ONTARIO SUPERIOR COURT OF JUSTICE

GUIDE TO JUDICIAL REVIEW IN DIVISIONAL COURT

TABLE OF CONTENTS

What is Judicial Review?

Judicial review is a process by which courts make sure that the decisions of administrative bodies are fair, reasonable and lawful. The Divisional Court hears applications for judicial review of decisions as set out in the *Judicial Review Procedure Act*, R.S.O 1990, c. J.1.

In an application for judicial review, a party asks a three-judge panel of the Divisional Court to change or set aside a decision of an administrative body where the party can show an error was made that warrants action by the Court. Judicial review is not an opportunity to re-argue the case, but rather to show that the decision-maker failed to properly exercise its decision-making powers.

What Kind of Decisions Can Be Reviewed?

Decision-makers whose authority and powers exist by virtue of statute are subject to judicial review. Administrative bodies whose decisions may be reviewed by the Divisional Court include administrative tribunals or government decision-makers whose responsibility it is to decide any person or party's legal rights or their eligibility to receive a benefit or licence. The decisions of private actors are not subject to judicial review.

For example, decisions of an administrative tribunal such as the Human Rights Tribunal of Ontario or an official decision-maker such as the Complaints Director under the *Community Safety and Policing Act* are subject to judicial review.

When to Apply for Judicial Review

An application for judicial review of an administrative decision must be brought within **30 days** of the decision being made. However, the Court may exercise its discretion to extend the time for making an application for judicial review if there are apparent grounds for relief and no substantial prejudice will occur to any person.

Where there is a right to request reconsideration of the decision by the original decision-maker or to appeal, the Court may decline to hear the application for judicial review until that process has been completed. Generally, decisions should be final and determinative of a case before they are judicially reviewed.

The Divisional Court may, in its discretion, consider an appeal alongside a judicial review application.

Urgent Applications

Various approaches to addressing urgent matters may be discussed as part of case management, outlined below. For example, a party may request an expedited schedule and hearing date. In addition, if a matter is urgent, an application for judicial review may be made to a single judge of the Superior Court with leave of that Court. Parties with urgent matters should request an urgent case conference in the Divisional Court.

Filing an application for judicial review does not mean that the original decision under review ceases to apply or be effective. If you want the Court to order that the decision made by the administrative body be suspended until the Court considers the application for judicial review, you must bring a motion for what is called a "stay" of the decision.

Leave to Commence an Application for Judicial Review

In some instances, a statute may require you to seek leave from the Divisional Court in order to bring an application for judicial review.

To seek leave, the applicant must serve and file a notice of motion for leave to commence a judicial review. The notice of motion should state that the motion will be heard on a date to be fixed by the Registrar and should set out the specific issues that will be raised in the hearing if leave is granted. All leave motions must be filed in the Toronto Region. The steps for filing the leave motion are set out in the Consolidated Practice Direction for Divisional Court Proceedings.

The motion for leave will be heard by a panel of three judges in writing (i.e., you will not attend a hearing to argue in-person why the Court should grant you leave to bring your application).

Case Management

Once you commence your application for judicial review or your motion for leave, there are steps that you must take regarding the schedule for the exchange of court documents and any preliminary issues. These steps are set out in the Consolidated Practice Direction for Divisional Court Proceedings.

All proceedings in the Divisional Court are subject to judicial case management. The purpose of case management is to facilitate access to justice through the timely adjudication of proceedings in the Divisional Court in a cost-effective and proportional manner.

This means that you may receive written directions from a judge and a judge may direct that there will be a case conference prior to the hearing of your motion or application.

As part of this process, the time for the delivery of court materials may be determined or changed as set out in directions from the Court. Other issues may be addressed, as set out in the judge's directions. Directions are normally sent to the parties by email.

Case Center

Case Center is an online document sharing platform which allows the Divisional Court to electronically view your court materials. The Divisional Court uses Case Center for both remote and in-person hearings. After you have brought an application or motion for leave, you will receive an email to register for Case Center and upload your materials. There is no fee to use Case Center.

Filing materials with the Court is not the same as uploading to Case Center. In order for the Court to view your materials, you must complete both steps according to the timeline in the Consolidated Practice Direction for Divisional Court Proceedings or as directed by

a judge. Generally, your materials must be uploaded four weeks before your scheduled hearing date.

