Public Law in Canada: *Judicial Review of Administrative Action*

Lenczner Slaght

Contents

What is a Judicial Review?

Judicial review is about enforcing the rule of law. It allows for the review of government action by the courts. Judicial reviews differ significantly from a private law cause of action. Its purpose is to overturn an invalid government decision, to require the government to act, or prohibit it from acting. It is not to seek compensation.

Government action must be authorized by law. All decision-making powers of public officials and administrative bodies are outlined in and constrained by statutes, the common law, or the Constitution. One function of judicial review is to ensure that the government is not exceeding the authority granted to it in law.

Judicial review is constitutionally guaranteed in Canada. The Supreme Court of Canada has held that sections 96-101 of the *Constitution Act* empower the superior courts to "engage in surveillance of lower tribunals" and other administrative bodies to ensure that the rule of law is adhered to and that they do not exceed their jurisdiction.

The rules and procedure governing judicial reviews are codified by legislation and in the Rules of Procedure, depending on the province in which the proceeding is brought. In Ontario, the *Judicial Review Procedure Act* was introduced in 1971 to simplify the process for bringing a judicial review. British Columbia has a similar statute, whereas Alberta, Saskatchewan and Nova Scotia have the processes set out in their respective Rules of Court.

This guide concerns judicial review of administrative action, and focuses on the Ontario and Federal Court context. This guide does not address other forms of judicial oversight, such as judicial review of legislative action (i.e., constitutional challenges) or judicial review of arbitral or other non-administrative decisions. These other forms of judicial oversight have their own substantive bodies of law, which would require guides of their own.

> "In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is 'executive accountability to legal authority' and protecting 'individuals from arbitrary [executive] action'... Put another way, all holders of public power are to be accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law."

Tsleil-Waututh Nation v Canada (AG), 2017 FCA 128 at para 78

What Decisions May Be Judicially Reviewed?

Judicial review is specifically concerned with ensuring the legitimacy of government action. Only those decisions or actions that are conferred upon or delegated to the government actor by legislation, or are prerogative powers at common law, constitute "government action" for the purposes of judicial review.

Furthermore, only those decisions that are of a sufficiently "public" nature can be reviewed. In its 2018 decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, the Supreme Court of Canada clarified what types of decisions can be judicially reviewed:

- Only decisions made by government or state decision-makers may be judicially reviewed. Decisions of private organizations — even where they may have a broad impact on the public — are not subject to judicial review.
- Not all decisions made by government or state decision-makers are subject to judicial review. For example, employment and contractual matters involving public bodies are not matters that may be judicially reviewed and are determined using ordinary principles of private law.

With these principles in mind, a conjunctive test has evolved to determine whether a decision is subject to judicial review:

1. The decision must be a result of an exercise of state authority; and
2. The decision itself must be of a sufficiently public character.

Exercise of State Authority

The first step in the test is to determine whether the decision-maker has been authorized in law to make a particular decision.

All government action must be supported by some grant of state authority. Ordinarily, the legislature authorizes the government to act by passing legislation. The *Judicial Review Procedure Act* in Ontario has codified this principle by indicating that judicial review is concerned with "statutory powers of decision."

> "Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review. In making these contractual decisions, the public body is not exercising 'a power central to the administrative mandate given to it by Parliament', but is rather exercising a private power. Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority."
>
> *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 14

In the absence of express statutory authority, the government may nevertheless have a common law basis upon which to act — this is known as a prerogative power. Prerogative powers are generally limited in nature and may be overtaken by statutory enactments.

The Supreme Court of Canada in *Khadr v Canada* has defined prerogative powers as the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."

The initiation of judicial reviews for decisions made pursuant to prerogative powers is relatively rare, but courts retain a narrow and limited power to review such exercises of power because in a constitutional democracy, "all government power must be exercised in accordance with the Constitution."

Khadr concerned the detention of a 15-year-old Canadian citizen by the United States in Guantanamo Bay, Cuba. Mr. Khadr had repeatedly asked the government of Canada to seek his repatriation to Canada, which the government declined to do. Mr. Khadr brought an application for judicial review alleging that the government's decision infringed his rights under section 7 of the *Charter of Rights and Freedoms*, and sought an order compelling the Canadian government to act.

