodies, by contrast, are not subject to judicial review.[2] They are only subject to courts' jurisdiction where they have entered into the legal arena, arising from:

(a) incorporation under statute,

(b) the entry by the body into a contract, or

(c) the commission of a tort or equitable wrong.

5. While these existing laws can and should be enforced, this Court ought not broaden the supervisory jurisdiction of the courts to adjudicate all alleged breaches of fairness in all contexts. There is no legal duty upon all persons to act fairly towards each other. Such a notion would entail judicial supervision of all human affairs regardless of any other enforceable law. Freedom of association (and disassociation) must preserve some residual freedom from state oversight.

6. Accordingly, claims for relief from the courts must come within the existing legal framework of remedies under statute, contract, tort or equity. Absent such legal strictures, people must be free to make decisions with which others may disagree.

PART II: POINTS IN ISSUE

7. The BCCLA's submission is focused on the issue of jurisdiction. First, the BCCLA addresses the unavailability of judicial review in the context of a private unincorporated association that exercises no public or governmental function. Second, the BCCLA canvasses the

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[1] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 749; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 71.

[2] Robert E. Forbes, "Judicial Review of the Private Decision Maker: The Domestic Tribunal" (1976) 15 U.W.O.L. Rev 123 at 124.

limited circumstances in which courts may adjudicate claims regarding the decisions of private actors. Courts should be loath to interfere in the internal affairs of private groups unless legislation or existing private law principles establish legally enforceable substantive rights and obligations.

PART III: ARGUMENT

A. DECISIONS OF PRIVATE GROUPS ARE NOT SUBJECT TO JUDICIAL REVIEW

8. Private organizations making decisions that have no legal effect outside the private group are not subject to judicial review.

9. Superior courts have the power to review the legality of administrative actions in accordance with the rule of law: the courts interpret the meaning of statutes.[3] Accordingly, judicial review is generally limited to the power of the superior courts to determine whether the administrator has acted strictly within the powers that have been statutorily delegated to it.[4] As McLachlin C.J. stated in *Dunsmuir v. New Brunswick*, judicial review "is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority".[5] It applies to the administrative process and its outcomes.

10. Further, judicial review only applies to the performance of a public duty. This requires courts to look not only at the source of the tribunal's authority, but also at whether the body is fulfilling a governmental or public function. In *Knox v. Conservative Party of Canada*, the Court of Appeal of Alberta emphasized that the mere fact that a tribunal or an organization is incorporated is not decisive, as the internal workings and decisions of private corporations are not subject to judicial review.[6] Rather, for a corporation to be subject to judicial review, it must discharge public duties or exercise powers of a public nature.[7]

11. There are no grounds for judicial review where a voluntary organization operates without

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[3] *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326 at 360 [*Lafontaine*].
[4] David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 6th ed. (Toronto: Thomson Carswell, 2014) at 6-7.
[5] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 28 [emphasis added] [*Dunsmuir*].
[6] *Knox v. Conservative Party of Canada*, 2007 ABCA 295 at para. 25 [*Knox*]
[7] *Knox*, *supra* note 6 at para. 25.

statutory authority and exercises no public power.[8] The vast majority of private groups – notably, individuals that associate for religious purposes – do not fulfill any governmental or public function. Where a decision-making authority within a private unincorporated association exercises no statutory powers and fulfills no governmental or public function, the court's supervisory jurisdiction to conduct judicial review is not engaged.

12. That is not to say that no recourse exists for individuals whose legal rights have been violated by those with whom they associate. Rather, individuals wishing to seek recourse against private decision-makers must apply for relief under the existing standards of private law. Courts should not permit litigants to circumvent established legal requirements by applying public law principles to purely private decisions.

B. NATURAL JUSTICE AND PROCEDURAL FAIRNESS ORIGINATE IN PUBLIC ADMINISTRATIVE LAW

13. Natural justice prescribes standards of procedural fairness that govern public bodies' treatment of individuals: public decision-makers must act fairly in the process of making decisions that affect the rights, privileges or interests of an individual.[9]

14. The modern concept of procedural fairness in Canadian administrative law can be traced back to *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*,[10] in which this Court ruled that the common law principles of natural justice applied to the decision of a police board. Chief Justice Laskin adopted Justice Megarry's dictum in *Bates v. Lord Hailsham*: "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."

