JUDICIAL REVIEW OF TRIBUNAL DECISIONS

by Carolyn Brandow

Introduction

With stated goals coming from both government policy and our principles of justice in our society, Canadian administrative tribunals straddle the divide between the legislature and the judiciary. The tribunals attempt to achieve specific policy objectives often within an environment that is tipped to favour efficiency, access, affordability, and the overall public good at the expense of legal fairness for individuals. However, the double-edged sword of justice remains available to aggrieved individuals to challenge tribunal decisions. This article covers the nuts and bolts of bringing a judicial review of decisions of administrative tribunals, particularly in light of the Supreme Court of Canada's decision in *Dunsmuir*.[1]

What is Judicial Review?

Judicial review is the guardian of legal fairness in the administrative process. It is similar to an appeal in that it is a way to challenge a decision that negatively affects your client.

For example, to challenge the decision by a judge at a trial in a motor vehicle accident case, you would appeal to the appropriate appellate court. To challenge a decision of the Director's Delegate of the Financial Services Commission of Ontario upholding an arbitral order of an arbitrator regarding accident benefits, you can bring a judicial review application.[2]

That being said, judicial review is not an appeal. The ability to "challenge" the decision is more limited than in an appeal. In a judicial review application, the role of the court is to look at the decision of the administrative tribunal, not to conduct a trial or inquiry into the truth of the facts presented in the matter along with the legal rights or obligations of the parties.

While not a full appeal, through judicial review the courts can provide a last gasp of justice for litigants who believe that the administrative tribunal or public body (eg. board, commission, public officer, municipality) failed to properly carry out its delegated function.

Why Would You Consider Judicial Review?

If your client is unhappy with the order or decision made by an administrative tribunal, you should turn your mind to whether a judicial review application can provide an appropriate remedy.

In general terms, if the reasons that your client is unhappy with the order or decision fall into the following categories, there may be grounds for judicial review:

I. there was no "jurisdiction" or authority to decide the issue;

II. the process was unfair; or

III. the decision did not logically flow from the information or was irrational.

If the tribunal's rules of procedure permit a reconsideration to be requested[3], but either the process is not going to provide what your client requires or a request for reconsideration fails, then your client's best (or only) option may be judicial review.

If there is no statutory right of appeal, rather than assuming the decision is final and cannot be challenged, it is important to remember that your client still may have an option to challenge the decision through judicial review. It is equally important to understand that even if there is a statutory right of appeal, a judicial review challenge may still be possible.

Another point to keep in mind is that there may be other reasonable options, thinking "outside the box", for your client such as approaching the provincial Ombudsman (which is free, in sharp contrast to the cost of a judicial review application). The provincial Ombudsman has the responsibility of investigating complaints against provincial government organizations and has more powers to provide relief in appropriate circumstances than you or your client may realize.

What can You Achieve for Your Client?

In an application for judicial review, the court may grant the following types of orders:[4]

1. mandamus – an order requiring a public official or body who

has refused to carry out his or her duties or to exercise a statutory authority, to do so;

2. prohibition – an order prohibiting a public official or inferior tribunal from hearing or dealing with a matter, usually where there was no jurisdiction or the jurisdiction was exceeded;

3. certiorari – an order requiring an inferior tribunal to deliver its records, effectively moving the proceedings to the court to review the decision and, where appropriate, set aside the decision; or

4. a declaration or an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

How do You Proceed?

First, you need to assess whether the tribunal was a federal or provincial tribunal (not whether the tribunal applies provincial or federal legislation). If the tribunal is a federal tribunal, then the Federal Court has exclusive jurisdiction to hear the judicial review request and a provincial court cannot entertain the application.[5]

In Ontario, the *Judicial Review Procedure Act*[6] (JRPA) sets out the procedure to be followed when you want to seek judicial review of a decision. Under the JRPA, an application for judicial review should be commenced by preparing a Notice of Application and having it issued by the local registrar of the court specifically identifying that it is an application for judicial review. However, any application asking for an order in the nature of mandamus, prohibition or certiorari is deemed to be an application for judicial review and can be treated and disposed of as if it were an application for judicial review.[7] In addition, in a lawsuit asking for a declaration and/or injunction and the exercise, refusal to exercise or proposed or purported exercise of a statutory power is an issue, a judge may direct the portion of the lawsuit related to the exercise, refusal to exercise or proposed or purported exercise of such power be treated and disposed of as if it were an application for judicial review.[8] The term "statutory power" is defined in the JRPA, and if you believe your client's situation might involve a "statutory power", you should start at the JRPA's definition section. Unfortunately, there is simply not enough room to discuss and explain that concept in the scope of this article.