The Supreme Court held that the Prime Minister's decision breached Mr. Khadr's section 7 *Charter* rights and was subject to judicial review as an exercise of the Prime Minister's prerogative powers. However, the Court acknowledged that it must remain sensitive to the fact that "the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are discharged."

Accordingly, while the Court was prepared to issue a declaration stating that Mr. Khadr's section 7 *Charter* rights were violated, it was not prepared to direct that the Canadian government take specific action to remedy the breach.

Sufficiently Public Character

After determining whether there has been a statutory exercise of authority, the next step is to determine whether the decision was of a sufficiently public character to warrant judicial review.

In *Sprague v Her Majesty the Queen in Right of Ontario*, the Divisional Court in Ontario addressed whether a "no visitor" policy implemented by a hospital during the COVID-19 pandemic was amenable to judicial review. The Court held that there had been no exercise of statutory power by the hospital and in any event the decision was not of sufficiently public character to be amenable to judicial review. In making its decision, the Court reiterated the principle that even where the decision at issue is exercised under a statutory power, judicial review is only available where the decision is also "the kind of decision that is reached by public law and therefore a decision to which a public law remedy can be applied."

In other words, not all decisions made by government decision-makers will be properly the subject of judicial review. Government decision-makers also make decisions that are of a private nature — for example, contractual decisions about renting premises or the hiring of administrative staff in a government office. In those cases, the government is acting as any private employer and their decisions in this respect are not subject to judicial review.

In *Air Canada v Toronto Port Authority*, the Federal Court of Appeal set out the following eight factors relevant to an assessment of whether a decision is of a sufficiently public character to warrant judicial review:

- The character of the matter for which review is sought (is it a private, commercial matter, or is it of broader import to members of the public?);
- The nature of the decision-maker and its responsibilities (is the decision-maker public in nature, such as a Crown agent or a statutorily recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?);
- The extent to which a decision is founded in and shaped by legislation and regulation as opposed to private discretion or contract;
- The decision-maker's relationship to other statutory schemes or other parts of government. If the decision-maker is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter. However, mere mention in a statute, without more, may not be enough;
- The extent to which a decision-maker is an agent of government or is directed, controlled, or significantly influenced by a public entity;
- The suitability of public law remedies. The more appropriate a public law remedy is, the more inclined a court may be to view the matter as public;
- The existence of compulsory power. If a compulsory power over the public at large or a defined group exists, this may be an indicator that the decision is public in nature; and
- An "exceptional" category of cases where the conduct has attained a serious public dimension.

All of these factors can be considered in a given case, and none will be necessarily determinative.

Before the Supreme Court of Canada's 2018 decision in *Wall*, the *Air Canada* factors had been used to support the judicial review of certain decisions made by private organizations such as political parties or sports organizations. Since *Wall*, the courts have been clear that the *Air Canada* factors are only to be used to assess the public character of a decision after a determination has been made that there has been an exercise of state power.

As a practical matter, counsel should be mindful when relying on pre-2018 case law given the significance of *Wall*.

Public Decisions Not Amenable to Judicial Review

Courts may consider that certain decisions, while sufficiently public, are not justiciable. A matter that is not justiciable is one that it is not appropriate for a court to decide.

Sometimes, this is because the matter is beyond the expertise and jurisdiction of the courts. For example, the Supreme Court of Canada in *Wall* held that questions of theology — such as the merits of a religious belief — are not justiciable.

For a matter to be considered justiciable, a party's legal rights must be affected. In *Democracy Watch v Attorney General of Canada*, the applicant sought judicial review of a decision of the Conflict of Interest and Ethics Commissioner relating to allegations that the Prime Minister attempted to unduly influence the Attorney General of Canada in the SNC Lavalin prosecution. The Commissioner declined to examine eight public officers who allegedly acted under the influence of the Prime Minister, and a public interest group sought to have that decision reviewed. The Federal Court of Appeal found that the matter was not justiciable as "the issue raised [...] does not affect rights, impose legal obligations, or cause prejudicial effects" and accordingly dismissed the application.