15. Six years after *Nicholson*, this Court declared in *Cardinal v. Kent Institution*:

> There is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.[11]

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[8] See Appellant's Factum at paras. 84-99.
[9] *Dunsmuir, supra* note 5 at para. 79.
[10] *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] S.C.R. 311, at para. 324 [*Nicholson*].
[11] *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at para. 14.

16. In *Knight v. Indian Head School Division No. 19*, this Court held that there is a general right to procedural fairness, although the degree of procedural protection will depend on the particular context of the administrative decision and the requirements of the enabling statute.[12] Justice L'Heureux-Dubé, writing for the majority, noted that the duty to act fairly stemmed from the fact that the employer is a public body whose powers are derived from statute powers that must be exercised according to the rules of administrative law.[13]

17. As these cases demonstrate, natural justice and procedural fairness are, at heart, public law principles. Courts ought to be slow to impose such sweeping public law concepts on a wide range of private actors, for two reasons:

(a) First, natural justice is not a single, universally-applicable code. Even in public contexts, the application of the principles must be adjusted to fit the circumstances. Even greater sensitivity is required if the principles are to be applied to private decision-makers.

(b) Second, constitutionally-protected freedoms of religion, expression, assembly and association belong to private citizens, not public actors. Those freedoms remain significant for private citizens making group decisions – *i.e.* "domestic tribunals".

18. Moreover, unlike individuals exercising public functions, individuals in their private lives, where their decisions have no implications for others' substantive legal rights, are free to act unfairly without judicial sanction. Their decisions, if they are "judged" by anyone, may be deemed immoral – but so long as no law is broken, individuals are free to act in ways that others dislike. So, a social group can choose to ignore a friend – refuse to return their calls, even shun them in public – and the victim of such misbehaviour has no legal recourse.

19. In this sense, there is a fine line between a group of friends, who individually and collectively owe no duty of procedural fairness to anyone; and a domestic tribunal whose decisions may be subject to judicial scrutiny in limited circumstances.

20. As such, it is critical that the Court in this case maintain a clear analytical distinction between the public and private realms; the differing legal standards applicable to each realm; and

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[12] *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 654-655 [*Knight*].
[13] *Knight, supra* note 12 at 654.

the differing legal remedies available for breaches of such legal rights and duties.

C. PRIVATE CLAIMS MUST INVOKE EXISTING SUBSTANTIVE RIGHTS

21. The unavailability of judicial review of private decisions has important implications for the resolution of private disputes brought before the court.

22. This concept was addressed by Tucker L.J. in *Russell v. Duke of Norfolk*, after it was argued that a domestic tribunal had failed to conduct an inquiry in accordance with the principles of natural justice:

> Counsel for the plaintiff, in the course of his forceful argument on this point, again and again said: 'What would be said of local justices who acted in this way?' With all due respect, the position is totally different. This matter is not to be judged by the standards applicable to local justices. Domestic tribunals of this kind are entitled to act in a way which would not be permissible on the part of local justices sitting as a court of law.[14]

23. Justice Gonthier similarly observed in *Lakeside Colony of Hutterian Brethren v. Hofer* that the requirement of an unbiased tribunal – one of "the most basic requirements" of natural justice – may not be applicable in the context of a voluntary association.[15] So too the procedural requirements of notice and opportunity to make representations. Context, including the distinction between public and private tribunals, is critical in identifying the applicable principles as well as applying them.

24. In civil matters, the pleadings define the parameters of the dispute and ultimately the court's jurisdiction.[16]

25. The court's jurisdiction over private disputes can arise from legislation, or other substantive legal rights, *i.e.* contract, tort law, or equity.

26. Those primary sources may provide for rights of procedural fairness in certain circumstances, in which case judicial enforcement of such rights is appropriate where property and civil rights are involved.[17]

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[14] *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 at 118 [emphasis added].
[15] *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at 195, 197 [*Lakeside*].
[16] *Shreem Holdings Inc. v. Barr Picard*, 2014 ABQB 112 at para. 43.
[17] *Port of Dalhousie Inc. v. Maltais*, 2011 NBCA 84 at para. 25.

27. However, this Court ought not expand those categories to include a freestanding right to procedural fairness in all circumstances. Such residual claims ought to be rejected as not subject to the courts' jurisdiction.

