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Considerations Before Seeking Judicial Review Checklist (ON)

By Marco P. Falco

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This checklist identifies some of the most important factors an applicant should consider when deciding to pursue judicial review in the Ontario Divisional Court.

Judicial review is the process by which an applicant challenges state action made by a tribunal or other government actor in court. In Ontario, judicial review is governed by the *Judicial Review Procedure Act*, *R.S.O. 1990, c. J.1* (the "JRPA").

Under the JRPA, an applicant may apply for judicial review to ask the court to:

- quash the administrative decision (*certiorari*);
- prohibit the decision-maker from taking further steps (*prohibition*); and / or
- compel the decision-maker to do something under its governing legislation (*mandamus*).

For additional information on judicial review, see *Judicial Review (ON)* and *Judicial Review: Standard of Review, Appeals and Judicial Reviews Pitfalls Checklist*, *Common Judicial Review Application Mistakes Checklist (ON)* and *Considerations Before Challenging a Tribunal Decision Checklist*.

1. Will the issue be remitted back to the tribunal?

Success on judicial review can be a mixed blessing.

Having a decision quashed by the Divisional Court usually means that the matter will be remanded back to the tribunal or decision-maker for reconsideration, in accordance with the Divisional Court's ruling.

In the Supreme Court of Canada's 2019 decision, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *[2019] S.C.J. No. 65* ("*Vavilov*"), the majority held that, where the court finds an administrative decision unreasonable, it "will most often be appropriate to remit the matter to the decision-maker to have it reconsider the decision, this time with the benefit of the court's reasons". There are "limited scenarios" where remitting a matter back to the original decision-maker would be inappropriate. This includes where it becomes apparent to the court that remitting the case would "serve no useful purpose".

The court will consider factors such as:

- delay;
- fairness to the parties;
- the urgency in providing a resolution to the dispute;
- the nature of the particular regime;
- whether the decision-maker had a genuine opportunity to weigh in on the issues;
- the costs to the parties; and
- the efficient use of public resources.

2. Will the administrative decision be quashed?

Most administrative decisions are scrutinized by way of "substantive review".

This means that the court will analyze the merits of the decision and either defer to it, by applying what is known as "reasonableness review" or show little deference to the decision, by applying what is known as "correctness review".

Vavilov creates a presumption of reasonableness in all cases. That being said, the presumption of reasonableness review can be rebutted where:

- The legislature has indicated that it intends a different standard of review to apply, *i.e.*, a statute expressly prescribes the standard of review, there is a statutory right to appeal the decision, or the matter gives rise to a question of law such as statutory interpretation or the scope of the decision-maker's authority.
- The rule of law requires that the less deferential standard of "correctness" applies, *i.e.*, because certain legal questions, such as constitutional questions, are at issue, or there are general questions of law of central importance to the legal system as a whole. The courts may also apply correctness review where two or more tribunals have assumed jurisdiction over a matter, creating an "operational conflict" between the two bodies.

Another basis for the court's intervention involves breaches of procedural fairness. This includes situations where the decision-maker may have violated basic principles of due process and natural justice, such as where the applicant's right to be heard, to be given reasons for the decision, or a right to an unbiased tribunal have been compromised (see generally, *Baker v. Canada (Minister of Citizenship and Immigration)*,*[1999] S.C.J. No. 39*(S.C.C.)).

3. Is there a right of appeal?

If the governing Act requires that the administrative decision at issue be appealed to a court, then judicial review as a discretionary remedy under the JRPA is unavailable.

The appellant is required to challenge the decision by way of the statutory appeal mechanism.

In such cases, the ordinary standards of appellate review, *i.e.*, "palpable and overriding error" and "correctness", apply (*Vavilov*, citing *Housen v. Nikolaisen*,*[2002] S.C.J. No. 31* (S.C.C.)).

A party who ignores the appeal route and pursues a judicial review application risks having the judicial review quashed on a preliminary motion.

4. Is fresh evidence required?

As a matter of fairness, judicial review applications are almost always decided on the basis of the record as it existed at the tribunal level.

Subsection *10* of Ontario's JRPA requires that the tribunal submit the record of its proceedings to the Divisional Court "forthwith", upon the commencement of a judicial review application.

The content of the tribunal's record of proceeding is defined under s.*20* of Ontario's *Statutory Powers Procedure Act*,*R.S.O. 1990, c. S.22*.

There is a general prohibition on submitting "fresh evidence" on a judicial review application. However, there are "narrow exceptions" where fresh evidence may be admissible to: establish general background to assist the court; show procedural defects not apparent from the record of the reasons for decision; and show a complete lack of evidence to support a material finding of fact.

The applicant must also show that the fresh evidence should have been included in the record of proceeding and that the materials are properly "fresh evidence" on the application. See, for example, *Lovell v. Ontario (Minister of Natural Resources and Forestry)*,*[2022] O.J. No. 210* (S.C.J.).

5. Is the judicial review application out of time?

Subsection *5*(1) of Ontario's JRPA requires that a judicial review application be brought within 30 days of the decision being challenged.

An applicant who misses this deadline will have to convince the Divisional Court, under s. *5*(2), that the time to bring the application should be extended because there are "apparent grounds of relief" and "no substantial prejudice or hardship will result to any person affected" by the delay.

The considerations above demonstrate that judicial review applications are very much their own creatures. Lawyers or clients unfamiliar with the mechanisms and substance of judicial review should tread carefully.

Author

Marco P. Falco
Partner

Tel: 416 777 5421
mfalco@torkinmanes.com

Marco is a partner in the Litigation Department at Torkin Manes who focuses on appellate litigation and applications for judicial review.