Issues of justiciability will also be in play where the matter is something that is for Parliament or the legislature to decide. For instance, courts will decline to address political questions for lack of justiciability. Historically, this has included decisions relating to the disbursement of public funds, which the courts have said are not subject to judicial review.

In *Bowman v Her Majesty the Queen*, the Ontario government cancelled a basic income pilot project. One recipient of that funding brought an application for judicial review. The Court declined to hear the case, on the basis that the allocation of public resources does not give rise to enforceable rights on judicial review. The Court further affirmed that the government cannot be required by the Court to make or continue to fund an expenditure, as the distribution of government funds is a political, not a judicial function, and the Courts have no power to review the policy considerations which motivate Cabinet decisions.

Statutory Right of Review

Certain statutes expressly point to judicial review as an available remedy. In these circumstances, there is no need to conduct a *Wall a*nalysis to determine whether the decision is of sufficiently public nature to permit judicial review.

For example, the *Human Rights Code* expressly states that a final decision of the Human Rights Tribunal of Ontario is subject to judicial review where the decision of the Tribunal is "patently unreasonable".

Commencing a Judicial Review

This section outlines the basic procedure to commence a judicial review in Ontario and federally. While the procedure is generally the same in both jurisdictions, there are substantive differences that affect the process to be followed when initiating a judicial review.

Ontario

In Ontario, a judicial review is normally heard by the Divisional Court and is governed primarily by the *Judicial Review Procedure Act* and the *Rules of Civil Procedure*.

A proceeding is commenced by the issuance of a Notice of Application for Judicial Review.

The *Judicial Review Procedure Act* provides a 30-day period to bring judicial review proceedings. This limitation is subject to any specific timelines set out in other legislation and may be extended by the Court.

A Notice of Application for Judicial Review must state the relief claimed by the applicant, the grounds for the application, and a list of the evidence to be relied upon. The applicant must also file the record of any underlying proceedings.

In addition to serving all of the named respondents in the proceeding, the *Judicial Review Procedure Act* requires that a Notice of Application for Judicial Review be served on the Attorney General of Ontario, who is entitled to be heard on any judicial review application. If the applicant intends to raise a constitutional issue, a Notice of Constitutional Question must be served at least 10 days before the hearing on the Attorney General of Ontario and the Attorney General of Canada.

A party who is served with a Notice of Application for Judicial Review and intends to respond to the application must serve and file a Notice of Appearance.

In instances of urgency, section 6(2) of the *Judicial Review Procedure Act* permits an applicant to make an application to a single judge of the Superior Court of Justice, with leave, where they can show that the delay required to bring an application in the Divisional Court is "likely to involve a failure of justice".

Federal Court

The *Federal Courts Act* and the *Federal Courts Rules* govern judicial review proceedings in the Federal Court.

Section 17 of the *Federal Courts Act* gives the Court jurisdiction to judicially review decisions made by the Crown. Sections 18 and 18.1 of the *Federal Courts Act* provides the Court with jurisdiction to review decisions made by a federal board, commission, or other tribunal. Prior to commencing a judicial review, counsel should also consult section 18.5 of the Act which precludes review where the administrative action can be appealed, and section 28(3) which requires that certain applications be made directly to the Federal Court of Appeal.

A judicial review is then commenced through the issuance of a Notice of Application (Form 301). The Notice must state the relief claimed by the applicant, the grounds for the application, and a list of the evidence to be relied upon.

The Notice of Application must be served on all respondents, the decision-maker whose decision is being reviewed, the Attorney General of Canada, and any other party who is required by statute to be served. If a constitutional issue is raised, a Notice of Constitutional Question must be served on the Attorney General of Canada and any provincial Attorney General who may be interested in the outcome of the issue.

The *Federal Courts Act* provides that an application for judicial review of any decisions or orders of a federal board, commission, or tribunal shall be made within 30 days of when the decision or order was first communicated by the federal board, commission, or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it.

