The Boundaries of Judicial Review Since *Highwood Congregation of Jehovah's Witnesses v Wall*

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In Highwood Congregation of Jehovah's Witnesses v Wall*, the Supreme Court of Canada defined the boundaries of judicial review on the basis of a public/private distinction. This decision attracted criticism, notably for its ambiguity with regard to the review of institutions at the margins of the public sector. This article reviews the impact of* Wall *in the three years since the Supreme Court of Canada issued its decision. It shows that some criticisms of the decision were warranted. It also shows that lower courts have overcome some of the difficulties of* Wall *by relying on the multi-factor test set out by the Federal Court of Appeal in* Air Canada v Toronto Port Authority et al. *Nevertheless,* Wall*'s imposition of a strict public/private distinction at times appears to be in tension with its stated purpose of ensuring that judicial review responds to rule of law concerns.*

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Introduction

In the 2018 case of *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, the Supreme Court of Canada made some of its most sweeping pronouncements about administrative law. Writing for a unanimous Court, Rowe J declared that "[t]he purpose of judicial review is to ensure the legality of state decision making".[1] In keeping with this purpose, Rowe J defined the boundaries of judicial review on the basis of a public/private distinction. Rowe J declared that "[j]udicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character."[2]

However, distinguishing between "public" and "private" is rarely as simple as in *Wall*. *Wall* arose from the decision of a Jehovah's Witness congregation to excommunicate one of its members. As other commentators observed, this decision was rather easy to characterize as a private matter and to exclude from judicial review on this basis.[3] Soon after it was issued, *Wall* was criticized for failing to provide clear guidance, especially as to the review of quasi-public institutions such as hospitals and universities.[4] Indeed, in other cases, the boundaries of judicial review may depend on multiple factors that are not straightforwardly captured by a public/private distinction.[5]

This article reviews the impact of *Wall* in the three years since the Court issued its decision. It shows that the aforementioned criticisms were warranted.

1. 2018 SCC 26 at para 13 [*Wall*].

2. *Ibid* at para 14.

3. See Paul Daly, "Right and Wrong on the Scope of Judicial Review: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*" (2018) 31:3 Can J Admin L & Prac 339.

4. See Mannu Chowdhury, "A Wall Between the 'Public' and the 'Private': A Comment on *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*" (2019) 9:2 Western J Leg Stud 1.

5. See Carol Harlow, "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43:3 Mod L Rev 241.

The test set out in *Wall* contains various ambiguities, particularly with regard to its institutional criterion. *Wall* does, admittedly, provide a quick and effective way of rejecting many judicial review applications. But it provides little guidance in harder cases.

The experience since *Wall* also shows that lower courts have overcome these difficulties to some extent. On one hand, they have often supplemented the *Wall* test with other elements, notably the contextual approach set out in the 2011 *Air Canada v Toronto Port Authority et al* case.[6] And in Quebec, courts have held *Wall*'s institutional criterion to be inconsistent with provincial legislation, thus avoiding it altogether.

However, on closer examination, the problems with *Wall* go beyond these ambiguities. There are also reasons to doubt that *Wall*'s public/private distinction truly works as advertised—as a means of safeguarding the rule of law. Arguably, the pursuit of that goal means that judicial review should be available even in some "private" settings.

The article proceeds as follows. In Part I, I review the *Wall* case and its central *dicta*. I explain *Wall*'s two-part test for the availability of judicial review, centred on a public/private distinction (as applied to the institution at issue as well as the function it performs). I also examine how the Supreme Court of Canada has doubled down on this test in subsequent cases.

In Part II, I analyze the use of the public/private distinction as a way of circumscribing judicial review and consider various alternatives. Contemporary public administration involves many institutions and functions that are difficult to characterize as straightforwardly "public" or "private". This ambiguity gives rise to considerable uncertainty at the boundaries of judicial review. One way of mitigating this uncertainty—indeed, one with a solid historical pedigree—is to impose a formal criterion, such as a statutory source for the power in question. Such a criterion still has a role to play in some statutory judicial procedure codes. Alternatively, or as a complement, it is possible to draw the boundaries of judicial review on a holistic, contextual basis. Such an approach is epitomized by the Federal Court of Appeal's 2011 decision in *Air Canada*.[7]

In Part III, I survey the case law since *Wall*. This analysis shows that *Wall* has allowed Canadian courts to banish certain kinds of cases from the realm of administrative law—most notably, those dealing with religious institutions, clubs, and other bodies easily characterized as private. But it also

6. 2011 FCA 347 [*Air Canada*].

7. See *ibid*.

shows that in harder cases, courts have found *Wall* difficult to apply, and have turned to *Air Canada*. In some cases, judges have looked to *Air Canada* to flesh out the details of the rather schematic *Wall* test—a "nested" approach. In other cases, courts have prioritized the *Air Canada* analysis and marginalized *Wall*. These cases reveal some of the shortcomings of the *Wall* test and confirm certain criticisms. Concluding the review of post-*Wall* case law, I discuss how Quebec courts have essentially rejected *Wall*'s institutional criterion as incompatible with provincial legislation.

In Part IV, I consider *Wall*'s reliance on a public/private distinction in light of the purpose of judicial review. According to *Wall*, judicial review is meant to keep state power in check and thus uphold the rule of law. However, even if one accepts this account of judicial review, a narrow public/private distinction does not serve that purpose very well. Moreover, there are alternative accounts of the purpose of judicial review that would recognize its application to some "private" institutions. These considerations give further reasons to doubt the *Wall* approach.

In brief, the experience since *Wall* confirms that a simple public/private distinction is of limited use as a way of drawing the boundaries of administrative law. Canadian courts will continue to look to other factors in order to circumscribe judicial review. They may do so on the basis of formal elements as implied by statute. Or, they may employ multi-factor, contextual analyses of the kind set out in *Air Canada*. While such tests are more laborious and may be unpredictable for litigants, any certainty provided by a simple, all-or-nothing test is likely to be illusory.

I. *Wall* and Its Successors at the Supreme Court of Canada

In 2014, Calgary's Highwood Congregation "disfellowshipped" Randy Wall, expelling him from the Jehovah's Witnesses and obliging others to shun him. The panel of elders that made the decision was apparently preoccupied by two episodes of "drunkenness" during one of which Wall had verbally abused his wife.[8] Wall initially pursued a series of appeals to other Jehovah's Witness bodies. When these failed, Wall brought an application for judicial review before the Court of Queen's Bench of Alberta.[9]

8. *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 at para 5 [*Wall 2016*].

9. See *ibid* at para 9.

Wall, representing himself, appears to have framed his case as one about natural justice in the private sphere. Wall was a real estate broker who had previously drawn about half of his clients from the Jehovah's Witness community. He noted that he had suffered financial losses, as Jehovah's Witnesses would no longer use his services. This argument appears to have been sufficient to convince a chambers judge that the Court had jurisdiction over the matter.[10]

These arguments were inspired by a recognition that procedural unfairness can sometimes play a role in a private law claim. A classic example can be found in the 1992 *Lakeside Colony of Hutterian Brethren v Hofer* case, in which a majority of the Supreme Court of Canada reviewed—and set aside—a Manitoba Hutterite community's decision to expel a group of members.[11] In that case, it appears that the Court ultimately grounded its review powers on the contractual arrangements among the members of the colony and the collective property rights attached to membership. Nevertheless, the Court framed its decision in administrative law terms, and applied concepts—in particular that of natural justice—in a manner indistinguishable from the review of a public body's decision. The Court also made extensive reference to the private Act under which the Hutterite Church was incorporated, implying that the Church's activities were a matter of public concern. In brief, *Hofer* implied the possibility of a porous approach to the public/private distinction.

In *Wall*, the Court of Appeal of Alberta's majority extrapolated from *Hofer*, declaring that "a court has jurisdiction to review the decision of a religious organization when a breach of the rules of natural justice is alleged".[12] Justice Wakeling, dissenting, argued that courts could only review the decisions of religious bodies where legal rights were at stake, and pointed out that *Wall*'s economic interest in maintaining his client base did not amount to a legal right.[13] Justice Wakeling also held that judicial review is only available against public, not private actors. Justice Wakeling added that even if the decision was subject to judicial review, it did not raise a justiciable issue, and that fundamental constitutional principles (notably freedom of religion and freedom of association) militate against the judicial review of religious bodies membership decisions.

