

JUDICIAL REVIEW and APPEAL CASES IN THE FEDERAL
COURTS and the DIVISIONAL COURT

FREYA KRISTJANSON
ELICHAJ SHAFFIR

Cavalluzzo, Hayes, Shilton, McIntyre & Cornish LLP

The 2010 Ontario Bar Association Institute, Administrative Law

February 16, 2010, Toronto

Judicial Review and Appeal Cases in the Federal Courts and Divisional Court¹

I. Introduction

Administrative lawyers in Ontario may participate in judicial review or appeals in either the Federal Court or Federal Court of Appeal (the “Federal Courts”) or in the Divisional Court and Court of Appeal for Ontario. It is important to understand the differences between the two systems. This paper will provide an overview of the essential elements of oral advocacy on judicial reviews and administrative law appeals, while emphasizing the distinct characteristics of the Federal Courts process in contrast to the Divisional Court process.

The Federal Court and the Federal Court of Appeal have statutory jurisdiction over certain substantive matters within the constitutional jurisdiction of the Federal government, such as navigation and shipping, intellectual property and tax. Pursuant to sections 18.1 and 28 of the *Federal Courts Act*², the Federal Court and the Federal Court of Appeal also have jurisdiction to generally review the decisions of federal boards, commissions and other tribunals exercising jurisdiction or powers conferred by or under an Act of Parliament or pursuant to a federal Crown prerogative.³ Certain matters relating to national security, defence and international relations also fall under federal jurisdiction, in accordance with the *Canada Evidence Act*⁴. Depending on the legislated assignment of jurisdiction, judicial reviews dealing with these subject matters will proceed either at the Federal Court or at the Federal Court of Appeal.

Most other administrative decisions in Ontario will proceed in Divisional Court, either by way of judicial review pursuant to the *Judicial Review Procedures Act*⁵, or on appeal pursuant to

¹ Parts of this paper are drawn from a paper by Freya Kristjanson and Noel Semple, “Judicial Review in the Federal Courts: A How-To Guide”, originally presented at the Ontario Legal Clinics Conference, February 5, 2008.

² *Federal Courts Act*, R.S. 1985, c. F-7, as am.

³ In Ontario, federal courts are located in Ottawa, Toronto, and London. Further information about contacting them can be found at http://www.cas-satj.gc.ca/offices/locations_e.php.

⁴ *Canada Evidence Act*, R.S. 1985, c. C-5, as am.

⁵ *Judicial Review Procedures Act*, R.S.O. 1990, c. J.1.

a statutory appeal provision such as section 9 of the Ontario *Securities Act*⁶. Typically, statutory provisions allowing for appeals from administrative decision-makers to the Divisional Court have limitation periods, and counsel must pay close attention to such provisions.

Typical Matters Within the Jurisdiction of the Federal Courts

Many of the tribunals which are reviewed by the Federal Court and the Federal Court of Appeal are the subject of highly specialized practice areas. General practitioners in Ontario may, however, deal with decisions from a number of federal bodies.

The Federal Court of Appeal has initial judicial review jurisdiction over matters enumerated in section 28 of the *Federal Courts Act*, including:

- Pension Appeals Board
- Umpires appointed under the *Employment Insurance Act*
- Canadian Industrial Relations Board
- Canadian Radio-television and Telecommunications Commission

Typical judicial review matters within the jurisdiction of the Federal Court include (see sections 18.1 of the *Federal Courts Act*):

- Immigration and Refugee Board (“IRB”)
- Employment Insurance Tribunals (Employment Insurance Commission and Board of Referees decisions)
- Canadian Human Rights Commission
- Canadian Human Rights Tribunal
- Adjudicators under the Unjust Dismissal Provisions of the *Canada Labour Code*
- National Parole Board
- Veterans Review and Appeal Board

⁶ *Ontario Securities Act*, R.S.O. 1990, c. S.5.