A party wishing to respond to the Notice of Application must file a Notice of Appearance within 10 days of being served.

Discretionary Bars to Judicial Review

In some cases, the court may decline to provide a remedy for reasons other than the merits of the application. In these circumstances, the court will consider whether there are other factors that outweigh the public interest in having governmental actors held to account through judicial review. These other factors include whether there are other appropriate remedies, the timeliness of the application, and whether the application is moot.

Statutory and Other Remedies

Judicial review is considered an "extraordinary" remedy, in that the court will expect applicants to have exhausted any other available avenues of redress. For example, the court may refuse to conduct a judicial review where another procedure, such as a right of appeal, exists.

In Ontario, an application for judicial review may be brought "despite any right of appeal" or prior to the completion of the administrative process and the exhaustion of appeal mechanisms. However, the courts have encouraged litigants to exercise restraint before doing so and in some cases (such as *Peel Standard Condominium Corporation No. 779 v Rahman*) have exercised their discretion to refuse to hear applications for judicial review where the applicant has declined to pursue an appeal.

In the Federal Courts, judicial review is not permitted where there is a right of appeal to the Federal Court, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council, or the Treasury Board.

> "Judicial review is considered an 'extraordinary' remedy, in that the court will expect applicants to have exhausted any other available avenues of redress."

In considering whether to consider an application for judicial review despite the existence of an alternative remedy, courts have considered whether the other remedy is an adequate alternative to judicial review. The factors relevant to this determination include:

- The convenience of the alternative remedy;
- The nature of the error alleged;
- The nature of the other forum which could deal with the issue, including its remedial capacity;
- The existence of adequate and effective resource in the forum in which litigation is already taking place;
- Expeditiousness;
- The relative expertise of the alternative decision-maker;
- Economical use of judicial resources; and
- Cost.

In *Gupta v Canada (Attorney General)*, the Federal Court determined that the application for judicial review was premature as the applicant had not exhausted alternative remedies including the grievance procedure set out in the *Labour Relations Act*.

Timeliness

The court may refuse to hear an application for judicial review where it is premature or delayed.

A judicial review may be premature where there is not yet a decision to be reviewed. In other words, if the decision-maker has not yet exercised its statutory authority, there isn't anything to review.

In other circumstances, there may be an interlocutory or intermediate decision that has been made, but the court will be hesitant to weigh in where the administrative process has not yet been completed. Judicial review of each step in a proceeding could result in excessive delay and encourage litigants to use the courts as referees before any decision has been rendered. It is not in the public interest to encourage inefficiency and delay by allowing piecemeal access to the courts. Judicial review of interlocutory, procedural, or evidentiary rulings will therefore only be permitted in exceptional circumstances.

As discussed above, the *Judicial Review Procedure Act* requires that an application for judicial review be commenced within 30 days of the impugned decision or action, subject to the court's discretion to grant an extension. As held by the Divisional Court in *Unifor and its Local 303 v Scepter Canada Inc.*, when determining whether to grant an extension, the court will consider prejudice arising from the delay, apparent grounds for relief, and any other circumstances that the court considers relevant which may include such issues as the length of the delay or the explanation for the delay.

Mootness

A court may decline to hear an application for judicial review which raises a hypothetical or academic question. If the court's decision will not have the effect of resolving an actual controversy affecting the rights of the parties, the court may decline to hear the case.

As set out by the Supreme Court of Canada in *Borowski v Canada*, courts are required to conduct a two-stage analysis to determine whether a particular case is moot:

1. The court will determine whether the tangible and concrete dispute has disappeared and the issues have become academic; and
2. If the response to the first question is affirmative, the court will decide whether it should exercise its discretion to hear the case.

> "[I]f, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot."
>
> *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at para 15

Legal Analysis to Be Applied When Reviewing a Decision

Application for Judicial Review on the Merits

When a court considers an application for judicial review on its merits, the first question is which standard of review to apply. The two available standards are:

- **Reasonableness** – A court applying the standard of review of reasonableness will consider whether the decision under review was "reasonable". A reasonable decision is one that is based on internally coherent reasoning and is justified considering the legal and factual constraints that bear on the decision. There can be a range of reasonable outcomes, and the court has to accept any decision that falls within that range.
- **Correctness** – A court applying a standard of review of correctness will consider whether the decision under review was the right decision. In such a case, there is only one right answer. If the decision under review got it wrong, the court will overturn the decision.

