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Article

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Top things to know if you miss judicial review deadline

By Marco P. Falco

Most applications for judicial review of an administrative decision in Ontario must be brought within 30 days under ss. 5(1) of Ontario's *Judicial Review Procedure Act,* R.S.O. 1990, c.J.1 (the JRPA). Where a party has not commenced a judicial review application by the required deadline, however, the court has broad discretion to extend that timeframe.

A recent decision of the Ontario Divisional Court, *Unifor and its Local 303 v. Scepter Canada Inc.,* 2022 ONSC 5683, clarifies the considerations the court will take into account, both statutory and at common law, when deciding whether to grant leave to allow a late judicial review application.

The discretion to extend JR deadlines

Scepter involved a challenge by the applicant union to a group/policy grievance arbitral (the award) which upheld certain discharges of employees following a change to the governing collective agreement. The union grieved the dismissals on behalf of certain employees and the arbitrator dismissed the grievances.

The award was issued Feb. 22, 2021.

The union's application for judicial review was not commenced until November 2021, more than eight months after the award was made.

Under ss. 5(1) of the JRPA, most applications for judicial review in Ontario must be commenced within 30 days of the decision being challenged:

5(1) Unless another Act provides otherwise, an application for judicial review shall be made no later than 30 days after the date the decision or matter for which judicial review is being sought was made or occurred, subject to subsection (2).

Subsection 5(2) of the JRPA lists two circumstances under which a court may exercise its discretion to extend that deadline:

5(2) The court may, on such terms as it considers proper, extend the time for making an application for judicial review *if it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.* [emphasis added]

Given that judicial review engages relief in the form of the old discretionary "prerogative writs" (i.e. orders in the nature of *certiorari, mandamus* and prohibition), judicial review and any application to

start a judicial review application, are by their nature entirely within the court's discretion.

Delay of eight months is too late

In *Scepter,* the court declined to extend the 30-day deadline.

The court held that the application's grounds, which challenged the arbitrator's reasons for decision and his legal analysis, were "weak." The court also considered the "lengthy" eight-month delay in this case to be "significant." Further, the union failed to provide a "robust explanation" for its delay.

In making its ruling, the court established a number of key principles for assessing whether to extend the deadline:

1. The Divisional Court's previous analysis of delay

Before the JRPA was amended to codify the 30-day deadline, parties generally had up to six months to commence their application for judicial review in Ontario.

This was a common law principle, based on various cases which established that a delay of more than six months *could* justify the dismissal of the application for judicial review: see, for example, *Kaur v. National Dental Examining Board of Canada,* 2019 ONSC 5882.

The case law held that, in deciding whether to exercise its discretion to extend the period for judicial review, the court had to consider:

- the length of the delay;
- the explanation for the delay; and
- whether the delay would cause prejudice to the respondent to the application (collectively, the "previous factors").

See *Kaur v. National Dental Examining Board of Canada, supra,* citing *Nahirney v. Human Rights Tribunal of Ontario,* 2019 ONSC 5501.

2. The court can still consider the "previous factors" in assessing delay

In *Scepter,* the applicant union tried to argue that because only two factors are now expressly mentioned under ss. 5(2), i.e. whether there are "apparent grounds for relief" and "that no substantial prejudice or hardship will result to any person affected by reason of the delay," the previous factors no longer needed to be considered.

According to the applicant, this meant that previous factors, such as whether there was any "explanation for the delay," were irrelevant to the analysis because they were not expressly codified in the statute.

The court rejected this argument:

Subsection 5(2) must be interpreted in context and giving meaning to all of its words. ... The legislative reform introduced a 30-day time limit, which should be given force ... an extension of time is not mandatory where the two factors referenced [under subsection 5(2)] are satisfied. On the contrary, the subsection

provides that an extension is in the court's discretion. The two factors mentioned are prerequisites to the exercise of that discretion. They are necessary, but *do not preclude the consideration of other circumstances. Given the time limit in s.5(1), the length of delay and any explanation offered for it would be relevant considerations.*

Therefore, s.5(2) *does not foreclose a consideration of the length of the delay, and any explanation offered for the delay, in the exercise of the court's discretion. ...* The lengthy delay in this case is therefore significant. [emphasis added]

A contextual approach to delay

Scepter illustrates that in order to give effect to the new 30-day period for most judicial review

applications in Ontario, the courts must adopt a contextual analysis in analyzing the delay.

This involves a consideration of the previous factors, which developed over years of jurisprudence, in addition to the considerations expressly enumerated in ss. 5(2). Accordingly, the Divisional Court, in exercising its discretion, can still consider both the length and explanation for any delay on the part of the applicant.

This approach protects the normative purpose of s.5(1) – i.e., to ensure that applications for judicial review are brought promptly and efficiently so that the respondent can move past the tribunal decision without the prospect of a judicial review application lingering for months thereafter.

In this way, the 30-day deadline under ss. 5(1) aligns the time and underlying policy for commencing judicial review applications with most appeal periods in the province.

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