

THE CASE FOR ROBUST JUDICIAL REVIEW IN AN AGE OF DEMOCRATIC DECLINE

Marco P. Falco*

Table of Contents

Introduction.	138
Part I – Conceptions of Justiciability and Judicial Review	141
Part II – Challenges To The Rule of Law	146
Part III – Towards A More Robust Understanding of Justiciability and Judicial Review.	149
Part IV – Conclusion	157

Introduction

Judicial review is discretionary.¹

Courts have no obligation to scrutinize the substantive or procedural merits of an administrative decision, where the State has chosen to delegate the adjudicative function to a non-judicial decision-maker.

Canadian Courts have long grappled with what makes a decision amenable to judicial review.

Known as “justiciability”,² the concept captures the Courts’ discretion to distinguish between private law matters (which form the subject of civil proceedings) and public law ones (which invoke the Court’s power to remedy procedural and substantive defects made by tribunals).

The Supreme Court of Canada’s 2018 decision, *Highwood Congregate of Jehovah’s Witnesses v. Wall*,³ brought this distinction into sharp focus. In *Wall*, the Court reaffirmed the “business” of the Courts in public law matters. Questions of religious tenet, for example, or exclusively private law functions, are non-justiciable. The discretionary remedies of *certiorari*, *mandamus* and

* Marco P. Falco is an appellate and public law litigator at Torkin Manes LLP in Toronto. The author would like to thank Alex Mazzadi, Noah Beiles and Georgia Gardiner, Students-at-Law, for their invaluable research and assistance with this paper.

1. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] S.C.J. No. 1 at para. 31; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 56.

2. See, for example, Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*. 2nd ed. (Toronto: Thomson Reuters Canada, 2012) at pp. 1 & 7.

3. *Highwood Congregate of Jehovah’s Witnesses v. Wall*, 2018 SCC 26 [“*Wall*”].