The presumptive standard of review in applications for judicial review is reasonableness. There are only two exceptions, as set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*:

1. The legislature may direct a court to apply a different standard. They can do this by stating expressly in a statute which standard of review applies, or by granting a right of appeal to a court in which case the standards of review used in ordinary appeals will apply.
2. Cases involving the rule of law will be reviewed on a standard of correctness. Such cases include: (i) constitutional questions, (ii) general questions of law that affect the legal system as a whole, and (iii) cases where the powers of two administrative bodies overlap. In 2022, the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association* identified a further category of correctness review: where courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute.

> "Reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process."

Applications for Judicial Review on the Basis of Procedural Fairness

An application for judicial review may challenge a decision on the basis that the procedure used to arrive at the decision was itself unfair or erroneous. In such cases, courts will only grant limited deference to decision-makers.

The procedural rights of a party subject to a public exercise of authority vary, depending on the source of that authority and the nature of the decision-maker. There are two "sources" of procedural fairness requirements in Canadian law:

- **Legislation** – In Ontario, for example, the *Statutory Powers Procedures Act* sets out particular procedural requirements for administrative tribunals. These are the minimum standards for the administrative boards and tribunals governed by this Act.

  Other Acts and Regulations may establish procedural rules, or allow a decision-maker to establish rules for a particular body. Section 25.1 of the *Statutory Powers and Procedures Act* authorizes a tribunal generally to make "rules governing the practice and procedure before it".
- **The Common Law** – Canadian courts have established basic rules of "natural justice" or "fairness". In *Baker v Canada (Minister of Citizenship and Immigration)*, the Supreme Court established that the duty of procedural fairness owed to an individual depends on the context of the particular decision being made.

Generally, courts will consider the following factors when determining what the duty of fairness requires in a particular circumstance:

- 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 agency itself.

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, para. 28

Evidence in Judicial Review

Where an application for judicial review arises from a proceeding, the only evidence available will generally be the evidence that was adduced before the inferior administrative body subject to the review. As held by the Manitoba Court of Appeal in *Kalo v Winnipeg (City of)*, the purpose of limiting the evidence available on judicial review is principled and straightforward:

> "A judicial review is not a hearing *de novo*, and there are strict limits on the type of additional evidence that may be admitted on judicial review. In modern judicial review, the record consists of all of the material that was before the original decision-maker [...]. It follows, therefore, that evidence that was not before the initial decision-maker will not be permitted on judicial review."

Notwithstanding this general prohibition, new evidence may be admissible in very limited circumstances. The leading authority on admitting such evidence is the Ontario Court of Appeal's decision in *Keeprite Workers' Independent Union v Keeprite Products Ltd*, which was aptly summarized by Justice Swinton in *142445 Ontario Limited (Utilities Kingston) v International Brotherhood of Electrical Workers, Local 636*:

> "The *Keeprite* standard for the admission of affidavit evidence on judicial review has been applied in numerous decisions involving labour boards and labour arbitrators. These cases have held that affidavit evidence can be admitted either to show an absence of evidence on an essential point or to disclose a breach of natural justice that cannot be proven by a mere reference to the record."

In *Keeprite*, the party seeking judicial review sought to adduce evidence to demonstrate that the underlying decision-maker "exceeded his jurisdiction by making findings of fact unsupported by or contrary to the evidence given". The Court admitted the impugned evidence.

More recently, in *Queensway Excavating & Landscaping Ltd v Toronto (City)*, the Court applied the *Keeprite* standard and allowed additional affidavit evidence regarding the calculation of wages, which were critical to a procedural fairness analysis.