You should review sections 18.1 and 28 of the *Federal Courts Act* before commencing a federal judicial review, to ensure that you are proceeding in the proper court.

II. Procedure

1. *Federal Courts Procedure*

Applying to the Federal Courts for judicial review is different than the process followed in Divisional Court, and lawyers who generally practice in the Ontario courts must be mindful of the differences. The annual publication entitled “Federal Courts Practice”⁷ is a very useful guide, and you should refer to it if you are conducting a judicial review in the Federal Courts.

The *Federal Court Rules*⁸ are thorough and Federal Courts staff are extremely helpful and responsive to telephone inquiries. My favourite part is that Court staff call lawyers in advance to tell you what courtroom you’ll be appearing in, and the members of your panel.

Reviews of immigration and refugee decisions are governed by a distinct procedure under the *Federal Courts Immigration and Refugee Protection Rules*⁹, and are not further discussed in this paper. The chart below describes the necessary steps for judicial review of other decisions.

For Ontario lawyers, the most important difference between a judicial review brought in Divisional Court and one in Federal Court is the strict 30 day limitation period for commencing a judicial review in the Federal Courts. The general Federal Courts procedure is set out below:

⁷ Brian J. Saunders, Donald J. Rennie & Graham Garton, *Federal Courts Practice 2010* (Toronto: Carswell, 2009).

⁸ *Federal Courts Rules*, SOR/98-106, as amended.

⁹ *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22.

| Step | Applicable Forms or Rules in the <i>Federal Court Rules (FCR)</i> , or provisions in the <i>Federal Courts Act (FCA)</i> | Explanation |
|--|--|--|
| Complete the Notice of Application | Form 301 ; FCA s. 18.1(2) | Given that the notice must be served and filed “within 30 days after the time the decision or order was first communicated” to the applicant, the form should be completed without delay. |
| Payment of Fee to Registry | FCR 19; Tariff A, paragraph 1(1)(d) | Currently \$50. |
| Issuance of the Notice of Application | FCR 301 | The document must be issued by a Federal Court Administrator. Federal Court locations are available at http://www.cas-satj.gc.ca/offices/locations_e.php |
| Service of the Notice of Application | FCR 127, FCR 304(1) | The Application must be served personally not only on the respondents, but also on the tribunal, on anyone else who participated in the tribunal’s decision. Under R. 133, the Registry effects service on the Attorney-General of Canada, provided one brings 2 extra copies of the Notice when taken to get issued. R. 304(2) allows an application to the Court to resolve uncertainty regarding who is to be served. For instructions on serving the Crown, see R. 133(1). |
| File the Notice and Proof of Service | FCR 304(3) | File proof that you have completed the previous step with the Court within 10 days of doing so. This step is not necessary if the Attorney-General of Canada is the respondent as per R. 133. |
| Request for Material In Possession (optional) | FCR 317 | If necessary, you may file a request for relevant material held by the tribunal. You may do so either with the application, or later. If you do it later, it must be served on all parties. |
| Tribunal response to Request for Material | FCR 318 | Unless it objects to the request, the tribunal must produce the documents within 20 days of the previous step. If it objects, it will indicate why in writing to all parties and to the Court (R. 318(2)). The Court may then instruct the parties to make submissions regarding whether the documents should be produced (R. 318(3)), and make an order on the issue (R. 318(4)). |
| Respondent’s Notice of Appearance | FCR 305, FORM 305 - Notice of Appearance - Application | Any of the respondents served with the Notice of Application who wish to oppose the relief requested must complete, serve, and file this form within 10 days of the application. |
| Service and Filing of Applicant’s Supporting Affidavits and Documentary Exhibits | FCR 306 | Must occur within 30 days of application issuance. |