Applications for judicial review are to be made to the Divisional Court unless there is urgency and the delay required to proceed to the Divisional Court is likely to involve a failure of justice.[9] Where the application is being made to the Divisional Court, the form must be a "Notice of Application to Divisional Court for Judicial Review".[10] As you prepare the Notice of Application and then prepare to serve the notice, keep in mind that there is a requirement set out in the JRPA that the Attorney General of Ontario at the Crown Law Office in Toronto be served.[11] In general terms, the notice of application should list your client as the applicant, the tribunal as the respondent and any other parties to the tribunal proceedings as respondents. The application record will typically include all or part of the record before the tribunal, the notice of application, and any affidavit filed in support of the application.[12]

What Specific Types of Decisions can be Reviewed?

It would take the entire length of this article or longer to prepare a comprehensive list of the types of decisions or orders that could be challenged by judicial review. The following are only some examples to give you a flavour for the wide variety of decisions that may require you to consider and discuss judicial review with your clients.

- Decisions of the Director's Delegate of the Financial Services Commission of Ontario upholding the arbitral order of FSCO Arbitrator.[13]

- Decisions by a member of the Pension Appeals Board (Board) denying leave to appeal to the Board from an earlier unfavourable decision by a Canada Pension Plan Review Tribunal.[14]

- Decisions of the Social Benefits Tribunal of the Ontario Disability Support Program.[15]

- Decisions of the Information and Privacy Commission (IPC) regarding access appeals under Ontario's *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*.

- Decisions of professional discipline proceedings, such as Law Society of Upper Canada discipline decisions.[16]

- Decisions of provincial Ministers such as the Minister of Agriculture and Food.[17]

- Decisions of the Ontario Human Rights Tribunal.[18]

Please keep in mind that judicial review can apply not just to "tribunal" decisions but also to any administrative decision. As Justice Binnie wrote in *Dunsmuir*, the decisions of *"the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits*

or the granting or withholding of licenses or municipal boards poring over budgets"[19] can also be reviewed.

But Be Warned.....

There are some pitfalls and traps with judicial review challenges that you need to remember as you consider the option of judicial review with your client.

No Automatic Stay: The tribunal's decision or order is not automatically stayed when the judicial review process is started.[20] A party seeking a stay of the order or decision to be reviewed has to make a motion to the court asking for interim relief.[21]

Do Not Let Your Heels Cool: There is no limitation period after which date your client cannot proceed with a judicial review application. However, the remedy is discretionary, and justice favours the swift. Where there has been unreasonable delay by the party applying for relief, the court may refuse to grant judicial review without deciding the merits of the application.[22] As a result, it is best to proceed quickly with an application as what the court will consider to be an "unreasonable delay" depends on the facts of the case.[23] The court will likely consider whether there was any prejudice to the parties, any delay already caused inherent in the tribunal process, and whether the party took steps expeditiously to proceed with judicial review.[24]

Interim Decisions Difficult to Challenge: Judicial review is not usually available in respect of interlocutory decisions regarding the process leading to a final decision. To complain about the process, the court will usually make you wait until the entire process has concluded and a decision rendered by the tribunal at the conclusion of a hearing. It is much harder than even meeting the test for leave to appeal an interlocutory court decision. To persuade the court to hear a complaint about an interlocutory or preliminary tribunal decision, you will likely have to persuade the court that without relief there would be a fundamental failure of justice.[25]

Costs: The costs of a judicial review application, like those associated with a motion or trial, can be quite a burden on the applicant. The court cannot grant costs of the proceeding before the tribunal, but only costs of the judicial review application itself.[26] This is important to take into account when the relief granted might be to return to the tribunal to go through another proceeding at that level (the costs of which would not be recouped).

Standard of Review

A key issue in any judicial review application is the standard of review – when can the court overturn the tribunal's decision? In essence, the standard of review guides how the court will conduct its review of the tribunal's decision and, on its face, affects the likelihood that the court will interfere with the outcome.

The standard of review reflects an attempt to balance two competing interests: safeguarding an individual's rights with oversight by the courts, without undermining the systems created by the legislature to resolve disputes outside of the court system.

The Supreme Court of Canada has discussed the standard of review in several cases over the past three decades, but despite this extensive guidance on the issue, it has been a complicated and difficult issue for many years.

In 1979, the Supreme Court created a new standard of review called "patent unreasonableness" in addition to "correctness."[27] In 1988, the Court added the "pragmatic and functional approach" to the equation setting requirements on how a court should determine which standard to apply.[28] In 1996, the Court introduced a further standard of review, known as "reasonableness simpliciter" and "reasonableness."[29] The three standards of review along with the pragmatic and functional approach used to determine which standard was applicable was confirmed in a unanimous judgment of the Supreme Court of Canada in 2003,[30] however, this system was criticized and recognized as being unworkable.[31]

Fortunately, the Supreme Court of Canada recently issued a decision commonly referred to as *Dunsmuir*,[32] in which it eliminated the "pragmatic and functional approach" and the three standards of review, namely correctness, reasonableness *simpliciter* and patent unreasonableness. There are now two standards of review — correctness and reasonableness — determined by following a standard of review analysis.

