Challenging government action in Canada

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Introduction

In our highly regulated world, interaction with government bodies and agencies is inevitable. At the municipal, provincial and federal levels, administrative decision-makers have significant power over key approvals, licenses and policies, and their decisions can have a serious impact on businesses and individuals.

However, their powers are not without limits. Judicial review is the process by which affected parties in Canada can turn to the courts to review government action and determine whether it meets legal and constitutional standards. Although administrative law in Canada is conceptually similar to that in the United States, the source, scope and focus of judicial review in the two countries differ in several important ways.

Canadian judicial review – key differences

- Administrative law in Canada is generally focused on administrative adjudication – challenging the exercise of statutory discretion as applied in a particular case. This is in contrast to the U.S., where administrative law has largely developed around challenges to rules and regulations adopted by federal agencies.
- Both the provincial and federal courts hear applications for judicial review. The Federal Court hears most applications from decision-makers that get their powers from federal statutes and orders. In contrast to the U.S. district and circuit court system, the Canadian federal court system has one Federal Court and one Federal Court of Appeal that hears cases on federal matters for all the provinces. The decisions of all other administrative bodies are reviewable in the provincial courts.
- Judicial review in Canada is governed by a common law standard of review analysis that is continually being developed in the courts, unlike in the U.S., where the Administrative Procedure Act governs the scope and standard of federal judicial review.
- There is no Canadian equivalent to the U.S. Administrative Procedures Act, which sets out uniform procedural standards that apply broadly to federal agencies.

Grounds for judicial review

In Canada, administrative law is focused on administrative adjudication – challenging the exercise of statutory discretion as applied in a particular case. This is in contrast to the United States, where administrative law has largely developed around challenges to rules and regulations adopted by federal agencies. Although government policies and regulations are still subject to judicial review in Canada, most Canadian administrative law cases relate to the fair and reasonable application of statutes to individuals and organizations, rather than the broader policy choices of the government of the day.

Broadly speaking, government action in Canada may be challenged on two grounds. The first is "procedural fairness" or "natural justice," or, as it is known in the U.S., "due process." In Canada, an administrative decision made by a public authority that affects someone's rights, privileges or interests triggers a duty of fairness, which requires at minimum the right to be heard and the right to an unbiased decision-maker.

The level of procedural fairness owed varies depending on the nature of the decision, the relevant statutory framework, the importance of the decision to the affected party, the legitimate expectations of the party and the procedural choices made by the decision-maker. In some contexts, an informal process may be sufficient, while others will require procedure akin to a judicial proceeding. If the process leading to the decision was unfair, the decision may be set aside on judicial review, regardless of the outcome.

Some provinces have enacted statutes setting out procedural requirements for administrative proceedings, which may either oust or add to protections under the common law. However, there is no Canadian equivalent to the U.S. *Administrative Procedures Act*, which sets out uniform procedural standards that apply broadly to federal agencies.

The second ground of review is the substance of the decision – what the government body decided and why. This is often the main reason a party seeks judicial review in court. A substantive challenge to the decision can be based on a number of different grounds, which are outlined in more detail below.

When to consider judicial review

Once the proceeding has concluded and a final decision is rendered, it is time to start considering judicial review. In the Federal Court, an application for judicial review must be brought within 30 days. Most provincial courts also have statutory time limits for bringing a judicial review. In Ontario, British Columbia and Manitoba, which do not have time limits, a judicial review should be brought within a reasonable time, which depends on the circumstances. Missing a time limit or proceeding with undue delay may result in dismissal of the application.

Where to start

In Canada, both the provincial and federal courts hear applications for judicial review. In contrast to the U.S. district and circuit court system, the Canadian federal court system has one Federal Court and one Federal Court of Appeal that hears cases on federal matters for all the provinces.

The Federal Court hears most applications for review from decision-makers that get their powers from federal statutes and orders, such as the Canadian Human Rights Commission, Canadian Industrial Relations Board, National Energy Board and federal ministers. However, certain federal tribunals are reviewable directly to the Federal Court of Appeal, including the Canadian Energy Regulator, Canadian Radio-television and Telecommunications Commission and the Competition Tribunal.

The decisions of all other administrative bodies are reviewable in the provincial courts. Each province has a superior court, which is a court of inherent jurisdiction. The power of the superior courts to review government decision-making is enshrined in the Constitution. Provincial bodies that are reviewable in the superior courts include each province's securities commission, workers' compensation boards and most professional associations.

Who can seek judicial review?

Standing, or eligibility to seek judicial review, varies depending on the jurisdiction and applicable legislation. The two main avenues for standing to bring a judicial review application are through "personal interest standing" and "public interest standing."

Personal interest standing applies to those who are individually affected or aggrieved by a government decision. The party might be the subject of the decision, such as the applicant seeking the license or the individual subject to the disciplinary proceeding. The party could also be directly impacted by the decision, such as an organization directly affected by a regulator's new policy. To have personal interest standing, the applicant's interest in the matter should be distinguishable from the public at large.

On the other hand, public interest standing allows a party who does not have a special interest in the matter to nevertheless challenge the decision in court. To obtain this discretionary standing, the applicant must have a genuine interest in the matter, the issue must be justiciable, there must be a serious issue to be tried and the court must be satisfied that there is no other reasonable and effective way for the issue to be resolved. Although public interest standing is difficult to obtain, it can be helpful to challenge government decisions that would not otherwise be subject to judicial oversight.