| | | |
|---|---|---|
| | | |
| Service and Filing of Respondent's Supporting Affidavits and Documentary Exhibits | FCR 307 | Must occur within 30 days of service of applicant's affidavits. |
| Cross-examinations on affidavits | FCR 308 | Unless a different time period has been set, cross-examination on affidavits must be completed by all parties within 20 days after the filing of the respondent's affidavits |
| Filing of Applicant's record | FCR 309 | Unless a different time period has been set, by 20 days after the cross-examinations the applicant must serve his or her record and file copies of it with the court. If the application is to the Federal Court, three copies must be provided, and if it's to the Federal Court of Appeal, five copies are required. For the contents of applicant's record, see R. 309(2). |
| Filing of Respondent's record | FCR 310 | Unless a different time period has been set, by 20 days after the previous step the respondent must serve his or her record and file copies of it with the court. If the application is to the Federal Court, three copies must be provided, and if it's to the Federal Court of Appeal, five copies are required. For the contents of respondent's record, see R. 310(2). |
| Additional Affidavits, Cross-Examination, or Supplementary Record materials. | FCR 312 | May only occur with leave of the court. |
| Requisition for hearing | FCR 314, FORM 314 - Requisition for Hearing - Application | Unless another deadline has been set, within 10 days after service of the respondent's record, the applicant must serve and file this form requesting a date for the oral hearing. For the required contents, see R. 314(2). |
| Pre-hearing conference | FCR 315, Rules 258 to 267 | This only occurs if the Court so orders. |
| Status review | FCR 380(2) | This occurs if 180 days elapse after issuance of the application without a Requisition for Hearing having been filed. |

Rule 302 states that, unless a court orders otherwise, a judicial review application can only be brought for one decision at a time. You must name as respondents anyone who would be “directly affected” by the order which you are seeking.¹⁰ If a relevant statute requires you to name some other entity as a respondent, you must also do so. If there is no one directly affected *and* no one required by a statute to be named, you should name the Attorney General of Canada.

With the consent of the other parties, any of the time limits described above except that for the first notice of application can be extended for one half of the prescribed period.¹¹ Each time limit can only be extended once via Rule 7. Longer extensions (or abridgements) of time can only be obtained via a motion to the Court.¹²

2. What is a Prothonotary?

Some judicial review applications may be subject to case management or other interlocutory rulings made by a “Prothonotary.” Prothonotaries are judicial officers who play a role very similar to that of a Master in the Ontario Superior Court of Justice. They may make important decisions in the course of a judicial review, such as whether to strike an application for judicial review. In a complicated case, or where the other side is not cooperating, you should consider whether you wish to apply for case management. A case management judge and case management prothonotary will be appointed. In these circumstances, the Prothonotary plays a valuable role in moving the case along.

¹⁰ *Federal Courts Rules* (SOR/98-106), R. 303(1)

¹¹ *ibid.*, Rule 7

¹² *ibid.*, Rule 8

3. Divisional Court Procedure

Procedural requirements for bringing an application for judicial review in the Divisional Court are set out primarily under Rules 38 and 68 of the Ontario *Rules of Civil Procedure*¹³ and the *Judicial Review Procedure Act*. The following chart sets out these procedural requirements:

| Step | Applicable Forms or Rules of the Ontario Rules of Civil Procedure | Explanation |
|---|---|--|
| Complete the Notice of Application | Rules 68.01, 68.03, 4.02(2)(d); Form 68A | The notice of application must state that the application is to be heard on a date to be fixed by the registrar at the place of hearing and must include the address of the court office in the place where the application is to be heard. |
| Issuance of the Notice of Application | Rules 38.05 and 14.07 | The notice of application must be issued by a court registrar. |
| Service of the Notice of Application | Rules 38.06(1), 38.06(3) and 39.01(2) | The notice of application (and affidavits on which the application is founded) must be served on all parties at least 10 days before the date of the hearing of the application. If service is to take place outside of Ontario, service must be completed at least 20 days before the hearing date. Where there is uncertainty whether anyone other than a party should be served, the applicant may make a motion without notice to a judge for an order for directions. |
| Respondent's Notice of Appearance | Rule 38.07; Form 38A | Any of the respondents served with the notice of application who wish to oppose the relief requested must deliver forthwith a notice of appearance form. |
| Affidavits in Opposition or Reply | Rules 39.01(3), 39.02(1) and 68.04(2)(c) | Affidavits in opposition or reply are to be served and filed as part of the applicant's application record. |
| Examination of a Witness before the Hearing | Rules 39.03 and 34.05 | Any party may examine a witness for the purpose of having a transcript available for use at the hearing. At least 2 days notice of the time and place of the examination must be given to the person to be examined and to all parties. |
| Cross-examination on Affidavits | Rules 39.03 and 34.05 | Any party may cross-examine on affidavits served by an opponent. At least 2 days notice of the time and place of the examination must be given to the person to |