In addition to evidence admitted on the *Keeprite* standard, new evidence may be admitted on judicial review where the court is reviewing alleged *Charter* violations caused by a ministerial decision. The admission of evidence on this basis flows from the general principle set out by the Supreme Court of Canada in *Ernst v Alberta Energy Regulator* and *Guindon v Canada*: that *Charter* issues should not be decided in an evidentiary vacuum.

Even where an application for judicial review arises from a non-adjudicative administrative decision, the evidence available to the reviewing judge will normally be limited to the record of the decision, unless there is fresh evidence related to an issue of jurisdiction or procedural fairness or if the evidence is necessary to elucidate the record.

Remedies in Judicial Review

Traditionally, remedies sought on judicial review were limited to the "prerogative writs", which are specified categories of direction that the court may provide to administrative bodies and government actors. The prerogative writs include the following: *certiorari*, *mandamus*, *prohibition*, *quo warranto*, and *habeas corpus.*

The prerogative writs have now been codified in legislation at the Federal and Provincial levels. In Ontario, the writs of *certiorari*, *mandamus*, and *prohibition* have been codified through section 2 of the *Judicial Review Procedure Act* and section 18 of the *Federal Courts Act*. In addition, section 18 of the *Federal Courts Act* has codified the writ of *quo warranto*. *Habeas corpus* is codified in the *Charter of Rights and Freedoms* and, in the Ontario civil context, the *Habeas Corpus Act*.

In addition to the writs, the *Judicial Review Procedure Act* and the *Federal Courts A*ct permit their respective courts to order declarations or injunctions.

Damages are generally not available as a remedy in judicial review proceedings.

Certiorari – "To Be Made Certain"

Perhaps the most sought remedy on judicial review, *certiorari* refers to the process by which the reviewing Court overturns a decision of an administrative tribunal or executive action.

Certiorari is available in a broad range of circumstances, as explained by Justice Dickson in *Martineau v Matsqui Institution*. *Certiorari* is available as a general remedy of supervision of the machinery of government decision-making. The order may go to any public body with the power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.

The grounds on which a reviewing court may grant *certiorari* can generally be grouped into three broad categories:

1. The decision was beyond the tribunal's jurisdiction;
2. The decision was either unreasonable or incorrect (depending on the applicable standard of review); or
3. The decision was made through a process that was procedurally unfair.

Where an applicant is successful in securing an order for *certiorari*, the decision will typically be referred back to the original administrative body for re-consideration.

Mandamus – "We Command"

Mandamus is the process by which a court may compel the performance of a public duty, normally in relation to public officials. *Mandamus* is a discretionary remedy, is limited to very specific circumstances, and is generally not available where the public duty sought to be performed is discretionary in nature.

The test that courts will apply in determining whether to exercise their discretion to grant *mandamus* is set out in *Apotex Inc v Canada (Attorney General)* and includes eight mandatory conditions, including that there must be a public legal duty to act which is owed to the applicant. Where the duty sought to be enforced is discretionary, the decision-maker cannot act in a manner which is "unfair", "oppressive", or demonstrates "flagrant impropriety" or "bad faith". However, *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive", or "unfettered".

The requirements to obtain *mandamus* are stringent, and it is typically only granted in extraordinary circumstances.

Prohibition

Prohibition is an extraordinary and drastic administrative law remedy that halts an administrative proceeding or other executive action in its tracks. Unlike *certiorari*, an application seeking *prohibition* is commenced prior to the conclusion of the administrative procedure.

Prohibition is discretionary and is only used to review administrative proceedings where the underlying decision-maker commits a jurisdictional error.

Quo Warranto – "By What Warrant"

Quo warranto is a largely outdated remedy that was traditionally used to compel a public authority to demonstrate by what authority it purported to exercise public power.

Quo warranto is not included in the list of remedies available to Ontario Courts under the *Judicial Review and Procedure Act*; however, it is still available at the Federal level by operation of section 18 of the *Federal Courts Act*.

In the Federal context, the Court set out the requirements for granting *quo warranto* in *R v Jock*.