Instead of the "pragmatic and functional approach", the court is now simply to analyze and select the appropriate standard of review ("standard of review analysis"). To determine whether the court ought to apply the standard of correctness or reasonableness, the new "standard of review analysis" requires that the following four factors be considered:

I. the presence or absence of a privative clause;

II. the purpose of the tribunal as determined by interpretation of enabling legislation;

III. the nature of the question at issue; and

IV. the expertise of the tribunal.

In a judicial review application factum (as factums are required), you will now only have to direct the court to analyze which of the two standards of review – correctness or reasonableness – should be applied to the case, and argue which one you believe should apply. This is good news.

Another piece of good news is that the *Dunsmuir* decision specifically allows courts to follow the decisions made about standard of review selection in cases before *Dunsmuir* and circumvent a lengthy and protracted analysis where there is an existing body of caselaw consistently selecting the same standard in similar cases. If this escape hatch exists, I suspect that both you and the judge hearing the application would be pleased to use it to avoid an otherwise arduous, tedious, and uncertain analysis to figure out which standard should be used.

The bad news is that the determination of which standard applies and what that will mean in terms of how close the scrutiny will be of the tribunal's decision remains a difficult argument and the outcome far from certain. The rule of law dictates that a level of certainty is necessary. This has also been described as a need for the law to be "intelligible, clear and predictable."[33] Certainty allows an assessment of the risks and benefits to allow individuals to decide upon their desired course of action. A review of even a handful of decisions in judicial review applications post-*Dunsmuir* (including those of the Supreme Court of Canada itself) clearly demonstrates that there remains so much debate and leeway that the law and the outcome can be far from certain.[34]

The test for reasonableness, as described in Dunsmuir by some but not all of the bench (query whether it is a good sign that there were three separate reasons written if we are seeking certainty or clarity), emphasizes that:

I. "reasonableness" is a deferential standard;

II. certain questions before tribunals may "*give rise to a number of possible, reasonable conclusions*"; and

III. judicial review is concerned with "*the existence of justification, transparency and intelligibility within the decision-making process*" and "*whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law.*"[35]

It would take more than this entire publication to fully explore, explain and

analyze how "reasonableness" is applied to the facts of a case.[36] Suffice it to say that the inherent vagueness of what "reasonable" may be in any given case creates uncertainty in the law, which may be unfortunate for those seeking to assess their chances of success, but certainly allows for plenty of room for the courts to provide "justice" to a party by interfering with and overriding the tribunal's decision.

It might be better if we could simply ask the court to address head-on whether it should intervene based on "aggravating factors" in the context of whether the administration of justice and a fair society requires intervention in a legislatively-created alternative to the court system. If the answer is yes to intervention, then the courts could consider the "mitigating factors" that would determine how deep the court delves into the process and decision. However, until a more drastic change in the law comes about, we are stuck in a fairly opaque process using words that are difficult to define and tend to obscure rather than make the real debate transparent.

Overall, although the legal framework for the issue of standard of review has been changed by *Dunsmuir*, it is not clear that the change will result in different outcomes in any particular judicial review application. It remains too easy to get bogged down on the "standard of review" analysis. It might be better for your client to remember to spend energy on the facts of your client's case that would persuade a court that intervention is necessary. The same advocacy tip that applies to a motor vehicle action applies equally to administrative law and judicial review – the picture with most sympathetic facts has a much better chance of success -- so present your client's facts as sympathetically as possible to the court.

Conclusion

In the past half-century, there has been explosive growth in the extent, complexity, and sophistication of administrative tribunals in Canada. The law of judicial review has, despite some growing pains, correspondingly matured alongside them. It is hoped that *Dunsmuir* will be seen as a long-lasting framework against which the law of judicial review can both adhere and continue to develop. If so, it will provide some needed stability and clarity for tribunal members, courts, and lawyers in the trenches.

Carolyn Brandow practices with Lerners LLP in London, ON.

NOTES

[1] *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII).

[2] *TTC Insurance Company Limited v. Watson*, 2008 CanLII 49337 (ON S.C.D.C.)

[3] Section 21.1 of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S-22, as amended, ("SPPA") permits a tribunal to correct errors made in its decision or order including to review all or part of its decision or order and confirm, vary, suspend or cancel the decision or order where the tribunal's rules made under section 25.1 of the SPPA deal with such processes.