Information about how to use Case Center is available on the Court's website: https://www.ontariocourts.ca/scj/casecenter/.

When uploading documents to Case Center, you should ensure that you follow the naming rules set out in Schedule B of the Consolidated Practice Direction for Divisional Court Proceedings.

What to Include in an Application for Judicial Review

Judicial review is initiated by filing a "Notice of Application for Judicial Review" (Form 68A) with the Divisional Court. The Notice of Application must be served on the Attorney General of Ontario. The Notice of Application should also be served on the decision-maker that exercised the statutory power and all parties who participated in the original hearing. The decision-maker may also be a party to the proceedings. You can serve the Notice of Application on the Attorney General of Ontario and the relevant administrative body by mail, fax or delivering it in person to their offices. You should look online for the correct contact information.

Notice of Application

The Notice of Application briefly sets out:

1. **the remedy being sought (as described above)** – the order the applicant is asking the Court to make if the applicant is successful;
2. **the grounds for review** – the errors alleged to have been made by the decision-maker, why the Court should make a different decision, and reference to any statutory provision or rule relied on; and
3. **a list of the evidence to be relied on** – this will usually be limited to the evidence that was before the decision-maker in making its decision. The circumstances under which an applicant can file additional evidence are very limited.

An applicant bringing a constitutional challenge as part of an application for judicial review must also serve and file a "Notice of Constitutional Question" (Form 4F). The Notice of Constitutional Question must be served on the Attorney General of Ontario and the Attorney General of Canada. This Notice is required when the applicant raises the constitutional validity or applicability of federal or provincial legislation, a regulation or by-law, or a common law rule is in issue or a remedy is claimed against the government under s. 24(1) of the *Canadian Charter of Rights and Freedoms.*

Records

If the tribunal is subject to the *Statutory Powers Procedure Act* and a hearing was held, the decision-maker that made the original decision will serve and file a "Record of Proceedings". The Record of Proceedings will include:

- any application, complaint, reference or other document, by which the administrative proceeding was commenced;
- the notice of the administrative hearing;
- any interlocutory (intermediary) orders made by the tribunal;
- all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
- the transcript, if any, of the oral evidence given at the hearing; and
- the decision of the tribunal and the reasons, where reasons were given.

The applicant must prepare, serve and file an Application Record. The applicant's Application Record will normally contain the following documents:

- a table of contents;
- a copy of the Notice of Application;
- a copy of the reasons for decision of the court or tribunal whose decision is to be reviewed, and any related orders, with a further typed or printed copy if the reasons are handwritten;
- a copy of all affidavits and other materials if they are not in the Record of Proceedings (note that the circumstances under which new/additional evidence will be allowed are limited);
- a list of all relevant transcripts of evidence; and
- a copy of any other material in the court file that is necessary for the hearing of the application.

The respondent must also prepare, serve and file an Application Record, which will contain:

- a table of contents; and
- a copy of any material to be used by the respondent on the application and not included in the applicant's Application Record (note that the circumstances under which new/additional evidence will be allowed are limited).

Factum

The applicant must also file a Factum, which should be no more than 9,200 words and 40 pages in length, double spaced, with each paragraph consecutively numbered. A Factum is a concise summary of a party's case.

The applicant's Factum should be organized as follows:

- **Part I:** A statement identifying the applicant, as well as the court or tribunal whose decision is to be reviewed and stating the result in that court or tribunal;

- **Part II:** A concise summary of the facts relevant to the issues on the application, with specific reference to the evidence;
- **Part III:** A statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue;
- **Part IV:** A statement of the order that the court will be asked to make, including any order for costs;
- **Certificate:** A statement of how much time (expressed in hours or fractions of an hour) will be required for oral argument, not including reply;
- **Schedule A:** List of authorities referred to; and
- **Schedule B:** Text of all relevant provisions of statutes, regulations and by-laws.