Habeas Corpus – "You Shall Have the Body"

Habeas corpus is concerned with the validity of a person's detention or form of detention by a government body. Detention may be contested through h*abeas corpus* on one of three grounds, as summarized in *Canada (Public Safety and Emergency Preparedness) v Chhina*:

1. The initial decision requiring the detention;
2. A further deprivation of liberty based on a change in the conditions of the detention; or
3. A further deprivation of liberty based on the continuation of the detention.

Importantly, the writ of *habeas corpus* is guaranteed to those who have been detained by virtue of section 10(c) of the *Charter of Rights and Freedoms*:

> Everyone has the right on arrest or detention [...] to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

For obvious reasons, *habeas corpus* most frequently arises in the criminal context; however, there are important civil applications of this writ as well, including detentions in the context of parole, immigration, extradition, adoption, child custody, and mental health matters. In Ontario, the civil application of *habeas corpus* is governed by the *Habeas Corpus Act*.

The test for whether a reviewing court should grant *habeas corpus* was summarized by the Supreme Court of Canada in *Khela v Mission Institution* and consists of three parts:

1. The applicant must establish that he or she has been deprived of liberty;
2. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality; and
3. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful.

Where an applicant successfully demonstrates that he or she has been detained unlawfully, the appropriate remedy is release or correction of a further deprivation of liberty.

Declarations and Injunctive Relief

In addition to the prerogative writs, an applicant for judicial review may also seek declarations and injunctions regarding the exercise of statutory powers by administrative bodies pursuant to section 2 of the *Judicial Review Procedure Act*. While originally private law remedies, declarations and injunctions have been available in the public law context since the 1960s. Both of these remedies follow the normal principles of availability in private law – they are equitable remedies and are discretionary in nature.

Declarations are defined in de Smith's *Judicial Review of Administrative Action* as "formal statement[s] by the court upon the existence or non-existence of a legal state of affairs". Declarations have been referred to as "the administrative law remedy of the late twentieth century".

A reviewing court's decision to issue a declaration is governed by the four-part test outlined by the Supreme Court of Canada in *SA v Metro Vancouver Housing Corp*:

1. The court has jurisdiction to hear the issue;
2. The dispute is real and not theoretical;
3. The party raising the issue has a genuine interest in its resolution; and
4. The responding party has an interest in opposing the declaration being sought.

Injunctions prohibit or require an entity to perform in a certain manner, either on an interlocutory or permanent basis. In the public law context, this may be used to temporarily suspend the order of an administrative tribunal pending an appeal or to compel or prohibit performance (in a manner akin to *mandamus* and *prohibition*).

Interlocutory injunctions serve as temporary injunctions pending the outcome of an ongoing court or administrative proceeding. As in private law, interlocutory injunctions are governed by the test set out by the Supreme Court of Canada in *RJR MacDonald v Canada (Attorney General)*:

1. The applicant must demonstrate a serious question to be tried;
2. The applicant must then demonstrate that irreparable harm will result if the relief is not granted; and
3. Finally, if the first two requirements are made out, the reviewing court will assess the balance of inconvenience to the parties.

Permanent injunctions, on the other hand, are available as equitable remedies to enforce compliance with established legal rights or to prohibit certain actions that have been determined to be unlawful on a permanent basis.

Importantly, pursuant to section 22 of the *Crown Liability and Proceedings Act*, injunctions cannot be used to enjoin Crown action (i.e., action taken by the Crown in Right of Ontario, as opposed to an administrative actor or tribunal).

> "If relief is sought in a proceeding against the Crown that might, in a proceeding between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance."

Conclusion

Judicial review exists to ensure that the government is held to account and that its actions conform to the Constitution and the rule of law. In this way, despite its unassuming name, judicial review is a fundamental part of the Canadian legal system.

"As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation... Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures."

Dunsmuir v New Brunswick, 2008 SCC 9 at para 27

Lenczner Slaght's Public Law Practice

Lenczner Slaght's lawyers help clients navigate complex litigation matters involving all levels of government and the public-sector.

Our public law practice includes litigation matters relating to constitutional, human rights, judicial review, municipal, procurement and professional regulation matters.