Justice Rowe's reasons, on behalf of a unanimous Supreme Court of Canada, clearly took some of their inspiration from Wakeling JA's dissent. Justice Rowe agreed with Wakeling JA that the decisions of religious bodies are not reviewable

10. See *ibid* at para 62.

11. [1992] 3 SCR 165, 97 DLR (4th) 17 [*Hofer*].

12. *Supra* note 8 at para 22.

13. See *ibid* at paras 127–39.

unless a legal right was at stake.[14] Justice Rowe clarified that mere membership in a religious group (or other "voluntary association") does not necessarily imply the presence of a contractual right.[15] In *obiter*, Rowe J endorsed some of Wakeling JA's holdings as to the non-justiciability of matters of religious doctrine.[16]

What is most notable about the Supreme Court of Canada decision, however, is that Rowe J frames the non-applicability of judicial review in even broader terms. Justice Rowe begins his analysis by declaring that "[t]he purpose of judicial review is to ensure the legality of state decision making."[17] He then sets out, as a general proposition, that "[j]udicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character."[18] This latter formulation has been taken as *Wall*'s central *dictum*.

What does this pronouncement mean for the availability of judicial review? Read in the context of the surrounding paragraphs, it 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".[19] He is at pains to distinguish decisions made by "public bodies" or "the administrative state" from those made by "private bodies" or "voluntary associations".[20] 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."[21] 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.

However, *Wall* also contains pronouncements that blur this reading to some extent. First, in the sentence I have identified as *Wall*'s central *dictum*, what is meant by "an exercise of state authority"? This phrase may be read as an awkward way of restating the institutional criterion. But taken out of context, it

14. See *Wall*, *supra* note 1 at paras 30–31.
15. See *ibid* at paras 24–31.
16. See *ibid* at paras 32–39.
17. *Ibid* at para 13.
18. *Ibid* at para 14.
19. *Ibid* at para 17.
20. *Ibid* at paras 13–19.
21. *Ibid* at para 14.

might also be read as implying a formal concern for the source of the power in question—whether it flows from statute, prerogative, or some other source. Alternatively, it could suggest a functional concern with the use of state coercion and its impact on individuals and communities.

A second source of ambiguity in *Wall* arises from pronouncements about the purposes of judicial review. Justice Rowe begins his analysis by declaring that "[t]he purpose of judicial review is to ensure the legality of state decision making".[22] He justifies the exclusion of contractual functions from judicial review by stating that such functions "do not involve concerns about the rule of law".[23] These statements imply a purposive test: they suggest that the availability of judicial review might depend in part on whether its use would help to uphold the rule of law in the circumstances. But such a purposive analysis would not necessarily align with a straightforward two-step test (see Part IV, below).

A year later, in the case of *JW v Canada (Attorney General)*, the Supreme Court of Canada both clarified the *Wall dictum* and perpetuated its ambiguities.[24] The case arose from an entirely different context: the 2006–2007 *Indian Residential Schools Settlement Agreement*, which resolved a number of class actions brought on behalf of residential school survivors. The Agreement included an Independent Assessment Process (IAP)—essentially, an arbitration process—meant to adjudicate individual claims. JW, a residential school survivor, filed for compensation under the IAP. Successive IAP adjudicators rejected his claim, basing their decisions on questionable interpretations of "sexual assault". JW applied to the Court of Queen's Bench of Manitoba for a review of these decisions. The Attorney General argued that the scope for judicial supervision of the IAP was more limited, and that courts could not intervene in circumstances like those of JW.[25]

JW eventually won his appeal at the Supreme Court of Canada, convincing five out of seven justices (although no single set of reasons commanded the support of a majority). However, the dominant view on the Supreme Court of Canada, put forward by Côté J in one set of concurring reasons and endorsed by Brown J in his dissenting reasons, was that the IAP is properly characterized as a form of private arbitration, founded on contract, rather than a body subject to judicial review in the administrative law sense.[26] Justice Côté based this analysis in part on the *Wall* dictum

22. *Ibid* at para 13.

23. *Ibid* at para 14.

24. 2019 SCC 20 [*JW*].

25. See *ibid*.

26. See *ibid* at para 102.

I have singled out, stating that judicial review is only available when the institution and its decision are both public in character.[27] Justice Côté further declared that "[t]he availability of judicial review depends on the *source* of the decision maker's authority, not the *identity* of the parties".[28]

This latter statement implies a concern for the formal source of authority of the institution in question. In *JW*, the fact that the IAP was founded on the contractual settlement of tort claims (rather than, for example, on statute) was a complete answer to the question of the availability of judicial review. Limited forms of judicial intervention were possible, but only according to the terms of the agreement. *JW* thus reinforced *Wall*'s two-part public/private test, but added a formal gloss on the notion of the "exercise of state authority".

The Supreme Court of Canada once again drew upon *Wall* in the May 2021 decision of *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*.[29] This case, like *Wall*, involved members of a religious community who had been expelled—apparently due to their public disagreement with a decision made by the archbishop. Taking a cue from *Wall*, the expelled members were careful to frame their claim in private law terms, as a denial of natural justice in a contractual matter. While the Court of Appeal for Ontario accepted this argument, the Supreme Court of Canada rejected it. In a unanimous judgment, again penned by Rowe J, the Supreme Court of Canada held that the church's constitution, bylaws, and membership forms did not demonstrate an intention to enter into legal relations, and thus did not give rise to a valid contract.[30] Thus, while *Wall* steered litigants away from administrative law and toward private law as a way of holding private bodies to account, *Aga* articulated a restrictive approach to private law.

In *Wall* and its successor cases, then, the Supreme Court of Canada relied heavily on some kind of public/private distinction for the purposes of judicial review. *Wall*'s *dicta* contain certain ambiguities. Nevertheless, as applied by the Supreme Court of Canada, *Wall* has seemed to imply a hardening of conceptual boundaries (as compared to the more fluid approach seen earlier in *Hofer*). As *Wall* itself demonstrated, and as was confirmed in *Aga*, this set of decisions could have harsh consequences for some litigants—in these cases, those expelled from religious communities. But Rowe J's *dicta* in *Wall*—to the effect that judicial review is reserved for public institutions and public decisions—also have broader consequences.

27. See *ibid* at para 101.

28. *Ibid* at para 104 [emphasis in original].

29. 2021 SCC 22 [*Aga*].

30. See *ibid*.

II. Public/Private and Other Ways of Circumscribing Judicial Review

The criteria set out in *Wall* offer one way of circumscribing the availability of judicial review, but they are not the only way. Courts have at times employed other criteria. These criteria are sometimes related to the public/private distinction, but not always in a straightforward manner.

In principle, there are a number of possible criteria for circumscribing the availability of judicial review.[31] Perhaps the most obvious—and one that appears to be intended by *Wall*—is an *institutional* criterion, focused on the identity of the decision-making body. Indeed, in the vast majority of judicial review cases—involving government departments, administrative tribunals, regulatory agencies, and so on—the public nature of the institution is not in question.

An institutional criterion can be difficult to apply if it depends solely on a public/private distinction, however. It is not always clear where the public sector ends and the private sector begins. Historically, governments have often conferred upon private organizations various forms of official recognition (not to mention material advantage): hospitals, universities, and professional associations come to mind. Courts have at times recognized such links as a basis for judicial review. For example, in 1987, the Court of Appeal of England and Wales held that judicial review applied to the Panel on Take-overs and Mergers, a self-regulatory arrangement devised by the financial industry (albeit surrounded by a framework of state law).[32] Governments have also established entities (i.e., Crown corporations) whose purposes are public but whose day-to-day operations are akin to those of private bodies.

Legislators could perhaps resolve some of these ambiguities by making a definitive list of the organizations subject to judicial review. Canadian laws do in fact contain lists of public organizations for other purposes: the "schedules" to the federal *Financial Administration Act* are a good example.[33] But such a

31. The criteria for the applicability of judicial review are distinct from, albeit to some extent parallel to, those for the applicability of the *Canadian Charter of Rights and Freedoms*. See e.g. *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545; *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577. For a useful comparison of these two issues, see Mary Liston, "A Public/Private Primer" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond Montgomery, 2021).