The respondent's Factum should be organized as follows:

- **Part I:** A statement of the facts in the applicant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees and a concise summary of any additional facts relied on, with specific reference to the evidence;
- **Part II:** A statement of the position of the respondent with respect to each issue raised by the applicant, immediately followed by a concise statement of the law and the authorities relating to that issue;
- **Part III:** a statement of any additional issues raised by the respondent, the statement of each issue to be immediately followed by a concise statement of the law and the authorities relating to that issue;
- **Part IV:** A statement of the order that the court will be asked to make, including any order for costs;
- **Certificate:** A statement of how much time (expressed in hours or fractions of an hour) will be required for oral argument, not including reply;
- **Schedule A:** List of authorities referred to; and
- **Schedule B:** Text of all relevant provisions of statutes, regulations.

Book of Authorities

If your Factum relies on previous tribunal or court decisions, or other legal texts, then the entire decision or the relevant text (for example, the complete legal article or, if it is a book, the relevant chapter or pages) should be provided to the Court in one of two ways.

If the decision is available on a free public website like CanLII.org, you must provide a hyperlink to that decision in your Factum. Alternatively, you may file an electronic book of authorities. In your Book of Authorities, you should provide the full text of all relevant court decisions. You must also include the relevant excerpts from any other sources you rely on. However, if the text is available on a free public website, then you may simply provide a hyperlink to that text in the table of contents of the Book of Authorities without providing the full text.

The Book of Authorities is often filed when the application is perfected.

Filing & Timing

The Notice of Application, Application Record, Factum and Book of Authorities should be served on the Attorney General, the decision-maker and any other respondent. Once the material is served, an electronic version of the materials should also be filed with the Court. Instructions for filing materials with the Court can be found online here. There may be fees associated with filing certain documents.

When filing documents electronically, you should ensure that you follow the document naming rules set out in Schedule B of the Consolidated Practice Direction for Divisional Court Proceedings.

The Notice of Application should be accompanied by an "Affidavit of Service" (Form 16B) confirming that it was served on each party.

Unless otherwise specified, the application for judicial review should be made within **30 days** after the date the decision to be reviewed was made.

Once the Application Record has been served on a respondent, the respondent will have **30 days** to file a responding Application Record and their Factum.

If the applicant has not yet delivered an Application Record and Factum within **1 year** of filing a notice of application, the respondent may make a motion to dismiss for delay. The Registrar can also give notice of a dismissal for delay. Once notice of dismissal is given, the applicant will have **10 days** to file the missing materials.

All your court documents must be uploaded to Case Center. Filing materials with the Court is not the same as uploading to Case Center. In order for the Court to view your materials, you must complete both steps according to the timeline in the Consolidated Practice Direction for Divisional Court Proceedings or as directed by a judge. Generally, your materials must be uploaded at least **four weeks before your scheduled hearing date**. During the hearing, you may make use of Case Center features including directing participants to a specific page and displaying exhibits.

Information about how to use Case Center is available on the Court's website: https://www.ontariocourts.ca/scj/casecenter/.

When uploading documents to Case Center, you should ensure that you follow the document naming rules set out in Schedule B of the Consolidated Practice Direction for Divisional Court Proceedings.

Standard of Review

The standard of review refers to the degree of scrutiny that the Court will apply in examining the substance of the decision being reviewed. The standard of review is an important feature of all judicial review applications and should be addressed in the written argument you file with the Court (your Factum).

For all judicial review applications, there is a presumption that the standard of review is reasonableness. This presumption is only rebutted in exceptional, narrowly defined circumstances in which the standard of review is correctness. Looking at recent cases where the Court considered similar decisions by the same decision-maker will assist you in determining what standard of review the Court will apply.

Where an application involves issues of procedural fairness, the Court considers what procedure is required and whether it was provided.

Reasonableness

Reasonableness is a deferential standard of review. A reasonable decision is “based on internally coherent reasoning” and is justified in light of the facts and law that constrain the decision-maker. Where a decision-maker has provided reasons, those will guide the Court’s review. The reasonableness standard recognizes that there may be more than one reasonable interpretation or more than one reasonable possible result. On this standard, courts will not interfere with a decision they consider reasonable, even if the judges themselves might have made a different decision.

When a court applies the reasonableness standard, the person applying for judicial review has to persuade the court that the decision was unreasonable. A court will find that a decision is unreasonable if there are any fatal flaws in its overall logic or if it is not justified in light of the factual and legal constraints on the decision. Those constraints include the evidence, the relevant law, the issues before the Court as framed by the parties, the parties’ arguments, past practices and the effect of the decision.