(1) Statutory Claims

28. Statutorily-authorized claims are available to individuals that have consented to the court's jurisdiction by choosing to associate through a legally recognized structure that is governed by statute. The remedies available to members of the association, and the obligations of the association in dealing with its members, are prescribed in the legislation. The legislation may be enforced in the courts.[18]

29. For example, British Columbia's *Societies Act* contains provisions governing the courts' jurisdiction to remedy irregularities in the conduct of the affairs of an incorporated society.[19] Similarly, corporate statutes provide courts with broad discretion to award relief on grounds of oppression and unfairness.[20] The *Partnership Act* provides that "A partner must act with the utmost fairness and good faith towards the other members of the firm in the business of the firm", and provides various remedial options for partners to enforce their rights against each other.[21]

30. In the statutory context, it can be said that the members of an incorporated society (or other group) have consented to the court's jurisdiction by choosing to associate through a legal structure that is recognized and governed by statute.

31. Courts may be required to interpret and apply standards of fairness as required by the relevant statute. In doing so, courts must be mindful of the voluntary and private nature of the group in question.[22]

32. Where the subject group is a religion, all the more sensitivity is required. In the context of a statutory claim, for example, the standard of fairness required of a decision-maker in an

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[18] See e.g. *Barrie v. Royal Colwood Golf Club*, 2001 BCSC 1181 at para. 63 [*Barrie*]. See also *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 at paras. 36, 47-48.
[19] See *Societies Act*, S.B.C. 2015, c. 18, s. 105.
[20] See e.g. *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 242; and *Canadian Business Corporations Act*, R.S.C. 1985, c C-44, s. 241.
[21] *Partnership Act*, R.S.B.C. 1996, c. 348, ss. 22, 38, 42, 43, 45.
[22] *Barrie*, *supra* note 18 at paras. 69-71.

incorporated religious organization will be different than that required of decision-makers conducting the affairs of a widely held corporation.[23]

33. Importantly, groups of people which choose not to incorporate should not necessarily be entitled to or saddled with the same rights and obligations as those which consciously invoke legislative schemes through incorporation.

(2) Contractual Claims

34. Where a group forms bylaws or other rules of association, courts have long treated such standards as contractually binding on members of the group.[24] As such, contractual claims are available to individual members that are aggrieved by the group's conduct. Courts have relied on contractual principles in justifying review of the decisions of private organizations.[25]

35. Duties that arise with respect to decision-making in the private sphere must be consistent with the contractual arrangement and expectations of the parties.[26] While a group of individuals may agree on a set of rules governing the operation of the group which are intended to be legally enforceable, courts should be wary of implying contractual terms or legal duties based on public law principles. Any claim on the basis of an implied contractual term must meet the established test for such.[27]

36. Private litigants must not be permitted to rely solely on administrative standards of natural justice or procedural fairness where such standards are not supported by the contractual arrangement of the parties.[28]

(3) Tort and Equitable Claims

37. Tort or equitable claims may also be available if the claimant can meet the test for such claims. For example, actions with respect to an individual's property rights can be tried under the

[23] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 74, [2008] 3 S.C.R. 560.
[24] *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555 at 566.
[25] See e.g. *Lakeside, supra* note 15 at 185; *Sahaydakivski v. YMCA of Greater Toronto*, [2006] O.J. No. 1368 at para. 30 (ON SC).
[26] See *Bhasin v. Hrynew*, 2014 SCC 71 at para. 69, [2014] 3 S.C.R. 494.
[27] *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 S.C.R. 619 at para. 27.
[28] See *Hofer v. Hofer*, [1970] S.C.R. 958 at 959.

law of trespass or conversion. Alternatively, the equitable remedy of a constructive trust may be imposed where there has been a wrongful act or unjust enrichment.[29]

38. Similarly, a claim in negligence is available if the claimant can establish that the defendant decision-maker owed a duty of care, breached the standard of care, and caused the plaintiff damage in doing so.[30] In the absence of a previously-recognized relationship entailing a duty of care, a claimant is required to meet the *Anns* test to establish a duty of care owed by the defendant.[31]

D. PROCEDURAL FAIRNESS REVIEW IS NOT AN ENFORCEABLE CLAIM

39. The Respondent argues that courts are entitled to conduct a procedural fairness review of a private association's decision whenever the decision is "significant enough to warrant the court's involvement"; "a property or civil right need not even be affected."[32] With respect, that proposition provides no useful standard by which to judge or be judged. Associations and their members would be left without direction as to the bounds of actionable conduct. To reference the example provided earlier, individuals (whether making decisions, or subject to them) must understand the difference between moral misbehaviour, and unlawful misconduct.