¹³ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

| | | |
|--|-------------------------|---|
| | | be examined and to all parties. |
| Service and Filing of the Applicant's Record and Factum | Rule 68.04 | The applicant's application record and factum must be served and filed with proof of service within 30 days after the record of the proceeding under review is filed; or, where the nature of the application does not require such a record, within 30 days after the application is commenced. For the contents of the applicant's record and factum, see Rules 68.04(2) and 68.04(3). 3 copies of the application record and factum must be filed with the court, together with 3 copies of any transcript intended to be referred to (Rule 68.04(9)). |
| Service and Filing of the Respondent's Record and Factum | Rule 68.04 | The respondent's application record and factum must be served and filed with proof of service within 30 days after service of the applicant's application record and factum. For the contents of the respondent's record and factum, see Rules 68.04(5) and 68.04(6). 3 copies of the application record and factum must be filed with the court, together with 3 copies of any transcript intended to be referred to (Rule 68.04(9)). |
| Service and Filing of the Certificate of Perfection | Rule 68.05 | The applicant must file with the application record a certificate of perfection. |
| Notice of Listing for Hearing | Rule 68.05(2); Form 68B | Once the certificate of perfection has been filed, the registrar places the application on a list for hearing and gives notice of the listing for hearing by mail to the parties and the other persons named in the certificate of perfection. |

It should be noted that the procedure for bringing appeals in both the Divisional Court and the Court of Appeal is different than the procedure for bringing a judicial review. For appeals, Rule 61 of the *Rules of Civil Procedure* should be consulted. Particularly noteworthy is Rule 61.04 which requires that an appeal be commenced within 30 days from the making of the order appealed from, unless a statute provides otherwise. No such time limit is prescribed for a judicial review application, but such an application may be dismissed for delay.

III. Substance

Often, judicial review will be sought due to an alleged denial of procedural fairness by the administrative decision-maker. In such cases, the controversy generally does not pertain to the substance of the decision, but rather to the process the tribunal used in reaching it or the way it treated the individual during the process. There are two main areas of procedural fairness: the right to a hearing (which raises issues such as notice, disclosure, right to counsel, conduct of oral hearings and reasons), and the rule against bias (which raises issues such as tribunal independence, impartiality and reasonable apprehension of bias) For a court conducting judicial review, determining the content of procedural fairness applicable in the circumstances can be a complex and challenging task.

It is important to note that federal administrative agencies are not subject to a general procedural code such as Ontario's *Statutory Powers and Procedure Act*.¹⁴ Thus, the common law interpretation of procedural fairness requirements is critical in the Federal Courts.

Once the content of the duty of fairness applicable in the circumstances is identified, judicial deference is not generally afforded. In other words, if you can convince the court that a duty of procedural fairness was breached by the tribunal, you do not have to conduct a standard of review analysis.

In the case of substantive review, counsel will have to undertake a "standard of review analysis." There are differences between the standard of review analysis in Divisional Court and in the Federal Courts.

