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PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS

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AUTHOR'S NOTE

In *Khorsand v. Toronto Police Services Board*, 2024 ONCA 597, 2024 CarswellOnt 11464 (Ont. C.A.), the Ontario Court of Appeal held that a pre-screening decision by the Toronto Police Service (TPS) determining that an applicant was ineligible for a position as a special constable with the Toronto Community Housing Corporation (TCHC) was not judicially reviewable because it is not of a sufficiently public character.

> [63] The purpose of judicial review is to ensure the legality of state decision making: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 13. It is a public law concept that allows s. 96 courts[7] to "engage in surveillance" of administrative decision makers to ensure that they respect the rule of law: *Wall*, at para. 13, citing *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, at para. 14, leave to appeal refused, [2007] S.C.C.A. No. 567.

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[64] In *Wall*, the Supreme Court confirmed that judicial review is available only where two conditions are met: (1) there is an "exercise of state authority"; and (2) that exercise of state authority is of a "sufficiently public character": para. 14. In setting out these requirements, Rowe J. explained that even public bodies make some decisions that are private in nature and thus not subject to judicial review: at para. 14.

[65] These two requirements have been helpfully explored in an article by Professor Derek McKee: "The Boundaries of Judicial Review Since *Highwood Congregation of Jehovah's Witnesses v. Wall*" (2021) 47:1 Queen's L.J. 112 ("The Boundaries of Judicial Review"). In this article, Professor McKee reads *Wall* as imposing both an institutional criterion ("identity of the decision maker") and a functional criterion (the decision must be "public" in nature) in determining whether a decision is subject to judicial review. He suggests the following, at p. 117: "[Rowe J.] appears to set out two requirements. The first is an institutional criterion, related to the identity of the decision maker. Justice Rowe writes that 'judicial review is aimed at government decision makers. He is at pains to distinguish decisions made by "public bodies" or "the administrative state" from those made by "private bodies" or "voluntary associations" '. The second is a functional criterion. Justice Rowe emphasizes that the decision in question must be public as well. He notes that "[e]ven 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." This structure implies a two-part test: the judge must characterize the institution in question and then characterize the function; if either of these is private, judicial review is excluded". [Footnotes omitted; emphasis added.]

[66] In other words, it is not enough that the decision maker is public – the decision in question must also be sufficiently public.

[67] Prior to *Wall*, this court applied the *Air Canada* factors in determining whether a decision was subject to judicial review: see *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481. Since *Wall*, legal commentators have expressed different views on whether the *Air Canada* factors have any continuing applicability in determining whether a decision is judicially reviewable outside of the Federal Court's distinctive statutory context, which Rowe J. noted is what the factors "actually dealt with": *Wall*, at para. 21.

[68] For example, Professor Paul Daly has stated that Wall gave *Air Canada* a "narrow interpretation" and so "potentially deprived Canadian courts of a very useful set of factors… to perform the difficult task of separating 'public' from 'private' matters": "Right and Wrong on the Scope of Judicial Review: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*" (2018) 31 Can. J. Admin. L. & Prac. 339, at p. 343.

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[75] This is all subject to one important caveat. *Wall* cautions against using the *Air Canada* factors to transform a private decision into a public one on

> the basis that a decision impacts or is of significant interest to a broad segment of the public. Rowe J. said the following, at paras. 20-21: "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 [v. New Democratic Party*, 2017 ONSC 3578, 28 Admin. L.R. (6th) 294 (Div. Ct.)], at para. 18; *West Toronto United Football Club [v. Ontario Soccer Association,* 2014 ONSC 5881, 327 O.A.C. 29 (Div. Ct.)], 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." [Emphasis added.]
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> [76] This passage makes clear that it is wrong to apply the *Air Canada* factors to transform the decision of a private actor – such as a church, sports club, or other voluntary association – into a public decision. In my view, the passage also cautions against characterizing a decision of a public body as public in function simply because a broad segment of the public may be interested in or impacted by it. For instance, a government decision to enter into a contract to purchase property may be of significant interest to, and have an impact on, a broad segment of a community; however, that would not transform the contractual decision into a public one. In other words, it is important to distinguish between "public" in the generic sense and "public" in the sense that the legality of state decision making is at play.

The Court concluded that, in light of this approach to the determination of whether a decision is sufficiently public to render it subject to judicial review, the pre-screening decision at issue in the appeal did not meet this threshold.

L.S.