32. See *R v Panel on Take-overs and Mergers, Ex parte Datafin plc et al*, [1987] 1 All ER 564, 2 WLR 699.

33. RSC 1985, c F-11.

list would require frequent maintenance, and might simply shift to civil servants (rather than judges) the burden of resolving any ambiguities.[34]

Another factor that seems relevant is a *functional* criterion. Public institutions' contracts and their management of property are generally subject to the ordinary common law (or to civil law in Quebec).[35] There is a solid jurisprudential basis for excluding such decisions from judicial review. In the 2008 *Dunsmuir v New Brunswick* decision, for example, the Supreme Court of Canada held that the employment of public servants who had a contract of employment should be governed by contract law rather than administrative law.[36] Likewise, in a case dealing with procurement contracts, the Federal Court of Appeal held that public bodies' "commercial" decisions are exempt from review.[37]

A functional criterion, like an institutional criterion, may generate difficulties, however. Government decisions in relation to contracts and property are not always separate from public functions. In some instances, public authorities have adopted formal rules to the effect that contracting decisions are to be subject to broader, non-commercial policy concerns.[38] In other instances, governments use contracts as mechanisms for various administrative processes, such as the granting of licences or financial assistance.[39] Indeed, governments often use contracts as regulatory devices to impose public policies on individuals and private entities.[40] Canadian courts have sometimes recognized a role for administrative law in such cases. In the 2011 *Mavi v Canada (Attorney General)* case, the Supreme Court of Canada examined a process whereby residents of Ontario had

34. See Harlow, *supra* note 5 at 254.

35. See e.g. art 1370 CCQ. See also Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011).

36. 2008 SCC 9.

37. See *Irving Shipbuilding Inc v Canada (AG)*, 2009 FCA 116.

38. See e.g. *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231, 110 DLR (4th) 1.

39. See e.g. *Canada (AG) v TeleZone Inc*, 2010 SCC 62; *Ferme Vi-Ber inc v Financière agricole du Québec*, 2016 SCC 34. It is worth noting that in the latter case, the Supreme Court of Canada recognized that, for the purposes of Quebec civil law, there exists a distinct category of "administrative contracts" subject to special principles of interpretation (see *ibid* at para 4).

40. For contrasting perspective on such practices in the context of public procurement, see Terence Daintith, "Regulation by Contract: The New Prerogative" (1979) 32:1 Current Leg Probs 41; Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (Oxford, UK: Oxford University Press, 2007).

undertaken to be financially responsible for immigrant family members.[41] Writing for a unanimous court, Binnie J held that the contractual nature of the process did not "extricate" it from the "public law context".[42] An administrative law duty of procedural fairness was held to apply.

Another possible way of circumscribing judicial review is according to a *formal* criterion, focused on the source of the power in question. Such a criterion played an important role in Anglo-Canadian administrative law until the late twentieth century. In England, judicial review of administrative action originally developed through the use of the prerogative writs—most notably the writ of *certiorari*, which empowered royal courts to overturn the decisions of lower courts.[43] As has often been the case in the common law tradition, the procedure came first, and the substantive rationale was articulated later. But by the eighteenth century, *certiorari* had come to be associated with the idea of an excess of jurisdiction, particularly an excess of jurisdiction in relation to statutory powers.[44] Conversely, "private or domestic tribunals"—i.e., arbitral tribunals whose powers derived from contract—were excluded from the scope of *certiorari*.[45]

However, in the late twentieth century, under the guise of a functionalist approach, English courts gradually abandoned the formal requirement of a statutory source of power. They opened the door to the review of prerogative or other non-statutory governmental powers under judicial review applications in the nature of *certiorari*.[46] The breakthrough case in the UK was *R v Criminal Injuries Compensation Board, Ex parte Lain*, which allowed for the judicial review of decisions about payments made under a non-statutory compensation scheme.[47] Later, it was made clear that judicial review was also applicable to decisions made under the royal prerogative—i.e., special sovereign powers derived from the common law rather than from statute.[48]

41. 2011 SCC 30.

42. *Ibid* at para 49.

43. See SA De Smith & JM Evans, *De Smith's Judicial Review of Administrative Action*, 4th ed (London, UK: Stevens & Sons, 1980) at 584–595.

44. See Edith G Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Cambridge, MA: Harvard University Press, 1963).

45. See the *dicta* of Parker LCJ in *R v Criminal Injuries Compensation Board, Ex parte Lain*, [1967] 2 All ER 770 at 778, 3 WLR 348 (QBD) [*Criminal Injuries*].

46. See David J Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 408–09.

47. See *supra* note 45.

48. See *Council of Civil Service Unions v Minister for the Civil Service*, [1984] All ER 935, [1985] AC 374 (HL (Eng)).

The boundaries of judicial review prior to the late twentieth century also depended in part on a functional criterion, but a much narrower one than that described above. In the nineteenth and early twentieth centuries, the writ of *certiorari* was available for denials of natural justice, which were assimilated to excesses of jurisdiction. However, in the early twentieth century, British judges held that judicial review on "natural justice" grounds was only available where the body in question was acting in a "judicial" or "quasi-judicial" capacity rather than in an administrative role.[49] The presence of a judicial or quasi-judicial power was thus taken as one of the preconditions for the exercise of *certiorari*.

In the 1960s and 1970s, however, English judges grappling with an expanded administrative state dismantled this distinction, recognizing a duty of procedural fairness in "administrative" decisions.[50] This change broadened the range of decisions that could be subject to judicial review. It did not altogether eliminate a functional criterion, but it implied that the functions that could be subject to judicial review would be defined much more broadly.

Canadian courts echoed these expansionary trends in the late 1970s. In the *Nicholson v Haldimand-Norfolk Regional Police Commissioners* case, the Supreme Court of Canada imported the British concept of procedural fairness, making it possible to scrutinize processes considered "administrative" rather than "judicial".[51] As David Mullan explains,

> In subsequent cases, it was accepted that the lowering of the threshold for the making of procedural fairness arguments and the application of principles of procedural fairness to a significant range of purely administrative bodies had also lowered the threshold for the reach of the remedy of *certiorari* and its pre-decision equivalent, prohibition.[52]

Mullan refers principally to the 1980 *Martineau v Matsqui Institution* case, concerning a disciplinary decision in a federal penitentiary.[53] In concurring reasons in that case, Dickson J suggested that one should "begin with the premise that any public body exercising power over subjects

49. See *Local Government Board v Arlidge*, [1915] AC 120, 1 KB 160 (HL (Eng)); *R v Electricity Commissioners, Ex parte London Electricity Joint Committee Co Ltd*, [1923] All ER 250, [1924] 1 KB 171 (CA).

50. See e.g. *Ridge v Baldwin*, [1962] 1 All ER 834, [1964] AC 40 (CA); *R v Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*, [1972] All ER 590, 2 QB 299 (CA).

51. [1979] 1 SCR 311, 88 DLR (3d) 671.

52. Mullan, *supra* note 46 at 409.

53. [1980] 1 SCR 602, 106 DLR (3d) 385.

may be amenable to judicial supervision"[54] and went on to hold that "*certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person".[55]

Where does *Wall* fit into the picture I have just described? As I have explained, the most internally coherent reading of *Wall* is that it combines an institutional criterion with a functional one, and that it makes these requirements cumulative. *Wall* has comparatively little to say about any formal criterion. Indeed, Rowe J expressly repudiates a line of cases that had opened the door to the judicial review of the churches on the basis of a private Act of incorporation.[56] However, in a negative sense, a formal criterion plays a role in *Wall*. One of Rowe J's justifications for repudiating the case I have just mentioned is that private Acts of incorporation do not confer "statutory authority".[57] Moreover, at two places in the judgment, Rowe J emphasizes that the Highwood Congregation *lacked* any statutory basis.[58] Finally, as I have discussed, *Wall*'s requirement of an exercise of state authority was linked in *JW* to a concern for "the source of the decision maker's authority".[59]

Prior to *Wall*, other Canadian authorities have combined formal, functional, and institutional criteria for the availability of judicial review in different ways. In the remainder of this section, I will explain some of these approaches. I will first discuss the statutory codification of judicial review procedure; I will then discuss the contextual approach set out by the Federal Court of Appeal in *Air Canada*.