Section 18.1 of the *Federal Courts Act* applies to federal judicial reviews, and reference should be made to that section in your submissions. In particular, s. 18.1(4) lays out the "grounds of review," a list of findings which are a legitimate basis for the court to overturn an administrative decision. For example, s. 18.1(4)(d) allows interference if the tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner

¹⁴ R.S.O. 1990, c. S.22.

or without regard for the material before it.” The Supreme Court of Canada in *Khosa*¹⁵ has considered the relevance of the statutory standard set out in section 18.1 of the Federal Courts Act, and lawyers arguing judicial reviews in the Federal Courts should review *Khosa* in addition to *Dunsmuir*¹⁶.

IV. Practice Points: Oral Advocacy on JR’s and Appeals

- **Preparation:** Preparation is the key to effective appellate advocacy. If you worked hard on your factum – work twice as hard on your oral argument. Your factum may be 30 pages long, but you will likely have only a few hours for argument. Make those hours count.
- You must have a complete grasp of the record – names, dates, who said what, what the tribunal held. Don’t misstate, and be ready to jump to the appropriate place in the record when a question arises. This is because oral argument rarely unfolds as you anticipate, with a silent court, hanging onto your carefully crafted pearls of wisdom. Rather, on a lucky day, you’re peppered with questions. You should be able to make the same points in response to questions as you would if you followed your outline, as long as you have a superb grasp of the facts and the law. If you are well-prepared, you will not be thrown off track. This dialogue with the bench is my favourite part of oral advocacy, but you have to be prepared.
- **Overview Statement:** The overview statement is absolutely critical in setting the tone for your hearing. The panel will be waiting to hear what you identify as the heart of your case. They will write down your opening words, and expect you to deliver on the promise. The overview provides the context, and it provides the road map. “This case is about (x). It was UNREASONABLE (use your standard) for the tribunal to conclude (y). The Tribunal reached this result by (cite the errors). I will address four points in this

¹⁵ *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

¹⁶ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

argument. They are, first (list each point –one sentence or less).” Then, as you go through the argument, make sure to use transition phrases. (“Turning then, to my second point – the standard of review. I submit...”)

- Don’t blow the opportunity to make a good impression. Start with an evocative summary demonstrating that your case is interesting, and the justice of a decision in your client’s favour. Judges want to mete out justice – give them the chance. Identify the key issue. Tell the court your position, and why your position is the one that is most compelling in the circumstances.
- Write out your overview: Your opening statement is critical. It must be well-crafted. You should write it out so you don’t miss anything. It must be concise, so each word counts. Work on your phrasing. Don’t be overly legalistic – be natural, accessible, understandable.
- Structure your argument: Be selective in the issues, facts and law you choose to rely on in oral argument. Make sure your argument flows. You must advance your points in such a manner that the argument has a coherent structure (and one consistent with what you told the judges you would cover.) It is interesting how often the presentation of oral argument doesn’t mirror the structure of your written factum – what seemed logically sequential on paper doesn’t follow orally. So don’t be afraid to move around the portions of your argument, but be prepared to tell the judges where you are in your factum.
- Relying on your factum: Sometimes, that great fourth point in the factum seems irrelevant six months later....so don’t waste your time on it. Tell the court you’ll be addressing three points in your oral argument. At the end, tell them that you’re relying on your factum for point #4. Judges would much rather you spend time on the key, relevant issues. Do not read your factum.
- Assume that judges have read your factum. Assume that they may be generally familiar with the issues of law, but less familiar with the facts of your particular case, or how the law applies to the facts.