[4] *Judicial Review Procedure Act*, supra, subsection 2(1)

[5] *Federal Court Act*, R.S.C. 1985, c. F-7, as amended, section 18

[6] R.S.O. 1990, c. J-1, as amended.

[7] *Judicial Review Procedure Act*, supra, section 7.

[8] *Judicial Review Procedure Act*, supra, section 8

[9] *Judicial Review Procedure Act*, supra, section 6

[10] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, Form 68A.

[11] *Judicial Review Procedure Act*, supra, subsection 9(4)

[12] The *Statutory Powers Procedures Act* sets out requirements for the record of a tribunal. *See the Statutory Powers Procedures Act*, R.R.O. 1990, c. S-22, section 20.

[13] See note 4 above.

[14] *Fancy v. Canada (Social Development)*, 2008 CanLII FC 1414 (FCC)

[15] *Detchev v. Ontario (Disability Support Program)*, 2004 CanLII 33200 (ON S.C.D.C.)

[16] *Marler v. Law Society of Upper Canada*, 2009 CanLII 6626 (ON S.C.D.C.)

[17] *Denby v. Agriculture, Food and Rural Affairs Appeal Tribunal*, 2005 CanLII 43068 (ON S.C.D.C.)

[18] *Weyerhaeuser Co. (c.o.b. Trus Joist) v. Ontario (Human Rights Commission)*, [2007] O.J. No. 640 (ON Div. Ct.)

[19] *Dunsmuir, supra*, at para.136.

[20] *Statutory Powers Procedures Act*, R.S.O. 1990, c. S-22, as amended, subsection 25(2)

[21] *Judicial Review Procedure Act*, supra, section 4 permits the court to grant interim relief.

[22] *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (S.C.C.), [1991] 1 S.C.R. 326, *Chippewas of Sarnia Band v. Canada (Attorney General)* 2000 CanLII 16991 (ON C.A.), (2001), 51 O.R. (3d) 641 (C.A.)

[23] *R. v. Board of Broadcast Governors* (1962), 33 D.L.R. (2d) 449 (Ont. C.A.)

[24] *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, 2008 CanLII 30290 (ON S.C.)

[25] *Mrak v. Canada (Minister of Human Resources and Social Development)*, [2007] F.C. 909 (T.D.), *United Food and Commercial Workers International Union v. Rol-Land Farms Ltd.*, [2008] O.J. No. 682 (Div. Ct.); *Ontario College of Art v. Ontario (Human Rights Commission)*, [1993] O.J. No. 61 (Div. Ct.); *Howe v. Institute of Chartered Accountants of Ontario* 1994 CanLII 3360 (ON C.A.), (1994), 19 O.R. (3d) 483 (C.A.); *Gore v. College of Physicians and Surgeons of Ontario*, 2009 ONCA 294 (CanLII)

[26] *Poulton v. Ontario (Racing Commission)* 1999 CanLII 1398 (ON C.A.)

[27] *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 This standard emphasized deference to tribunals and where applied, the courts would only intervene where the tribunal's decision could not be rationally justified in light of the statutory authority of the decision-maker. If the standard was not "patent unreasonableness", the standard to apply was "correctness".

[28] *Union des Employés de Service, Local 298 v. Bibeault*, 1988 CanLII 30 (S.C.C.) In this decision, the Supreme Court of Canada introduced the "pragmatic and functional" approach which was the analysis by which the proper standard of review was to be determined. In this approach, the courts were to conduct a careful reading of the relevant statutory provisions as well as to look at the broader purposes of the administrative scheme and the specific expertise of the decision-maker.

[29] *Canada (Director of Investigation and Research) v. Southam Inc,*. 1997 CanLII 385 (S.C.C.)

[30] *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII)

[31] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), Justice Lebel acknowledged the "growing criticism" and "serious questions" which had emerged over the standard of review jurisprudence of the Court. In particular, Lebel J. questioned whether a court could meaningfully distinguish between the "reasonableness simpliciter" and "patent unreasonableness" standards.

[32] *Dunsmuir v. New Brunswick, supra.*

[33] *The Rule of Law*, The Sixth Sir David Williams Lecture, by The Rt. Hon Lord Bingham of Cornhill KG *(House of Lords)*

[34] Despite the unanimous decision in *Dunsmuir* there is still debate and disagreement within the bench of the Supreme Court of Canada. For example, in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), Justice Rothstein's comments regarding standard of review were rejected by other members of the bench.

[35] *Dunsmuir, supra*, at para.47.

[36] For example, see Justice Rouleau's comments in *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 (CanLII) that the standard of reasonableness does not include a "sliding scale" but rather it is a single standard to be applied contextually. See also Justice Binnie's comments at paragraph 144 of *Dunsmuir*, supra, that "reasonableness is a big tent" and the courts will have to accommodate a range of levels of deference within "reasonableness".