Thus far, I have largely analyzed the criteria for judicial review developed by courts. But it is important to note that courts have not been the only authorities defining the scope of judicial review. Since the 1960s, most Canadian jurisdictions have enacted statutory procedural codes or similar legislation. Such legislation often groups together the traditional prerogative writs to create a single judicial review application procedure. These statutory procedures also tend to incorporate the equitable remedies of declarations and injunctions, as applied to public bodies. In doing so, these statutes may employ a mix of institutional, formal, and functional criteria. These statutory criteria sometimes constrain judges' ability to undertake the review of certain bodies—but sometimes they give judges freer rein than the caselaw would suggest.

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54. *Ibid* at 619.

55. *Ibid* at 622–23. For an endorsement of the view that non-statutory powers should be reviewable regardless of their formal source, see Hogg, Monahan & Wright, *supra* note 35 at 26.

56. See *supra* note 1 at para 18.

57. See *ibid* at paras 18, 20.

58. See *ibid* at paras 3, 12.

59. *Supra* note 24 at para 104.

A good example of a statutory procedural code and its impact on the boundaries of judicial review is Ontario's *Judicial Review Procedure Act*, enacted in 1971. This legislation establishes a process for an "application for an order *in the nature of* mandamus, prohibition or certiorari".[60] In the early years following the enactment of this statute, Ontario courts sometimes took the words "in the nature of" as an invitation to expand the range of judicial review beyond the scope of the historical writs to the decisions of labour unions, churches, and schools.[61] Conversely, while the same statute makes declarations and injunctions part of the unified judicial review procedure, it specifies that this amalgamation only applies to declarations and injunctions "in relation to the exercise, refusal to exercise or proposed or purported exercise *of a statutory power*".[62] The reference to a statutory power here appears intended to distinguish judicial review from declarations and injunctions used as private law remedies. Nevertheless, some Ontario judges came to see the presence of a statutory power as a prerequisite for all forms of judicial review—thus precluding the review of government actions whose source lay in common law rather than statute. In short, Ontario judges understood themselves to have more flexibility than courts in other jurisdictions, but they also placed more emphasis on a formal criterion—the presence or absence of a statutory power.[63]

Parliament codified federal judicial review procedure in 1970, in the statute now known as the *Federal Courts Act*.[64] Given that the federal courts lack inherent jurisdiction, their judicial review powers depend on the language of this statute. The *Federal Courts Act* gives the federal courts exclusive jurisdiction over judicial review proceedings against any "federal board, commission or other tribunal".[65] The latter is a specialized term, defined in the Act to refer to powers derived from federal statute or from royal prerogative.[66] At the federal level, an institutional criterion is therefore unavoidable, although it is mingled with a formal criterion.[67]

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60. *Judicial Review Procedure Act*, RSO 1990, c J.1, s 2(1)(1) [emphasis added] [*JRPA*].

61. See Mullan, *supra* note 46 at 441.

62. *JRPA*, *supra* note 60, s 2(1)(2) [emphasis added].

63. Mullan notes that although British Columbia's legislature copied Ontario's statutory language, its judges avoided placing the same emphasis on statutory sources. See Mullan, *supra* note 46 at 440–41.

64. RSC 1985, c F-7.

65. *Ibid*, s 18(1)(b).

66. *Ibid*, s 2(2).

67. The formal criterion can be understood as constitutionally necessary to give effect to the federal courts' mandate of administering "the laws of Canada" under section 101 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 101, reprinted in RSC 1985, Appendix II, No 5.

In Quebec, the traditional prerogative writs were codified in the 1965 *Code of Civil Procedure*.[68] Unlike some other jurisdictions' reforms, this original Quebec codification did not provide for a unified judicial review procedure. It did, however, unify the writs of *certiorari* and prohibition under a single mechanism.[69] This new procedural mechanism was stated to apply to any "court" (in French: *tribunal*) that was "subject to [the] superintending and reforming power" of the Superior Court. But it did not specify that these tribunals had to be public bodies, nor that they had to be exercising statutory powers. The *Code of Civil Procedure* also set out a *mandamus*-like power, making it possible to apply to the court for "an order commanding a person to perform a duty or an act which is not of a purely private nature".[70] But although the act in question had to have a public character, this was not necessarily the case of the institution that was the target of the order. The order was available not only against bodies, but also against any "legal person" or "association".[71] Finally, the 1965 *Code of Civil Procedure* also declared that the Superior Court's "superintending and reforming power" extended to all "courts [*tribunaux*] within the jurisdiction of the Parliament of Québec, and bodies politic, legal persons established in the public interest or for a private interest within Québec", other than the Court of Appeal.[72] In short, the 1965 *Code of Civil Procedure* cast its net broadly in institutional and functional terms (although the case law at that time was understood to impose other functional as well as formal criteria).

Fifty years later, Quebec undertook a major reform of civil procedure, culminating in a new code that entered into force on January 1, 2015. In this code, unlike its predecessor, a single judicial review procedure groups together the traditional forms of *certiorari*, prohibition, *mandamus*, *quo warranto*, as well as public law declarations and injunctions.[73] However, this new code does nothing to narrow the applicability of the older procedures. It includes a power similar to *certiorari* and prohibition, applicable to any case or decision "made by a person or body under the authority of the Parliament of Québec".[74] It also preserves the *mandamus*-like power, which

68. CCP (1965).

69. See *ibid*, art 846.

70. *Ibid*, art 844.

71. *Ibid*.

72. *Ibid*, art 33.

73. See CCP, art 529. *Habeas corpus* is treated separately. See *ibid*, arts 398–402.

74. *Ibid*, art 529(2).

serves to "direct a person holding an office within a public body, a legal person, a partnership or an association or another group not endowed with juridical personality to perform an act which they are by law required to perform, provided the act is not of a purely private nature".[75] It also reiterates the Superior Court's broad power of judicial review, applicable not only over "all courts in Québec other than the Court of Appeal" but also "over public bodies, over legal persons established in the public interest or for a private interest, and over partnerships and associations and other groups not endowed with juridical personality".[76]

Canadian federal and provincial legislators have thus set out the conditions for judicial review in somewhat different terms than those set out in *Wall*. Like *Wall*, these approaches combine various elements—formal, functional, and institutional. But they generally avoid relying on a public/private distinction to the same extent as *Wall*.

Another approach to the scope of judicial review can be seen in a 2011 decision of the Federal Court of Appeal, *Air Canada*. This case arose from two bulletins issued by the Toronto Port Authority (TPA), a federal Crown corporation, with regard to the allocation of takeoff and landing slots at the Toronto Island airport. Air Canada complained that the TPA had announced a process that would give an unfair advantage to its competitor, Porter Airlines. Because Air Canada brought the challenge under the *Federal Courts Act*, the availability of judicial review depended on elements specified in that Act: first, whether there was any "matter" that triggered Air Canada's right to apply for judicial review (as required by section 18.1 of the Act), and second, whether the TPA was acting as a "federal board, commission or other tribunal".

First, addressing the question of a "matter", Stratas JA analyzed the two bulletins issued by the TPA. He noted that both bulletins were essentially indicative statements, announcing aspects of the TPA's process of awarding landing spots. They did not constitute decisions or orders, nor did they signal a refusal to act. With regard to Air Canada, these bulletins did not "affect its legal rights, impose legal obligations, or cause prejudicial effects upon it".[77] In Stratas JA's view, this conclusion would have been sufficient to dispose of the case.[78]

Justice Stratas nevertheless went on to consider a second line of argument for the sake of thoroughness. Section 18 of the *Federal Courts Act* specifies that judicial review is available against "any federal board,

75. *Ibid*, art 529(3).

76. *Ibid*, art 34.

77. *Air Canada*, *supra* note 6 at para 39.