Correctness

While reasonableness is the default standard of review, in certain limited circumstances, the correctness standard will apply instead.

In applying a correctness standard of review, the Court does not defer to the decision of the administrative decision-maker. Instead, it makes its own determination of the correct outcome. A correctness standard will only apply to the following questions:

- constitutional questions;
- general questions of law of central importance to the legal system as a whole (that is, questions that must always be answered the same way because the answer has implications across the justice system);
- questions concerning the jurisdictional boundaries between two decision makers; and
- questions where courts and administrative bodies have concurrent first instance jurisdiction over a legal issue.

Procedural Fairness

Where an application for judicial review challenges the procedural fairness of a decision-maker's process or hearing, the Court will consider what level of procedural fairness is necessary in the circumstances, and whether that level has been met. In determining the content of the duty of procedural fairness, the Court will look at the relevant factors, including the following:

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual or individuals affected;
- the legitimate expectations of the person challenging the decision; and
- the choices of procedure made by the original decision-maker.

Many statutes also set out particular procedural requirements. Further, when applicable, the *Statutory Powers Procedure Act* (the "*SPPA*") establishes minimum procedural requirements that must be met by administrative tribunals in conducting hearings and decision-making. Not all administrative bodies are subject to the *SPPA*, nor are all tribunals required to hold a hearing. The decision-maker's enabling legislation, regulations, by-laws, and rules may set out specific procedural requirements.

The Divisional Court Hearing

The Court office will provide the parties with the hearing date. At the hearing of the application for judicial review, the parties will have the opportunity to argue the case before a three-judge panel of the Divisional Court. The parties can expect the panel to have read the materials filed and be familiar with the issues in the case. The oral hearing is an opportunity to present each party's position on the key issues in the case. It is not an opportunity to recite what is in the Factums. The judges may ask questions about the arguments.

The hearing begins with the applicant's submissions, after which the respondent(s) will make their oral submissions. The applicant may then make brief reply submissions, however this is not an opportunity to repeat your submissions, as replies should only address new matters raised by the respondent. The panel of judges presiding at the hearing may adjust these steps.

Remedies

Once the Divisional Court has heard an application for judicial review, it may grant remedy in the nature of *mandamus*, prohibition, *certiorari*, a declaration or an injunction: s. 2(1) of the *Judicial Review Procedure Act*. All these remedies can, but do not have to, be granted as the Court sees fit.

Mandamus

Mandamus is a remedy requiring a party to do something. If the Court determines that the decision-maker has a duty to do something, but did not, then the Court may require the decision-maker to fulfil that duty.

Prohibition

Prohibition prevents a decision-maker from continuing an unlawful process or action. If the Court determines that the decision-maker has no authority to do something or it would be wrong for them to do something, the Court may prevent the decision-maker from doing or continuing to do that thing.

Certiorari

Certiorari is a remedy that renders the decision under review of no force and effect (called quashing the decision). If the Court decides that the decision cannot be upheld (for example, because the decision-maker lacks jurisdiction or there has been a breach of procedural fairness), the Court may grant an order quashing the decision. The Court may then send the matter back to the decision-maker or, in exceptional circumstances, make the decision it considers appropriate.

Declaration

A Declaration is a statement, made by the Court, of its decision about the parties' legal rights or obligations or determining a question of law applicable to them. For example. a declaration may be made to rule on a party's rights or whether the decision-maker acted within its legislative authority.

Injunction

An injunction is an order stopping a party from doing something. The Court may order an injunction to prevent harm or protect a legal right.

The Decision

The parties may receive an oral decision from the panel on the day of the hearing. Otherwise, the decision will be reserved and released at a later date in writing.

Appendix: Relevant Legislation and Practices

Statutes and Regulations

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Sched. B to the *Canada Act 1982* (UK), 1982, c. 11

Judicial Review Procedure Act, R.S.O. 1990, c. J.1

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

Consolidated Practice Direction for Divisional Court Proceedings

Forms

Affidavit of Service (Form 16B)

Notice of Application for Judicial Review (Form 68A)

Notice of Constitutional Question (Form 4F)