ONTARIO SUPERIOR COURT OF JUSTICE
GUIDE TO JUDICIAL REVIEW IN DIVISIONAL COURT

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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 of administrative bodies in Ontario by virtue of s. 6(1) of 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. Section 1 of the *Judicial Review Procedure Act* defines the scope of decisions that can be subject to judicial review. 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 Independent Police Review Director are subject to judicial review. There need not be legislation that specifically grants the right to judicial review.

When to Apply for Judicial Review

There is no specific time limit for bringing an application for judicial review. However, the Court may dismiss an application if, in the Court's opinion, there has been undue delay in bringing the application. Generally speaking, an application for judicial review should be brought within thirty (30) days of the date of the decision to be reviewed.

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 speaking, decisions should be final and determinative of a case before they are judicially reviewed.

Urgent Applications

Pursuant to s. 6(2) of the *Judicial Review Procedure Act*, if a matter is urgent, an application for judicial review may be made to a single judge of the Superior Court. In Toronto, such applications are heard by a Divisional Court judge sitting as a judge of the Superior Court of Justice. Elsewhere in the province, a Superior Court judge deals with the urgent application.

Leave of a judge of Superior Court is required for an urgent application to be heard, which may be granted at the hearing of the application. The judge will determine whether the matter is urgent and whether waiting for the matter to be heard by a panel of the Divisional Court is likely to involve a failure of justice.

Remedies

In order to know whether to bring an application for judicial review, it is important to understand what relief the Court can order. Subsection 2(1) of the *Judicial Review Procedure Act* specifies that, on an application for judicial review, the Court may grant remedy in the nature of *mandamus*, prohibition, *certiorari*, a declaration or an injunction. All of these remedies can but do not have to be granted as the Court sees fit.

Mandamus – is an order 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 – 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 – is an order that the decision under review is of no force and effect (i.e., quashed). 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 – is a statement made by the Court about the parties' legal positions or the law applicable to them. A declaration may be made to rule on a party's rights or whether the decision-maker acted within its legislative authority.

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

Standard of Review

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).

The standard of review refers to the degree of scrutiny that the court will apply in examining the substance of the decision being reviewed. There are generally two standards of review: reasonableness and correctness. Determining which standard of review is applicable to your case can be complicated. (Where an application involves issues of procedural fairness, no standard of review analysis is necessary.)

A good first step in determining which standard of review applies is to look at previous cases where the Court considered other decisions involving similar decisions by the same

decision-maker and see what standard of review the Court applied. By and large, the standard of review is a function of the legislation that gives the decision-maker its authority and the nature of the issues being brought for judicial review.

Sometimes, legislation directly sets out the standard of review that applies. For example, the *Human Rights Code*, s.45.8 provides that in most cases, a decision of the Human Rights Tribunal of Ontario shall not be set aside unless the decision is "patently unreasonable" – in other words, the legislation requires the Divisional Court to take a very deferential approach to decisions of this Tribunal.

Where legislation does not directly set out the standard of review, the Divisional Court's approach will be guided by precedent, the overall legislative scheme, and the nature of the issues.

Reasonableness

Reasonableness is a deferential standard of review. The decision has to be one that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." The reasonableness standard recognizes that there may be more than one reasonable interpretation or more than one reasonable decision. On this standard, courts will not interfere with decision they consider reasonable, even if the judges themselves would 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 it is based on illogical reasoning or if it does not respect the factual and legal constraints on the decision. Those constraints include the evidence, the relevant law, the parties' arguments and the impact of the decision.

Correctness

There is a rebuttable presumption that the reasonableness standard applies on judicial review. That means reasonableness is the default standard, but 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;
- Questions of central importance to the legal system (that is, questions that must always be answered the same way because the answer has implications across the justice system); and
- Questions concerning the jurisdictional lines between two administrative decision makers.

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 appropriate level of procedural fairness, the Court will look at the relevant factors, including:

- The nature of the decision being made and 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 itself.

Many statutes also set out particular procedural requirements. The *Statutory Powers Procedure Act*, R.S.O. 1990, c. 22 ("*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.

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 anyone else 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, facsimile, or by 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 and why the Court should make a different decision; 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 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. 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 governments under s. 24(1) of the *Canadian Charter of Rights and Freedoms.*

Stay Motions

Filing an application for judicial review does not automatically 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 apply to the Court for what is called a "stay" of the decision. To do so, an applicant must bring a motion to Divisional Court seeking an order staying the original decision so that it does not take effect until the final determination of the application.

Records

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

- Any application, complaint, reference or other document, if any, by which the proceeding was commenced;
- The notice of 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 and file an Application Record. An Application Record will normally contain the following documents:

- A table of contents,
- A copy of the Notice of Application,
- A copy of the reasons of the Court or tribunal whose decision is to be reviewed, with a further typed or printed copy if the reasons are handwritten,
- A copy of all affidavits and other materials served by any party that were before the original decision-maker. (As indicated above, 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

Factum

The applicant must also file a factum, which should be no more than 30 pages in length. A factum is a concise summary of a party's case, and should be organized as follows:

- *Part 1*: 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 2:* A concise summary of the facts relevant to the issues on the application, with specific reference to the evidence;
- *Part 3:* A statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue;
- *Part 4*: A statement of the order that the Court will be asked to make, including any order for costs;
- Schedule A: List of authorities referred to; and
- Schedule B: Text of all relevant provisions of statutes, regulations and by-laws.

Book of Authorities

If a party's 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 compiled in a Book of Authorities. It is also a good idea to highlight the portions of the case or text that are referred to in the factum. The Book of Authorities is often filed when the application is perfected but it does not technically need to be filed at that time.

Cases that are frequently relied on in judicial review applications are supplied to Divisional Court judges in a Judges' Book of Authorities and do not need to be included in a party's Book of Authorities. The list of cases included in the Judges' Book of Authorities is updated from time to time and can be found on the Divisional Court's website.

Certificate of Perfection

Once the above materials have been served and filed, the applicant must complete a "certificate of perfection". The certificate of perfection confirms that all the material required to be filed by the applicant for the hearing of the application has been filed.

Once the certificate of perfection has been filed at the Court, the registrar will place the application on a list for hearing and send the "Notice of Listing for Hearing" (Form 68B) to the parties. The Notice of Listing for Hearing will advise you of the next steps required in order to get a date for the application to be heard by the Divisional Court.

Filing & Timing

The Notice of Application, Application Record, factum, Book of Authorities, and Certificate of Perfection should be served on the Attorney General, the decision-maker, and any other respondent. Once the material is served, three hard copies and an electronic version of the materials should also be filed with the Court.

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

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

If the applicant has not yet delivered an application record and factum and filed a certificate of perfection within **one 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.

The Hearing

Once a hearing date has been set, 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 facta. 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 reply submissions, however this is not an opportunity to repeat your submissions, as replies should only address new matters raised by the respondent.

Appendix: Relevant Legislation

Judicial Review Procedure Act, RSO 1990, c J.1

Statutory Powers Procedure Act, RSO 1990, c S.22 – Section 20

Rules of Civil Procedure, RRO 1990, Reg 194 – Rule 38 and 68, except Rule 38.02 and 38.09