78. See *ibid* at para 43.

commission or other tribunal", a term defined in section 2 of the Act. Referring to this definition, Stratas JA noted that it refers to bodies or persons "exercising or purporting to exercise jurisdiction or powers" under an act of Parliament or under the royal prerogative. In the case at hand, Stratas JA noted, the TPA's powers had their origins in federal statute, which weighed in favour of characterizing the TPA as a federal board.[79] Nevertheless, in Stratas JA's view, identifying the source of the power was not enough. It was also important to consider whether the TPA's conduct had been "of a public character".[80] Justice Stratas explained that all government entities exercise some private functions, such as "renting and managing premises, hiring support staff, and so on", that are not subject to review.[81]

Recognizing that it might be impossible to articulate a single criterion to separate public from private, Stratas JA proposed that courts should consider a range of factors:

> i. "the character of the matter" (a private, commercial matter or something of broader interest);
> ii. "the nature of the decision-maker and its responsibilities";
> iii. the basis of the decision in "law" (e.g., statute, regulation, order) versus "private discretion" (contract law, business considerations);
> iv. "the body's relationship to other statutory schemes or other parts of government" (whether "the body is woven into the network of government and is exercising a power as part of that network");
> v. whether a decision maker is "an agent of government or is directed, controlled or significantly influenced by a public entity";
> vi. "the suitability of public law remedies";
> vii. "the existence of compulsory power"; and
> viii. exceptional circumstances whereby an otherwise private matter "has attained a serious public dimension" (e.g., fraud, bribery, corruption, human rights violations).[82]

Applying these criteria to the case before him, Stratas JA concluded that the TPA's bulletins were essentially a matter of property management, a private

79. See *ibid* at para 49.

80. *Ibid* at paras 50–51.

81. *Ibid* at para 52.

82. *Ibid* at para 60 (text outside of quotations has been paraphrased by the author).

function. This implied that the TPA was not acting as a "federal board, commission or other tribunal" when it issued the bulletins, and that its actions were not subject to judicial review.[83]

The only *sine qua non* under the *Air Canada* test is a formal criterion—that the organization be exercising a power under a federal statute or under the royal prerogative—dictated by the federal courts' grounding in section 101 of the *Constitution Act, 1867*. Once that threshold test is satisfied, institutional and functional (as well as formal) criteria are combined and weighed together, in a multi-factor, contextual analysis.

In a number of subsequent cases, Ontario courts also drew upon the *Air Canada* test to broaden the availability of judicial review. Most notably, in the 2013 case of *Setia v Appleby College*, the Court of Appeal for Ontario was faced with a challenge to a private school's decision to expel a student.[84] One wrinkle in the case was that the school had been established by a private Act of the Ontario legislature; the Act contained a reference to "administration and discipline". This wording led the reviewing judge to conclude that the school had been exercising a statutory power and that its decision was therefore reviewable on procedural fairness grounds. The Court of Appeal for Ontario ultimately rejected this conclusion, characterizing the relationship between the school and the student (and his family) as essentially contractual. However, on its way to this conclusion, it looked to *Air Canada* for guidance and considered various other factors, before finally determining that judicial review was not available. *Setia* was followed by a number of decisions involving sporting organizations[85] and political parties[86] in which the Ontario Superior or Divisional Courts relied on the *Air Canada* factors to hold that judicial review *was* available.

In *Wall*, the Supreme Court of Canada explicitly repudiated this line of cases. Justice Rowe criticized cases (including *Setia*) that had employed multi-factor tests (such as that from *Air Canada*) to determine whether a private body's decision might be reviewable.[87] Justice Rowe thus emphasized that Stratas JA's reasons in *Air Canada* cannot serve as a template for identifying "public" decisions taken by private bodies.[88]

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83. *Ibid* at paras 61, 81.

84. 2013 ONCA 753 [*Setia*].

85. See e.g. *West Toronto United Football Club v Ontario Soccer Association*, 2014 ONSC 5881; *Gymnopoulos et al v Ontario Association of Basketball Officials*, 2016 ONSC 1525.

86. See e.g. *Graff v New Democratic Party*, 2017 ONSC 3578 [*Graff*].

87. See *supra* note 1 at paras 19–20.

88. See *ibid* at para 21.

In other respects, however, *Wall*'s treatment of *Air Canada* is ambivalent. On the one hand, a generous reading might suggest that Rowe J implicitly endorses the use of the *Air Canada* factors as part of the second step in the public/private analysis (consistent with the "nested" approach I identify in Part III, below). Justice Rowe certainly says nothing that would directly negate such a reading. On the other hand, Rowe J does not explicitly endorse *Air Canada*. In his reference to the case, Rowe J implies that Stratas JA's analysis was limited to determining whether the TPA had been acting as a "federal board, commission or other tribunal" for the purposes of the *Federal Courts Act*.[89] Such a reading would in principle limit *Air Canada*'s application to the federal courts. The widespread use of the *Air Canada* test, then, cannot be said to have been mandated by the Supreme Court of Canada.

There are thus a number of ways of circumscribing judicial review, based on institutional, functional, or formal criteria—or some combination of the three. The approach set out in *Wall* is one such combination; however, it contains certain ambiguities, largely arising from its heavy reliance on an uncertain public/private distinction. Other approaches can be found in federal and provincial judicial review procedure statutes, and in the Federal Court of Appeal's decision in *Air Canada*. In some cases, these approaches rely less heavily on a public/private distinction; in other cases, they explicitly try to account for its nuances.

III. *Wall*'s Impact

In this section, I review the impact of *Wall* on Canadian cases rendered in the three years since the decision.[90] This analysis reveals that *Wall* has served as a blunt instrument to exclude certain cases from judicial review—most notably the decisions of institutions considered to be private. However, it also reveals the persistence of other approaches.

The cases can be roughly divided into five categories. The first of these contains instances where courts have straightforwardly applied *Wall*'s institutional criterion in order to reject judicial review applications.[91] The second category consists of cases where courts have excluded judicial

89. See *ibid*; the wording is that of the *Federal Courts Act*, *supra* note 64, s 2(1).

90. The research is up-to-date as of July 1, 2021.

91. As an offshoot of this first category, one might include cases where litigants have anticipated this difficulty and chosen some other procedural route.

review on the basis of *Wall*'s second, functional criterion. The third category comprises cases where courts have employed the *Air Canada* factors as a supplement, especially in relation to *Wall*'s second, functional criterion—what I describe as a nested approach. The fourth category includes cases that rely more heavily on *Air Canada*, sometimes blurring *Wall*'s structure or displacing it altogether. The fifth and final category consists of Quebec cases where *Wall*'s institutional criterion has been rejected as incompatible with statute.

To begin with the first category: Canadian courts have enthusiastically applied *Wall*'s initial requirement of an exercise of state authority, interpreted as an institutional criterion. This requirement has proven a handy way of excluding from judicial review the decisions of volunteer collectives,[92] sports clubs,[93] churches,[94] Indigenous associations,[95] fishing cooperatives,[96] alumni associations,[97] and insurance companies.[98] It is of course true, as others have observed, that *Wall* says little about how one might characterize an institution as public/private, and that this determination can be difficult.[99] Nevertheless, it must be acknowledged that courts sometimes find this determination easy, as these cases attest.

Echoes of this first category of cases can also be seen in cases that employ private law concepts. Following the Supreme Court of Canada's categorical statements in *Wall*, those adversely affected by the decisions of non-governmental bodies have tried other litigation strategies. One such strategy has been to frame the issue as a breach of contract. Some litigants have been successful in this regard. In particular, in two lawsuits aimed at the Conservative Party of Canada, one by an excluded leadership candidate,[100] the other by a would-be delegate to the party's national council,[101] the Ontario Superior Court of Justice held the party to be in breach of contract and awarded private

92. See e.g. *Bell v Civil Air Search and Rescue Association et al*, 2018 MBCA 96.

93. See e.g. *Roberts v Vernon Pickleball Association*, 2018 BCSC 1834.

94. See e.g. *Mathai v George*, 2019 ABQB 116.

95. See e.g. *McCargar v Métis Nation of Alberta Association*, 2019 ABCA 172; *Quewezance v Federation of Sovereign Indigenous Nations*, 2018 SKQB 313; *Chartier v Métis Nation – Saskatchewan*, 2021 SKQB 142.

