Some Judicial Discretions in Judicial Review Proceedings

Produced for the CIAJ Judicial Seminar,
"Judicial Review and Judicial Discretion" on June 8, 2006

David Stratas, Heenan Blaikie LLP
dstratas@heenan.ca – (416) 643-6846 – (416) 360-8425 (fax)

***

This document is accessible at http://www.davidstratas.com/adminjun8.html. Most of the cases listed are linked to full text copies of the cases online, primarily at http://www.canlii.org or official court websites. This document may be amended from time to time, so please feel free to visit often.

At present, this document deals only with topics that I am presenting at the seminar. One important discretion not examined here is the discretion not to hear a case on account of relitigation concerns (issue estoppel, collateral attack) or the applicant's failure to exhaust administrative avenues of relief.

The cases listed are not meant to be anywhere near exhaustive of the case law on point. I have listed key cases, i.e., cases that set out the foundational principles for the topic, and some recent cases that contain rich discussions of the topic or that are themselves good repositories of relevant case law.

***

Standing and parties

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236

Vriend v. Alberta, [1998] 1 S.C.R. 493

Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157

York Advertising Ltd. et al. v. Human Rights Commission (Ont.) et al. (2005), 197 O.A.C. 185 (Div. Ct.) (standing to apply for judicial review; non-party before tribunal permitted to apply given significant impact of the decision on that individual)

Partridge v. Technical Standards and Safety Authority (2005), 195 O.A.C. 71 (Div. Ct.) (affected parties should have been added as respondents in judicial review)

Citizens Mining Council of Newfoundland & Labrador Inc. v. Canada (Minister of the Environment) (1999), 163 F.T.R. 36 (Fed. T.D.)

Harris v. Canada, [2000] 4 F.C. 37 (F.C.A.)

Violette v. New Brunswick Dental Society (2004), 267 N.B.R. (2d) 205 (N.B.C.A.) (A party who abandons the right to participate in a tribunal hearing does not entirely waive the right to challenge the tribunal's decision, either on its merits or with respect to issues that could have been raised during the proceedings)

H.E.U. v. Northern Health Authority (2003), 2 Admin. L.R. (4th) 99 (B.C.S.C.) (union had standing to challenge provincial government's delegation to a subordinate authority; although not directly affected, union given public interest standing because otherwise the government's action would be immune from challenge)

Nunavut Territory (Attorney General) v. Canada (Attorney General) (2005), 23 Admin. L.R. (4th) 288 (F.C.) (No standing for territorial government to challenge Minister of Fisheries decision regarding allocation of total allowable catch; interest "indirect" and another party was better suited to challenge the decision)

Bell Canada v. Allstream Corp. (2004), 21 Admin. L.R. (4th) 222 (F.C.A.) (no standing to invoke procedural fairness of others [Bell's customers])

Tribunal participation in the judicial review

Northwestern Utilities Ltd. v. Edmonton (City), [1979] 1 S.C.R. 684 (No tribunal is entitled to make submissions aimed at bolstering reasons that are otherwise materially deficient. Bootstrapping is not to be tolerated. Tribunals may not make submissions that address the merits of the case.)

Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983 (tribunal can demonstrate its decision is not patently unreasonable)

Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd., [2000] F.C.J. No. 220 (C.A.)

Quebec (Commission des affaires sociales) v. Daigle, [1992] 1 S.C.R. 952

Ellis-Don Ltd. v. Ontario (Labour Relations Board), [2001] 1 S.C.R. 221

United Brotherhood of Carpenters and Joiners of America Local 1368 v. Bransen Construction Ltd. et al. (2002), 249 N.B.R. (2d) 93 (N.B.C.A.)

Children's Lawyer for Ontario v. Goodis (2005), 75 O.R. (3d) 309 (C.A.)

Telus Communications Inc. v. Telecommunications Workers Union (2005), 257 D.L.R. (4th) 19 (F.C.A.) at para. 108 (no standing of tribunal to speak to issue of bias)

Chrétien v. Canada (Attorney General) (2005), 29 Admin. L.R. (4th) 195 (T.D.) (Commissioner granted leave to intervene on the issue of the scope and mandate of the commission as set out in the terms of reference and jurisdiction; permitted to bring an appeal if A.G. Can. did not because of the public interest in favour of a final resolution; no standing to make submissions on issues of bias because submissions would not be helpful to the court and would be solely self-interested)

Genex Communications Inc. v. Canada (A.G.), 2005 FCA 283 (F.C.A.) (CRTC's interventions limited to objective description of jurisdiction, regulatory framework, procedure, licence renewal application proceeding)

Lang v. British Columbia (Superintendent of Motor Vehicles), 2005 BCCA 244 (B.C.C.A.) (While the line between arguing the merits and explaining the record is somewhat blurry when the test is patent unreasonableness, there remains a boundary which must be observed.)

