Technical Aspects of Judicial Review

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THE BASIS FOR JUDICIAL REVIEW

Judicial review is the mechanism by which courts supervise the actions of governments and administrative agencies. Historically, government and administrative action was supervised through various exercises of the court's inherent jurisdiction – the prerogative writs (*certiorari*, *mandamus, prohibition*, *quo warranto*, *habeus corpus*), and the equitable remedies of injunction and declaration. These exercises of inherent jurisdiction have been subsumed in Alberta into the application for judicial review under the *Alberta Rules of Court*, with equivalent remedies available.

Statutes often contain "privative clauses" which purport to oust the jurisdiction of the court to review the decisions of administrative agencies. They do not do so. While a privative clause will inform the standard of review to be applied by the court, the power of judicial review is constitutionally entrenched. The Supreme Court noted in *Dunsmuir v New Brunswick*:

> The legislative branch of government cannot remove the judiciary's power to review actions or decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect … The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault,* [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits.[1]

PRELIMINARY CONSIDERATIONS

The following are some technical matters to consider before filing a judicial review. Additional practical considerations appear at the end of this paper.

Judicial Review May Not Apply to Private Law Matters

Judicial review generally does not apply to private disputes, including consensual tribunals such as clubs, societies, political organizations and charities. The general rule is that a tribunal is only subject to judicial review when public powers are in question. Key exceptions to the principle that judicial review does not apply to private discipline or dispute resolution processes is when they affect the rights of individuals to earn a living e.g. labour relations and professional bodies.[2]

[1] 2008 SCC 190, [2008] 1 SCR 190 at para 31

[2] See for example, *Kaplan v. Canadian Institute of Actuaries*, 1997 ABCA 310 (Canlii).

However, the limits to this exception appear to have been stretched by the Court of Appeal in *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*.[3] In a 2-1 split decision, the majority rejected the argument that courts may only interfere in the affairs of religious groups if property or civil rights are at stake, and held that courts also have jurisdiction when there has been a breach of the rules of natural justice or the complainant has exhausted the organization's internal processes. Leave to appeal the Court of Appeal's decision has been granted by the Supreme Court.

Public entities are not subject to judicial review for the exercise of private law, such as contracts and employment law.[4]

Judicial Review May be Refused if an Adequate Alternative Remedy Exists

Judicial review is discretionary. Courts will typically decline to judicially review a matter is there is an adequate alternative remedy.[5] If a clear right of appeal exists, and that appeal would provide an adequate remedy, the courts will rarely grant judicial review.[6] The Court expanded on the policy behind this in a subsequent case:

> A fundamental principle of administrative law is that the statutory scheme established by a Legislature or Parliament must be used; it is not discretionary, and courts ought not usurp the functions entrusted to statutory delegates. Administrative delegates ensure the expeditious and proper functioning of the schemes of which they are a part. It is unnecessary to discuss the benefits of such schemes, other than to observe that they are an essential element of Canada's regulatory scheme and without them the judicial system would be overwhelmed.[7]

Check the statute governing the administrative body to determine whether there is some internal appeal or review mechanism which should be exhausted first, or whether there is a statutory appeal to the court. If there is a statutory appeal, that appeal must be pursued first.

In rare circumstances where the mechanism available is not adequate, the existence of an appeal right or internal review mechanism will not foreclose judicial review. There are cases where the appeal to an internal body[8] or even to the court[9] does not constitute an adequate alternate remedy.

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[3] 2016 ABCA 255

[4] See, for example, the usually unread second-half of *Dunsmuir*, *supra* note 1, at paras 112-116.

[5] See *Harelkin v University of Regina*, [1979] 2 SCR 561; *J.W. v Alberta (Victims of Crime Programs Committee)*, 2012 ABCA 212 at paras 65 to 81

[6] *Merchant v Law Society of Alberta,* 2008 ABCA 363 at para 3

[7] *Pridgen v. University of Calgary*, 2012 ABCA 443 at para. 166.

[8] For example, where there is an apprehension of bias on an institutional level. See *Canadian Pacific Ltd. v Matsqui Indian Band*, [1996] 1 S.C.R. 3 at paras. 64 to 105.