96. See e.g. *Evans v Norway House Fisherman's Co-op Ltd et al*, 2020 MBCA 83.

97. See e.g. *Sivanadian v Kanagaratnam*, 2020 ONSC 6760.

98. See e.g. *Ahmed v Crawford and Company*, 2020 ONSC 7656.

99. See Chowdhury, *supra* note 4.

100. See *Karahalios v Conservative Party of Canada*, 2020 ONSC 1947.

101. See *Melek v Conservative Party of Canada*, 2021 ONSC 1959.

law remedies. In these cases, the parties had clearly seen *Wall*'s signals and taken an alternative route.[102]

Not all litigants who have invoked private law have been successful, however. When the ousted president of an Indigenous association invoked private law concepts to challenge her exclusion, the Supreme Court of British Columbia called this an abuse of process, telling her she should have first used internal appeal mechanisms.[103] The Supreme Court of Canada finally imposed strict limits on the contractual approach in the 2021 *Aga* case, discussed earlier.[104]

In a related series of cases, litigation has shifted to the terrain of corporate law. Thus, the British Columbia courts determined that a charity had rejected membership applications in a manner that was inconsistent with its bylaws,[105] and that a hockey league's disciplinary actions were procedurally unfair.[106] In both of these cases, the courts intervened on the basis of remedies set out in British Columbia's *Societies Act*.[107] Such strategies have not always been successful, however. In one Ontario case, the ousted treasurer of a Sikh gurdwara failed to convince the Court that corporate law principles mandated his reinstatement.[108]

On the whole, the cases in this first category appear to dispel charges of ambiguity. They indicate that courts are able to apply *Wall*'s first, institutional criterion without much difficulty.

In a second category of cases, courts have identified the institution in question as public, but have excluded judicial review on the basis of *Wall*'s second, functional criterion. Such a reasoning process is clearest in decisions that can be characterized as contractual. For example, in one case, it was held that the Northwest Territories Legal Aid Commission's decision not to schedule a particular lawyer for cases was essentially private.[109] The Superior Court of Quebec arrived at the same conclusion with regard to a government department's decision to change the contractor for some laundry services.[110] The Ontario

102. These cases can be contrasted with some pre-*Wall* cases where Canadian courts had authorized the judicial review of political parties' decisions. See e.g. *Graff*, *supra* note 86.

103. See *Morin Dal Col v Métis Nation British Columbia*, 2021 BCSC 964.

104. See *supra* note 29.s

105. See *Farrish v Delta Hospice Society*, 2020 BCCA 312.

106. See *Surrey Knights Junior Hockey v The Pacific Junior Hockey League*, 2020 BCCA 348.

107. SBC 2015, c 18.

108. See *Dhaliwal v Singh*, 2020 ONSC 6116.

109. See *Tarnow v NWT Legal Aid Commission*, 2020 NWTSC 13.

110. See *Buanderie Blanchelle inc c Procureure générale du Québec (Ministre de la Santé et des Services sociaux)*, 2019 QCCS 2039 [*Buanderie Blanchelle*].

Superior Court of Justice relied on *Wall*'s functional criterion to rebuff a college student who sought to remain in residence after the college declined to renew his residence agreement.[111]

Cases in this second category appear to vindicate *Wall*'s second, functional criterion. They also show that, because the two steps of the *Wall* test are cumulative, any problems arising at the first stage can be resolved at the second stage. They do not directly address concerns about *Wall*'s first, institutional criterion. But they suggest that the *Wall* test is, on the whole, workable.

In the third category of cases, courts have combined *Wall* and *Air Canada*. They have looked to the contextual test set out in *Air Canada* in order to characterize the function in question as public or private. The *Air Canada* analysis is thus treated as nested within the second part of the *Wall* test. According to this approach, courts first determine whether there was an exercise of state authority, applying *Wall*. They then ask whether the exercise of state authority was "of sufficiently public character", turning to the *Air Canada* factors to make this determination.

A number of Canadian courts have concluded via this method that the function in question was private, despite the public nature of the institution. For example, reviewing the City of Saskatoon's actions surrounding the judicial sale of a house, the Court of Queen's Bench for Saskatchewan wrote that "[t]here is no dispute the City was exercising state authority. The contentious issue is whether the City's exercise of state authority . . . was of a sufficient public character to be subject to judicial review."[112] It proceeded to apply the *Air Canada* factors to determine that the function in question was essentially private.[113] The Court of Queen's Bench of Alberta followed a similar analysis when reviewing a municipal administrator's attempt to restrict communications among certain councillors who had been accused of misconduct.[114] The Federal Court arrived at the same conclusion with regard to the federal government's decision not to exclude a staff lawyer from working on a particular file despite an alleged conflict of interest,[115] and with regard to a band council's decision to evict a member from a house.[116] Most recently, the Ontario Divisional Court followed the same line of reasoning in a case involving the Ministry of Health's termination of funding to a corporation of health care professionals.[117]

111. See *Zhang v Algonquin College of Applied Arts and Technology*, 2021 ONSC 3359.

112. *Alie-Kirkpatrick v Saskatoon (City)*, 2019 SKCA 92 at para 40.

113. See *ibid* at para 65.

114. See *Kissel v Rocky View (County)*, 2020 ABQB 406.

115. See *Geophysical Service Inc v Canada (AG)*, 2020 FC 984.

116. See *Cyr v Batchewana First Nation of Ojibways*, 2021 FC 512.

117. See *Wise Elephant Family Health Team v Ontario (Minister of Health)*, 2021 ONSC 3350.

In some other cases, the same nested approach has yielded the opposite result—a conclusion that the exercise of state authority in question was indeed sufficiently public. For example, reviewing a procurement decision by the Alberta Minister of Environment and Parks (AEP), the Court of Queen's Bench of Alberta first turned to *Wall*, noting that "there is no doubt that the AEP is a state actor".[118] It then applied the *Air Canada* factors to determine whether the decision in question was public—ultimately concluding that it was, in large part because of its broad public impact. Echoes of this approach can be seen in reviews of a minister's requirement that bidders on an infrastructure project employ workers belonging to certain unions;[119] of a warden's decision to revoke the security clearance of a prison nurse;[120] of a city's decision to ban a company from using municipal waste disposal facilities;[121] and of a Legal Aid Commission's decision to remove a lawyer from its roster.[122]

The most explicit embrace of this nested approach came in the reasons of the Federal Court of Appeal in *Oceanex Inc v Canada (Minister of Transport)*, a challenge to the rates charged by Marine Atlantic, a federal Crown Corporation, for ferry services (rates alleged to be so low as to be unfair to a private competitor).[123] In this case, the Court acknowledged the Supreme Court of Canada's attempt in *Wall* to distinguish *Air Canada* and to limit its application to the determination of whether an entity was "acting as a federal board, commission or tribunal" for the purposes of the *Federal Courts Act*.[124] It nevertheless assimilated the determination of whether an entity was "acting as a federal board, commission or tribunal" to the first step of the *Wall* test, declaring that "judicial review jurisdiction under the *Federal Courts Act* requires an initial finding that the power exercised is a 'state' power—one sourced in statute or Crown prerogative. The *Air Canada* factors can then be used to ensure that its exercise is of a 'sufficiently public character'".[125] In this case, the Federal Court of Appeal endorsed the Federal Court's application of

118. *Aquatech v Alberta (Minister of Environment and Parks)*, 2019 ABQB 62 at para 9.

119. See *Independent Contractors and Business Association v British Columbia (Transportation and Infrastructure)*, 2020 BCCA 243.

120. See *Strauss v North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207.

121. See *C & D Septic Ltd v Prince Albert (City)*, 2018 SKQB 185.

122. See *Harvey v Saskatchewan Legal Aid Commission*, 2020 SKCA 110.

123. 2019 FCA 250.

124. *Ibid* at para 50.

125. *Ibid* at para 51.

the *Air Canada* factors to determine that Marine Atlantic's rate-setting decision was indeed reviewable.[126]

Like the cases in the second category, cases in this third category tell us little about *Wall*'s first, institutional criterion. But they show that courts have at times found it difficult to apply *Wall*'s second, functional criterion. Courts have therefore looked to the *Air Canada* factors for help.[127]

In a fourth category of cases, courts have also looked to *Air Canada*, but in a less structured manner. In this fourth category, the steps of the *Wall* test are blurred or bypassed in favour of an *Air Canada* contextual analysis. These cases demonstrate greater uncertainty about the *Wall* test.