40. This Court has long eschewed unbounded discretion for judges, and the resulting unpredictability for Canadians. It is no more appropriate for courts to take jurisdiction over disputes on the basis that they are "significant" than it is defensible for courts to impose remedies on grounds of simple "fairness". Rather, this Court has affirmed the need for a "rule of ordered principle which is of the essence of any coherent system of rational law".[33]

41. Contrary to the Respondent's argument, courts have firmly rejected the existence of a general duty to conform with the principles of natural justice. As the Ontario Court of Appeal has held, "There is no cause of action at law pertaining to breach of natural justice."[34]

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[29] See *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 43.
[30] *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 6, [2008] 2 S.C.R. 114.
[31] *Cooper v. Hobart*, 2001 SCC 79 at para. 30, [2001] 3 S.C.R. 537.
[32] Respondent's Factum at paras. 39, 42.
[33] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 677-678.
[34] *Deep v. Ontario*, [2005] O.J. No. 1294 at para. 6 (ON CA). See also *Losier v. Mackay, Mackay & Peters Limited*, [2009] O.J. No. 3463 at para. 66 (ON SC); and *Worth v. Drews*, 2001 ABQB 621 at para. 16.

42. To put it another way, "unfair decision-making" by private actors is not an independently-actionable civil wrong.

E. CHARTER VALUES MUST INFUSE COURTS' DECISION-MAKING

43. The Court's framework for identifying the bounds of its jurisdiction must respect *Charter* values.[35] In this case, those values include freedom of association and religion.

44. Freedom of association must include the freedom to choose with whom one does or does not wish to associate. As Justice Rothstein wrote in *Archibald v. Canada*, in some circumstances "forced association is arguably as dissonant with self-actualization through associational activity as is forced expression".[36]

45. The importance of judicial restraint with respect to the procedures of private decision-makers is amplified in the context of private religious associations. This Court has observed that the state should generally refrain from acting in matters relating to religion; its actions should be limited to "setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship".[37]

46. Restrictions on freedom of association and religion should not be lightly countenanced.

47. The appropriate framework here is analogous to that adopted by this Court in the secondary picketing context. In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, the Court held that secondary picketing is permitted except where it involves tortious or criminal action. Such a standard respects freedom of expression and the "vast scope of activities captured within the nebulous boundaries of the term 'secondary picketing'".[38]

48. Likewise here, there is a vast array of private decision-makers that fall within the nebulous term "domestic tribunal". Courts ought not take jurisdiction over their decision-making unless the plaintiff claims a breach of contract, tortious activity, or otherwise relies on an

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[35] *Hill v Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 97.
[36] *Archibald v. Canada*, [2000] 4 FCR 479 at para. 37.
[37] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at para. 68, [2004] 2 S.C.R. 650.
[38] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156 at para. 70 [*Pepsi-Cola*].

existing substantive legal or equitable right. This framework respects the fundamental proposition that private decisions are *prima facie* private, and then imposes only such limitations as may be justified in the interests of protecting individuals whose civil rights are impacted by those decisions.[39]

F. CONCLUSION

49. The freedom of individuals to conduct their private affairs without state regulation is a fundamental tenet of civil society in Canada. When individuals voluntarily associate in unincorporated groups, they do not expect to give up those freedoms. Nor, from the perspective of individual freedom and privacy, is a common law requirement any less conceptually intrusive than legislation. Both forms of law are state-imposed legal restrictions on liberty.

50. The courts have already developed a wide range of substantive legal rights and remedies which, in addition to legislation, govern the conduct of human affairs in Canada. Those aggrieved by the decisions of "domestic tribunals" may avail themselves of many existing remedies, under statute, common law and equity. This Court ought not expand the existing remedies by adding an ill-defined right of all individuals to be treated with "procedural fairness" by all private groups of individuals, great and small, where no breach of substantive civil or property rights is alleged.

51. No such expansion is necessary; and more fundamentally, it would impose an unjustified restriction on freedom and privacy. Just as the legislature cannot legislate morality, it is not the role of courts to ensure that individuals treat one another morally when associating together.

PART IV: SUBMISSIONS CONCERNING COSTS

52. The BCCLA does not seek costs, and asks that no award of costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of October, 2017.

Roy W. Millen

Ariel Solose

[39] See *Pepsi-Cola*, *supra* note 38 at para. 67.

PART VI: TABLE OF AUTHORITIES

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