- Spend time reviewing the statutory scheme, which is often critical in administrative law cases.
- Gauge the court's knowledge of the law of the standard of review to determine how much time you should spend addressing this issue.
- If you are arguing in the Federal Courts, you should be aware that the Federal Courts are less willing than the Ontario courts to consider cases that emerge in other courts. They are more self-referential than the Ontario courts.
- Don't commence your argument with a long recitation of the facts. Rather – make sure that the facts are addressed in the context of the legal issues and arguments. This is more interesting for counsel and court alike.
- If you are the applicant, don't just argue as if the respondent had never filed a factum and will not be appearing. Rather, address the respondent's arguments head on. State the respondent's arguments fairly, respond to them, and undermine them in so doing. Do not set up straw men (or women); don't waste your time on issues that are not relevant.
- If there are problems with your argument, don't ignore the problems. Think about how to deal with the problems, since either the court or the other side will find them and probe them. Make concessions reasonably and responsibly. Have direct answers prepared to the toughest questions.
- It is much more difficult to act as the respondent. You have to modify your arguments on the fly in light of the questions posed by the court and the applicant's submissions. You must truly respond – you will not be sticking with the script as closely as an applicant might. If you are a respondent and the applicant has cleverly misstated your argument, then don't let the applicant get away with it. Make sure the court understands your position. Politely indicate that applicant's counsel said x, but in fact your position is y. Don't let the applicant frame the debate unfairly. They get the first chance, but you don't have to give in.

- Anticipate questions: If a judge asks a question – answer it. Listen to the question. Take a moment to think. And answer what was asked, directly and succinctly. Don't defer your answer if you can possibly avoid it. Judges do not like it when you say "I'll be coming to that point shortly." The reason they asked the question is that this is an issue of concern to them now. You may well lose their attention if you don't respond now. If you realize later in your argument that your answer could have been better, then don't be afraid to return to the question and supplement your answer.
- Answer with FACTS when possible – make use of the specific evidence/record in this case, rather than legal generalities. This is where your superb grasp of the record due to your preparation is most helpful. As counsel, you can be of greatest assistance to the court by grounding your submissions in the facts. Most judges generally know the legal principles at play, but will not understand the record as thoroughly as you do.
- When referring to case law, avoid reading long extracts. Summarize the legal principles in your own words, and refer the judges to the relevant portions from the cases you are relying upon.
- Question that shows a judge is lost at sea: This is worrisome. A question may reveal that a judge does not understand the issue, the statutory scheme, or the decision below. This is your chance for a bit of remedial education – take your time to correct such misapprehensions.
- Hostile questions: You should answer the question, directly, and give it your best shot. At some point, however, it will be obvious to you that you have no more ammunition, and you will not be able to satisfy the judge on a particular point. Don't forget – you're likely before a panel of three – don't give up hope. More importantly – time is wasting, you should move on, politely.
- On a judicial review or appeal of an administrative decision, you must be respectful of the tribunal below while pointing out the errors. Generally, a court will find it hard to believe that a tribunal has made more than three reversible errors – so don't push it. Do not misrepresent what the tribunal below did or considered.

- In closing, tell the Court that you are relying on your factum for the points you have not made orally. Tell the Court that these are your submissions, if there are no further questions. Then sit down, shut up, and hope for the best.
- Reply: Take advantage of the opportunity because it gives you the last say. A good rule of thumb, however, is to limit yourself to 5 minutes unless your case is overly complicated.
- If you are arguing in the Divisional Court, be ready to deal with costs at the end of argument. Also note that in the Divisional Court the applicant is positioned on the right side of the court.
- Dealing with client expectations: Don't overpromise. Don't disparage the judges, ever. Give your clients confidence that they will get justice from the court. When it is over, tell them that it was a good hearing, a fair hearing, and identify your concerns if appropriate.
- When acting for the applicant you must explain to your clients, in advance, the significance of the standard of review. That is, a court may find that some errors were made, but that at the end of the day, the court may hold that it was not unreasonable for a tribunal to find as it did. You must also explain the limited nature of most judicial remedies available on judicial review – courts will generally remit the matter to the administrative decision-maker for another decision.
- You must always be respectful of the court, opposing counsel, and the administrative decision-maker under review.
- Above all – have fun, be passionate and creative, and enjoy your role in the maintenance of the rule of law in our system of justice.

Freya Kristjanson – fkristjanson@cavalluzzo.com

Elichai Shaffir – eshaffir@cavalluzzo.com