To begin, some courts have applied the nested approach without clearly distinguishing between the first (institutional) and the second (functional) steps of the *Wall* test. For example, the Ontario Divisional Court accepted for the sake of argument that a municipal library *might* be exercising state authority, but then applied the *Air Canada* factors to determine that the decision had been a private one.[128] Likewise, in a case involving a university's termination of a researcher's contract, the Court of Queen's Bench of Alberta first applied *Wall* to determine that the university had not been exercising state authority.[129] It then looked to the *Air Canada* factors to buttress its conclusion, holding that "even if the Decisions could be said to be exercises of state authority, they are not exercises of state authority with sufficient public character".[130] The Court of Queen's Bench of Alberta followed the same reasoning process in another case involving a real estate board's expulsion of one of its members.[131]

The latter cases do not simply rely on *Air Canada* to flesh out the second stage of the *Wall* test. Instead, the characterization of the function as private (on the basis of *Air Canada*) makes it possible to avoid definitively characterizing the institution in question. In these cases, courts implicitly or explicitly acknowledge difficulties at the first stage of the *Wall* test, but they are relieved from having to deal with them.

126. See *ibid* at para 54.

127. I have noted that a generous reading of *Wall*, discussed in Part II above, would imply an endorsement of this nested approach. However, as I have explained, it seems doubtful that the Supreme Court of Canada prescribed this synthesis. Lower courts more likely deserve the credit.

128. See *Weld v Ottawa Public Library*, 2019 ONSC 5358.

129. See *Eksteen v University of Calgary*, 2019 ABQB 881.

130. *Ibid* at para 67.

131. See *Sedgwick v Edmonton Real Estate Board Co-Operative Listing Bureau Limited*, 2021 ABQB 59 [*Sedgwick*].

Further uncertainty is on display in a handful of cases from Ontario where courts have more or less bypassed the *Wall* criteria and proceeded directly to the *Air Canada* factors. In two of these cases, courts employed an *Air Canada* analysis to conclude that the decision in question was private and therefore unreviewable. The first case targeted the decision of a company that had been contracted to manage municipal bus shelters after this company cancelled a contract with an advertiser.[132] The second case involved a hospital's decision to limit visitors in the context of the COVID-19 pandemic.[133] In a third case, involving a challenge to an Indigenous organization's rejection of a membership application, the court loosely applied the *Air Canada* factors before arriving at the conclusion that the organization as a whole—and not just this particular decision—was private.[134]

On the whole, the cases in this fourth category suggest that courts are looking to *Air Canada* to help overcome ambiguities at the first, institutional stage of the *Wall* test. When it is not clear whether the institution in question should be considered public/private, one can turn to the *Air Canada* factors (sometimes ostensibly nested within *Wall*, sometimes not). These cases bear out the concerns of critics who warned that the *Wall*'s institutional criterion was too vague.

A fifth category of cases is limited to Quebec. In that province, courts have determined that *Wall*'s institutional criterion is inconsistent with the *Code of Civil Procedure*. Prior to *Wall*, in cases involving a housing cooperative[135] and a condominium association,[136] the Court of Appeal of Quebec had confirmed the availability of judicial review procedures against private bodies. Since *Wall* (and in spite of it), Quebec courts have held firm. The Superior Court of Quebec has endorsed the possibility of judicial review against a local branch of the Royal Canadian Legion,[137] a student association,[138] and a housing cooperative.[139] In each of these cases it has explicitly rebuffed attempts to invoke *Wall* to the contrary.[140]

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132. See *People for the Ethical Treatment of Animals, Inc v City of Toronto*, 2020 ONSC 2356.

133. See *Sprague v Her Majesty the Queen in right of Ontario*, 2020 ONSC 2335.

134. See *Beaucage v Métis Nation of Ontario*, 2019 ONSC 633, aff'd 2020 ONSC 483.

135. See *Tcheng c Coopérative d'habitation Chung Hua*, 2016 QCCA 461.

136. See *7718284 Canada inc c Complexe Cité du Havre II inc*, 2017 QCCA 1668.

137. See *Dufour c Légion Royale Canadienne*, 2019 QCCS 2923.

138. See *Allen v Students' Society of McGill University*, 2021 QCCS 1165.

139. See *Drouin c Coopérative d'habitation de la Haute Rive d'Aylmer*, 2021 QCCS 177.

140. As I noted earlier, *Wall*'s functional criterion has had an impact in Quebec: it has been

Canadian courts' embrace of the *Air Canada* test, along with Quebec courts' rejection of an institutional criterion, confirm the limits of the *Wall* test for circumscribing judicial review. While *Wall* has given courts a starting point for their analysis, courts have often looked elsewhere for greater nuance—or rejected the test as incompatible with legislation. While the Supreme Court of Canada's *dicta* in *Wall* sound definitive, they are not being treated as the last word.

IV. Public/Private and the Purposes of Judicial Review

I have noted that *Wall* rests the availability of judicial review on a public/private distinction. I have also noted that this distinction can be difficult to apply, and that Canadian courts have therefore looked to alternative or complementary criteria. However, if we zoom out for a moment and examine *Wall* in broader context, there are further reasons for concern. If, as *Wall* states, the purpose of judicial review is to uphold the rule of law, private institutions or functions do not necessarily deserve a free pass. Alternatively, there are plausible arguments for other accounts of judicial review that would endorse its application in at least some private contexts.

As I have noted, Rowe J in *Wall* stated flatly that "[j]udicial review is a public law concept" and that its purpose is "to ensure the legality of state decision making".[141] Justice Rowe explicitly linked the purpose of judicial review to upholding the rule of law.[142] Indeed, it accords with common sense to say that judicial review must be aimed at the public sector, because we take the power of the state for granted. Public organizations have an enormous impact on people's lives, through decisions governing matters such as land use and planning, business regulation, occupational licensing, labour, social benefits, and immigration. Moreover, in a democratic society, it is assumed that public decision-making will be rationally justified and that it will follow a fair process. Administrative law traditionally assigns judges the role of evaluating both the process and the substance of public decisions.

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invoked to exclude government contracting decisions from review. But attempts to exclude certain kinds of *institutions* from review because of their private nature have been unsuccessful in Quebec. See *Buanderie Blanchelle*, *supra* note 110.

141. *Supra* note 1 at para 13.

142. See *ibid* at para 14.

However, it is not clear that the categorical exclusion of private institutions from the scope of judicial review furthers this vision of the rule of law. As other scholars have explored at length, a strict public/private distinction might imply that public authorities could insulate some of their activities from judicial review by delegating these matters to private entities.[143] Nor is it clear that the "private" functions of government are exempt from rule of law concerns.[144] A bungled procurement process, for example, may suggest an abuse of power or some other form of mismanagement.[145] Even where private law remedies are available, they generate their own share of difficulties.[146] Some authors have therefore argued that judicial review should be available in some such cases.[147]

An alternative perspective on the scope of judicial review might start from the particularities of the judicial review process. When exercising their review powers, courts are acting in a supervisory role, examining the quality of decision-making within other institutions.[148] Judicial review focuses on the reasons for the decision (or the process used to make it) rather than on rights, interests, or harms. This is what sets judicial review apart from private law actions, which are generally directed toward the payment of damages or the vindication of property rights.

As applied to the public sector, the appropriateness of such mechanisms seems self-evident. Public authorities must not only apply the law; they are also expected to do so rationally (in a manner that serves the public interest) and to follow fair processes. While judicial deference may be in order (depending on the standard of review), public institutions must make decisions that are at least defensible. Moreover, for the reasons I have described above, those who

143. *Cf Société de l'assurance automobile du Québec v Cyr*, 2008 SCC 13. See generally Michael Taggart, ed, *The Province of Administrative Law* (Oxford, UK: Hart, 1997).

144. See Adam Perry, "The Crown's Administrative Powers" (2015) 131:4 Law Q Rev 652.

145. See e.g. *Canada (AG) v Rapiscan Systems Inc*, 2015 FCA 96.

146. For an unsuccessful attempt to invoke tort law in this context, see *Martel Building Ltd v Canada*, 2000 SCC 60. For a contract claim that resulted in a $40 million damage award against the federal government, see *Envoy Relocation Services Inc v Canada (AG)*, 2013 ONSC 2034.