Common barriers to watch for

Because judicial review involves the court interfering in an administrative process, there are a number of procedural barriers to consider before bringing an application. First, not all public body decisions are reviewable – if the decision is not of a sufficiently public character, or does not actually constitute an exercise of power, a court may decline jurisdiction.

In addition, judicial review is limited to the actions of decision-makers that exercise powers from the government. It cannot be used to challenge the decisions of private associations, even those whose decisions have significant public impact. Although private associations may be held accountable through the courts for their procedural choices and decisions, these cases are limited to private law remedies and assessed based on private law principles such as contract and tort.

Second, a court will generally not hear a judicial review until all alternative remedies within the administrative process are exhausted, so trying to bypass an administrative step through a court application is not likely to succeed. Courts are reluctant to interfere with an ongoing administrative proceeding, so applications for judicial review of interim decisions made by the decision-maker will likely be dismissed for prematurity.

Merits review – standards and grounds

On judicial review, the applicant has the opportunity to address the substance of the decision. There are two standards, or degrees of scrutiny, that Canadian courts apply to administrative decisions. The first is correctness review, which means that the court will conduct its own assessment of the matter, regardless of what the decision-maker decided. The second is reasonableness review, which means that the court will give a measure of "deference," or respect, to the decision-maker's outcome and reasoning. Correctness review is analogous to "de novo" review under United States federal law, while reasonableness review resembles the "arbitrary and capricious" analysis.

Unlike in the U.S., where the *Administrative Procedure Act* governs the scope and standard of federal judicial review, Canadian administrative law is governed by a common law standard of review analysis that is continually being developed in the courts. In 2019, the Supreme Court of Canada overhauled the Canadian framework for determining the correct standard of review in the *Vavilov case*.

The starting presumption is that reasonableness applies. The fact that the legislature delegated the decision to the administrative body, not the courts, means that it intended that its decisions not be interfered with unless they are unreasonable. In *Vavilov*, the Supreme Court of Canada provided new guidance on what makes a decision "reasonable."

A reasonable decision is based on an internally coherent chain of analysis; essentially, the decision-maker's reasoning must "add up." It must also be reasonable in light of the factual and legal constraints, including the governing scheme, case law, principles of statutory interpretation, evidence, submissions, past precedents and implications of the decision for the parties. Following *Vavilov*, it is anticipated that parties will have more room to argue that an administrative decision failed to abide by the applicable legal constraints, even where the standard of review requires deference.

The presumption of reasonableness can be rebutted in circumstances where the legislature has indicated that correctness applies through express statutory language or where it has enacted a right of appeal. For example, in British Columbia, the legislature has set out the applicable standards of review in legislation, which overrides the common law presumption of reasonableness. In addition, the enabling legislation for many administrative tribunals in Canada contains an avenue for appeal to a court. Where the judicial review is commenced as an appeal, the ordinarily appellate standards of review will apply – correctness for questions of law, and palpable and overriding error for factual determinations. For a summary of the appellate standards and considerations, view BLG legal primer "Bet the company appeals north of the border".

The court will also apply correctness on judicial review in a limited number of categories that raise particular rule of law concerns, including constitutional questions, general

questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. For these questions, the court will not defer to the administrative decision-maker, but will provide its own view of the correct decision. For a party seeking to overturn a negative decision, correctness review will provide the most leeway to convince the court that the decision-maker made an error, so it is important to understand and leverage these categories.

For challenges to the decision-maker's procedure, the reviewing court will apply a correctness standard to ensure that the standard of procedural fairness was met.

Remedies

If you are thinking about bringing an application for judicial review, first consider what you hope to get out of the proceeding. The usual remedy on a successful judicial review application is to quash the decision and remit it to the government body to reconsider in accordance with the court's guidance. However, following *Vavilov*, courts have a broader authority to provide a directed verdict in cases where the proper outcome is clear and it is a timely and effective resolution of the matter.

Depending on the circumstances, a party can also seek other types of relief against the government, such as a declaration of their rights or injunction restraining the conduct. Prerogative writs, including *certiorari*, prohibition and *mandamus*, are also available for public law breaches by administrative decision-makers. Important to note is that remedies on judicial review are generally discretionary. Even where the applicant makes out a case on the merits, the reviewing court has an overriding discretion to refuse relief, including based on the availability of alternative remedies and other concerns about suitability and propriety of the remedy requested.

Applicants should also keep potential cost consequences in mind – the ordinary Canadian rule that a successful litigant is entitled to its costs applies equally in applications for judicial review. However, costs are subject to the court's discretion, and parties may ask for no costs be ordered against it in matters of public interest or other novel cases.

Conclusion

When considering a challenge to government action in Canada, it is important for non-Canadians to understand the rules of the game. Key differences between the Canadian and American constitutions – especially with respect to executive power – have produced unique administrative law frameworks in each country, with the Canadian courts typically taking a more deferential approach to the decisions of governmental bodies and agencies.

However, the government is still subject to clear procedural and substantive constraints, and judicial review can be an effective way to overturn problematic decisions and policies. Understanding these administrative law rights and remedies is crucial to effectively navigating the Canadian regulatory landscape.

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