

NEW BOUNDARIES OF JUDICIAL REVIEW

JUSTICE LORNE SOSSIN, ONTARIO SUPERIOR COURT OF JUSTICE

CIAJ ADMINISTRATIVE LAW ROUNDTABLE,

MAY 29, 2020

WHAT ARE SOME AREAS OF TENSION IN APPROACHES TO JUSTICIABILITY

- Outline
- 1) Private vs. Public Decisions and Judicial Review
- 2) Politics vs. Law and Judicial Review
- 3) Justiciability Issues and the COVID-19 Emergency

PRIVATE VS. PUBLIC DECISIONS AND JUDICIAL REVIEW

- *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018 SCC 26](#) – judicial review available only where decisions have a sufficient public character – “The relevant inquiry is whether the legality of state decision making is at issue.” (at para. 21)
- Could applications of *Wall* exclude decision-making by Indigenous and Métis organizations from the sphere of judicial review?
 - *Beaucage v. Métis Nation of Ontario*, [2019 ONSC 633](#)
 - *McCargar v Métis Nation of Alberta Association*, [2018 ABQB 553](#)

POLITICS VS. LAW AND JUDICIAL REVIEW

- *Greenpeace Canada v. Minister of the Environment (Ontario)*, [2019 ONSC 5629](#) – judicial review available against state action even where no practical remedy available “In our Parliamentary system, the Executive in a majority government has enormous power and authority to govern. But it is not unbounded. It is courts that enforce those boundaries. I would keep it that way.” (per Corbett J. at para. 67)
- *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, [2018 ONSC 5062](#) - judicial review available against Ontario Government decision to exclude Tesla from transitional supports to electric car sales: “Just as it is not for the court to tell the government that it must fund a highway or it must spend public funds on this or that project, it is very much the role of the court to inquire into the *propriety* or the lawfulness of a payment or withholding of a payment under statutory or regulatory laws.” (at para. 36)

JUSTICIABILITY ISSUES AND COVID-19 EMERGENCY

- *Sprague v. Her Majesty the Queen in right of Ontario*, [2020 ONSC 2335](#) – judicial review over constitutionality of hospital visitation restrictions and Chief Medical Officer of Health (CMOH) guidelines during COVID-19 Emergency directives denied:
 - The hospital visitation policy lacked “public character” under *Wall* test.
 - The CMOH guidelines does not constitute a binding directive, but rather represents “soft law”
 - If either the policy or guidelines were subject to judicial review, Court goes on to conclude that neither violates the *Charter* (s.7, 12, 15)

QUESTIONS ...