147. See e.g. Sue Arrowsmith, *Government Procurement and Judicial Review* (Toronto: Carswell, 1988); ACL Davies, *The Public Law of Government Contracts*, (Oxford, UK: Oxford University Press, 2008) at 189–90.

148. See John Alder, "Obsolescence and Renewal: Judicial Review in the Private Sector" in Peter Leyland & Terry Woods, eds, *Administrative Law Facing the Future: Old Constraints and New Horizons* (London, UK: Blackstone Press, 1997) 160.

are negatively affected by government decisions often seek to have the decision overturned, to have the power of the state mobilized in a way that is more favourable to them. Private law remedies would often be inadequate.

But these justifications also apply in some cases involving private organizations. Private law remedies are ill-suited to some forms of private unfairness as well. The arbitrary or unfair refusal of a membership application, for example, is unlikely to ground any claim in contract. In England, equity might once have been of assistance: as Philip Murray has noted, prior to the mid-twentieth century, natural justice could be invoked, for example, when the plaintiff was challenging the abuse of fiduciary powers: "the rules of natural justice were conceptualised as freestanding equitable principles".[149] In the late nineteenth century, it was possible for a member of a club, for example, to apply for a declaration and injunction challenging his expulsion from the club, and to argue that the club's process was contrary to natural justice, even when the rules had been followed. By the mid-twentieth century, however, the contractual approach came to dominate: courts held that where the organization had written rules, and a constitution, observance of the rules was determinative and it was not possible to imply a freestanding concept of natural justice.[150]

The limited availability of private law remedies matters, in part, because some private organizations (such as stock markets, real estate boards, and sporting associations) effectively exercise monopoly control over a particular sector or activity. When such an organization excludes a member, the person affected may be left without alternatives. Such organizations may therefore be understood as having certain obligations to consider the public interest in their decision-making and to follow a fair process. Indeed, in a line of cases from England in the mid- to-late twentieth century, courts displayed a willingness to scrutinize the decisions of private entities exercising such monopoly powers, particularly on natural justice grounds.[151] Although these cases were largely framed as private law applications for declarations or injunctions, courts carefully examined the decision-making process as they would have done in an administrative

149. Philip Murray, "Natural Justice at the Boundaries of Public Law" (21 November 2013), online (blog): *UK Constitutional Law Association* <ukconstitutionallaw.org/2013/11/21/philip-murray-natural-justice-at-the-boundaries-of-public-law/>.

150. See *ibid*. See also Paul Jackson, *Natural Justice*, 2nd ed (London, UK: Sweet & Maxwell, 1979).

151. See e.g. *Lee v Showmen's Guild of Great Britai*n, [1952] 2 QB 329, 1 All ER 1175 (CA); *Nagle v Feilden*, [1966] 2 QB 633, 1 All ER 689 (CA); *Enderby Town Football Club Ltd v Football Association Ltd*, [1971] 1 Ch 591, 1 All ER 215 (CA); *McInnes v Onslow-Fane*, [1978] 3 All ER 211, 1 WLR 1520 (Ch).

law case. Some authors have therefore argued that bodies exercising monopoly powers should be subject to judicial review on a basis analogous to that used for public sector organizations.[152]

One need not dig very far into the post-*Wall* caselaw to find examples of such monopoly situations—and of how *Wall* has helped to insulate them from review. One recent case involves another real estate agent from Alberta, albeit this time from Edmonton rather than Calgary.[153] In 2018, Steven Sedgwick admitted to the Real Estate Council of Alberta (RECA), a statutory body, that he had engaged in misconduct involving signatures. The RECA suspended Sedgwick's license to operate as a real estate agent for three months. As a result of this disciplinary process, the Real Estate Association of Edmonton (RAE), "a voluntary, non-profit, private organization registered as a cooperative", terminated Sedgwick's membership.[154] The RAE controls access to the multiple listing service and Key Safe, two tools indispensable to real estate agents. At the end of his three-month suspension from RECA, Sedgwick applied to rejoin the RAE, but was refused, and was told to reapply in two years. When Sedgwick applied for judicial review of the RAE's decision, the Court of Queen's Bench of Alberta determined (on the basis of *Wall*) that the RAE was not exercising state authority and (on the basis of *Wall* combined with *Air Canada*) that its decision was not of a public character. Judicial review was therefore impossible, and Sedgwick was forced to look for another line of work.

There are also arguments for judicial scrutiny of private decisions outside the context of monopolies. Contemporary law imposes numerous constraints on private decision-making in contexts where one party is likely to wield considerable power, for example, in the contexts of the family or employment. Beyond these contexts, anti-discrimination laws also impose certain constraints on private decision-making by a wide range of actors. Pointing to such trends in the UK context, Dawn Oliver has argued for the existence of shared values that transcend the public/private divide: that concerns about fairness and rationality, or "the principles of good administration", have a role to play in private law.[155] Such a recognition does not necessarily imply that private

152. See Alder, *supra* note 148.

153. See *Sedgwick*, *supra* note 131.

154. *Ibid* at para 1.

155. Dawn Oliver, "Common Values in Public and Private Law and the Public/Private Divide" in Dawn Oliver, ed, *Public Law* (London, UK: Sweet & Maxwell, 1997) 630; Dawn Oliver, "Towards the Horizontal Effect of Administrative Justice Principles" in Michael Adler, ed, *Administrative Justice in Context* (Oxford, UK: Hart Publishing, 2010) 229.

decision-making should be subject to precisely the same standards, or the same review procedures, as public decision-making. But it does imply that some cross-fertilization between public law and private law is appropriate, and that it is fine to ask questions about fairness and rationality in the private sphere.

Dawn Oliver's observations are equally applicable in the Canadian context, in spheres such as labour, employment, housing, and the family—and in private law more generally. Indeed, Canadian common law now recognizes a duty of good faith in the performance of contracts.[156] While there is a sound jurisprudential (and in some cases, legislative) basis for limiting judicial review (in the strict sense) to the public sector, there are also plenty of examples of a more fluid approach, where administrative law concepts may have an application in ostensibly private settings. For example, in some corporate law cases, courts have applied *certiorari*-type remedies to assess the *vires* of corporate decision-making (based on statutes as well as the corporation's own constitution and bylaws) as well as natural justice in the decision-making process. *Hofer* is in fact a good example.[157]

Admittedly, the context of decision-making within religious authorities, such as those in *Wall* and *Aga*, presents particular challenges. As Rowe J was at pains to point out, the procedural propriety of a religious decision may depend on questions of religious doctrine, and state courts are justifiably reluctant to get involved. In the UK as well, courts have been reluctant to extend judicial review to religious bodies.[158] But such an exclusion could be more narrowly defined in terms of justiciability rather than in terms of a stark public/private distinction.

In short, private administration may share some of the same qualities as public administration in certain cases, suggesting that an argument can be made for the availability of judicial review. It is not my purpose in this article to argue that judicial review should necessarily be available in the private sector, but there is at least a plausible argument as to why it could be available in some cases.

Conclusion

The use of a public/private distinction as a way of defining the boundaries of judicial review, as prescribed by *Wall*, will always generate problems at the

156. See *Bhasin v Hrynew*, 2014 SCC 71.

157. See *supra* note 11.

158. See *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann*, [1992] 1 WLR 1036, [1993] 2 All E R 249.

margins. Whether in regard to institutions or functions, the categories of public and private are not self-evident. Since *Wall*, the rigours of this distinction have been mitigated, to extent, by the persistence of contextual analysis in the form of the *Air Canada* factors. While this contextual analysis has been helpful, one might nevertheless doubt whether restricting judicial review to certain institutions and certain functions is actually conducive to *Wall*'s stated purpose of upholding the rule of law.

Evidently, recent developments in other areas of Canadian administrative law suggest a preference for categorical approaches rather than multi-factor, contextual tests.[159] The categorical approach to standard of review is recognized as having cleaned up a messy area of case law, providing greater certainty for litigants. The Supreme Court of Canada's adoption of the *Wall* test is in keeping with this tendency.

However, unlike the question of the standard of review, the question of the availability of judicial review is a final determination. Any awkward consequences of a given standard of review can often be mitigated in the way that standard is applied. But under the *Wall* test, once an institution or decision is determined to be private, the door to administrative law is closed. All the more reason, then, to make such a determination very carefully.

159. See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.