Public Law Practice Areas

We advise clients facing public inquiries, legislative and parliamentary committees, and investigations by ethics and integrity Commissioners. We act as counsel for governments, government departments/agencies, and Crown corporations. We also act as counsel for companies conducting business with governments and their agencies, as well as for individuals and organizations dealing with specific regulators and/or overall regulatory regimes.

45+

Expert litigators with a public law practice.

30+

Years representing our clients in public law litigation matters.

2024

Recognized in Chambers Canada - Litigation: Public Law.

We bring decades of relevant experience to challenging and defending the decisions of public bodies through the courts.

Litigate.com

"Their client services are extraordinary. They are masters of strategic thinking, planning, and execution."

Chambers Global

"Their main strength is the ability to provide objective and pragmatic litigation expertise with a sensitivity to issues."

Chambers Canada

Expert Strategy

Lenczner Slaght represents and assists clients at every level of government in lobbying and ethics related investigations and disputes, including investigations by the federal Office of the Commissioner of Lobbying of Canada and Ontario's Office of the Integrity Commissioner and judicial review of those bodies' decisions.

Our lawyers combine a deep knowledge of the workings of government with expertise in a broad range of relevant areas, from the nuances of judicial review applications to constitutional issues and questions under the *Charter of Rights and Freedoms*. From conducting a successful fraud trial on behalf of a major public sector institution to arguing appeals before the Supreme Court of Canada on constitutional matters, we have the experience and credibility in court to successfully represent clients in public sector disputes.

About the Authors

Rebecca Jones
416-865-3055
rjones@litigate.com

Rebecca co-leads the firm's Public Law Practice Group.

An experienced trial and appellate lawyer, she represents private and public sector clients in public law proceedings, commercial disputes, class actions, and professional liability matters. Rebecca's public law practice includes judicial reviews, public inquiries, integrity investigations, constitutional and regulatory proceedings, and expropriation disputes. She acts for governments, public institutions and senior public officials, as well as individuals and corporations navigating the regulatory landscape or involved in disputes or investigations with public entities.

Lauren Mills Taylor
416-238-1975
lmillstaylor@litigate.com

Lauren is an experienced advocate whose litigation practice encompasses professional liability, commercial litigation, class actions, defamation, public and administrative law, and appeals. She has appeared before all levels of court in Ontario as all as administrative tribunals.

Lauren previously clerked at the Alberta Court of Appeal for Justice Marina Paperny and at the Supreme Court of Canada for Justice Malcom Rowe.

Sean Blakeley
416-865-4697
sblakeley@litigate.com

Sean maintains a broad civil litigation practice which includes complex commercial litigation, insurance disputes, professional liability, and public and administrative law. Sean's clients have included international insurance companies and brokerages, real estate developers, regulated professionals, and household names in the food and beverage industry.

Sean's practice focuses on trial and appellate advocacy. He has appeared as counsel at all levels of court in Ontario and regularly appears before administrative tribunals and boards.

Our Other Public Law Litigators

Nina Bombier
416-865-3052
nbombier@litigate.com

Tom Curry
416-865-3096
tcurry@litigate.com

Monique Jilesen
416-865-2926
mjilesen@litigate.com

Colin Johnston
416-865-2971
cjohnston@litigate.com

Risa M. Kirshblum
416-865-3098
rkirshblum@litigate.com

Brian Kolenda
416-865-2897
bkolenda@litigate.com

Eli S. Lederman
416-865-3555
elederman@litigate.com

Jaan Lilles
416-865-3552
jlilles@litigate.com

William C. McDowell
416-865-2949
wmcdowell@litigate.com

Brendan F. Morrison
416-865-3559
bmorrison@litigate.com

Andrew Porter
416-865-3554
aporter@litigate.com

Aoife Quinn
416-865-9907
aquinn@litigate.com

Margaret Robbins

416-865-2893
mrobbins@litigate.com

Scott Rollwagen

416-865-2896
srollwagen@litigate.com

Dena N. Varah

416-865-3556
dvarah@litigate.com

Paul-Erik Veel

416-865-2842
pveel@litigate.com

Andrea Wheeler

416-865-3058
awheeler@litigate.com