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Article

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Top 5 considerations before challenging a tribunal decision

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As a discretionary remedy, judicial review asks the court for relief by way of what were once known as the "prerogative writs," including *certiorari, mandamus* and prohibition.

Under ss. 2(1)1 of Ontario's *Judicial Review Procedure Act*, R.S.O. 1990, c.J.1 (the JRPA), the Divisional Court can:

(i) require the tribunal or administrative body to perform a statutory duty (mandamus);
(ii) require that the tribunal cease certain action (prohibition); or
(iii) quash the tribunal's decision (certiorari).

Given the extraordinary nature of the relief sought, lawyers and parties who have argued a proceeding at the tribunal level should wade carefully into the waters of judicial review.

Below is a brief summary of the primary considerations any party should contemplate before embarking on an application for judicial review.

1. The application may be premature.

The Divisional Court frowns upon parties who seek to fragment a tribunal decision mid-course by bringing a premature application for judicial review. However, "exceptional circumstances" may nonetheless justify early intervention.

In a recent decision of the Divisional Court, Bannis v. Ontario College of Pharmacists, 2020 ONSC 6115, the court emphasized that its reluctance to hear premature judicial review applications is based upon respect for the delegation of decision-making authority to the tribunal:

... Normally, courts are reluctant to review interlocutory or interim steps in an administrative proceeding, preferring to wait until the proceeding has run its course in order to avoid fragmentation of the administrative process and delay, as well as to respect the legislative decision to confer decision-making authority on the administrative tribunal. Therefore, judicial review will be refused where the application is premature, unless there are exceptional circumstances: see Volochay v. College of Massage Therapists of Ontario, 2012 ONCA 541 [Volochay] at para. 70. [emphasis added]

2. Will the tribunal's decision attract deference?

For substantive review of the tribunal's decision, the standard of review by which the court assesses that decision must be identified.

In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 sec 65, the Supreme Court of Canada established that Canadian courts should apply the deferential standard of "reasonableness" review in most cases of judicial review. Courts should only deviate from the presumption of reasonableness review, and apply the less deferential standard of "correctness," where "required by a clear indication of legislative intent or by the rule of the law."

Correctness review applies where:

• the governing Act requires that the court assess the tribunal's decision on a correctness standard;
• the governing Act creates a statutory right to appeal the tribunal's decision to the court (in which case the ordinary appellate standards of review apply, i.e. "palpable and overriding error" or "correctness");
• constitutional or Charter issues are engaged;
• general questions of law of "central importance to the legal system as a whole" are raised; or
• there are issues concerning the jurisdictional boundaries between two or more administrative bodies.

This list of exceptions to reasonableness review is not closed.

3. Was the tribunal process fair?

Administrative bodies throughout Canada have a duty to act fairly.

This duty includes ensuring that parties have the right to be heard (known as the doctrine of *audi alteram partem*); the right to notice of a decision; and the right to adjudication free from a reasonable apprehension of bias. An applicant may also have a "legitimate expectation" that a certain procedure or process will be followed by the tribunal, based on past representations by the state or tribunal itself. What amounts to procedural unfairness is a fact-based inquiry.

The court will consider the following factors when deciding the scope of the duty of fairness:

• the nature of the decision and the decision process followed;
• the statutory scheme pursuant to which the body operates;
• the importance of the decision to the individual affected;
• the legitimate expectations of the person challenging the decision; and
• the nature of deference accorded to the administrative body.

See generally *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

4. Should the applicant adduce fresh evidence?

Like an appeal, a judicial review application is decided by the Divisional Court on the basis of the record before the tribunal. Subsection 10 of the JRPA provides that the tribunal or administrative decision-maker has an express obligation to file the record of proceedings before the tribunal with the court upon receipt of a notice of application for judicial review.

In rare situations, however, circumstances may have changed since the tribunal decision was made, requiring that the court have before it "fresh evidence" that was unavailable at the tribunal level. The threshold for seeking to admit fresh evidence on a judicial review application is high. Exceptionally,

"affidavit evidence may be admitted to show an absence of evidence on an essential point or to disclose a breach of natural justice that cannot be proven by reference to the record alone": *Queensway Excavating & Landscaping Ltd. v. Toronto (City)*, 2019 ONSC 5860 (Div. Ct.) at para. 46, citing Re. Keeprite Workers' Independent Union et al. and Keeprite Products Ltd. 29 O.R. (2d) 513.

5. Is the tribunal order stayed?

The commencement of an application for judicial review may not necessarily stay or hold the underlying tribunal order in abeyance.

To obtain a stay of administrative proceedings pending the resolution of an application for judicial review under ss. 106 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, the moving party has to meet the following threshold:

- There must be a serious issue to be tried;
- The moving party will suffer irreparable harm if interim relief is not granted; and
- The "balance of convenience" favours granting the stay.

See generally *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

If an application for judicial review is deemed to be premature, a court has the discretion to refuse the stay of the tribunal proceeding on the basis that there is no serious issue to be tried: *Pan v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 5325 (Div. Ct.).

Why expertise matters

The considerations above illustrate that parties and lawyers should not embark on judicial review applications lightly. The level and nature of expertise required for effective advocacy at the tribunal level may not be the same as that required in the Divisional Court.

Understanding the fundamentals of administrative law on judicial review is a discrete exercise from adducing evidence and advancing a case at the tribunal level. Parties and lawyers should proceed carefully before seeking to challenge a tribunal decision in court.

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