Bransen Construction Ltd. v. C.J.A., Local 1386 (2002), 39 Admin L.R. 1 (N.B.C.A.) (the true issue is whether the tribunal seeking intervener status has something to contribute beyond that expected of the parties; if so, there is no problem with the tribunal addressing the merits in written submissions; Oral submissions that respond only to questions posed by the reviewing court, or are of brief duration, qualify as non-aggressive participation that respect the principle of impartiality; but there are limits: tribunal cannot make submissions designed to supplement tribunal's reasons for judgment)

Interveners

For example: *Rules of Civil Procedure (Ontario)*, Rule 13; *Federal Court Rules*, Rule 109; *Rules of the Supreme Court of Canada*, SOR/83-74, Rule 18 and Practice Direction

Bransen Construction Ltd. v. C.J.A., Local 1386 (2002), 39 Admin L.R. 1 (N.B.C.A.) (Tribunals as interveners) ("The jurisprudence does not offer bright line tests for deciding whether to grant a tribunal intervener status. But there are certain obvious guidelines. The tribunal must persuade the court that: the case is of precedential significance; the tribunal can contribute to the proceedings in a manner not reasonably expected of the parties; and the principle of impartiality can and will be respected.")

Ferguson Bus Lines Ltd. v. Amalgamated Transit Union, Local 1374, [1990] 2 F.C. 586 at 590 (F.C.A.) ("A tribunal that seeks intervener status with "monotonous regularity" will soon realize that it lacks credibility before the courts.")

Canadian Council of Professional Engineers v. Memorial University of Newfoundland (1998), 135 F.T.R. 211 (T.D.)

Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929 (interveners cannot be used to try to bolster a party's suspect standing)

Lang v. British Columbia (Superintendent of Motor Vehicles) (2005), 28 Admin. L.R. (4th) 299 (B.C.C.A.) (Attorney General may speak for government to advance the public interest or on behalf of the tribunal where the tribunal does not appear)

Discretionary stays of tribunal decisions pending judicial review

Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110

RJR - MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311

143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General), [1994] 2 S.C.R. 339

Harper v. Canada (Attorney General), [2000] 2 S.C.R. 764

Discretion to dismiss judicial review on the basis of delay / laches

M.(K.) v. M.(H.), [1992] 3 S.C.R. 6 (Mere delay is insufficient to trigger the doctrine of laches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine).

Remo Imports Ltd. v. Jaguar Canada Ltd., 2005 FC 870 (The doctrine of laches does not apply when there is a statutory limitation period and a person asserts his or her right within that timeframe). However, see *J.L.O. Ranch v. Logan Estate* (1987), Alta. L.R. (2d) 130 (Q.B.) (where the statute providing for limitation period permits the operation of equity, the doctrine of laches may apply despite the limitation not having expired).

Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327 (The doctrine of laches does not apply in the context of constitutional division of powers)

Ontario Conference of Judges v. Ontario (Chair, Management Board) (2005), 71 O.R. (3d) 528 (Div. Ct.) (dismissal of judicial review for delay [among other things])

Langley (Township) v. Wood, 1999 BCCA 260 (B.C.C.A.) (As a general rule, municipal rights, duties and powers, including the duty to carry out the provisions of a statute, are of such public nature that they cannot be waived, lost or vitiated by mere acquiescence or laches).

Zaki v. Ottawa Hospital (General Campus) (2003), 169 O.A.C. 255 (S.C.J.) (application for judicial review dismissed for excessive delay).

Becker v. City Park Co-operative Apartments Inc. (2005), 193 O.A.C. 52 (Div. Ct.) (judicial review quashed because there was an adequate alternative remedy)

Ontario Conference of Judges v. Ontario (Chair, Management Board) (2005), 71 O.R. (3d) 528 (Div. Ct.) (dismissal of judicial review for delay; dismissal for failure to exhaust internal remedies)

Syndicat des employés de la function publique de l'Ontario et al. v. Collège des Grands Lacs et al. (2005), 200 O.A.C. 101 (Div. Ct.) (dismissal of judicial review for delay)

Discretion to dismiss on the basis of mootness or prematurity

Solosky v. The Queen, [1980] 1 S.C.R. 821

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46

M. v. H., [1999] 2 S.C.R. 3

Sommers v. Ontario Civilian Commission on Police Services, unreported, Ont. Div. Ct., May 10, 2005 (good discussion of prematurity and mootness)

Duffin Capital Corp. v. Ontario (Minister of Municipal Affairs and Housing) (2005), 198 O.A.C. 192 (Div. Ct.) (judicial review dismissed for prematurity)

Nunavut Territory (Attorney General) v. Canada (Attorney General) (2005), 23 Admin. L.R. (4th) 288 (F.C.) (Challenge to Minister's decision regarding the allocation of "total allowable catch" for a season that had passed was not moot: the underlying principles continued to be in contention and they would govern exercises of discretion in future years).

Harquail v. Canada (Public Service Commission) (2004), 20 Admin. L.R. (4th) 266 (F.C.) (judicial review of denial of unpaid leave requested for the purposes of running for Parliament; election passed and thus moot; a case that is of recurring nature but evasive of review may be heard in the discretion of the court)

Thamotharampillai v. Canada (Solicitor General) (2006), 37 Admin. L.R. (4th) 1 (F.C.) (application for judicial review of removal order moot after applicant's request for stay of order denied and applicant deported)

Judicial Euthanasia – Discretion to quash proceedings with no hope of success

York Regional Police (Chief of Police) v. Ontario Civilian Commission on Police Services, 2005 CanLII 1415 (Ont. Div. Ct.) (whether the rules provide for it or not, it may be possible for a party to quash a judicial review that has no hope of success)

David Bull Laboratories (Canada) Inc. v. Pharmacia Inc., [1995] 1 F.C. 588 (C.A.) (quashing is available in Federal Court despite the absence of a specific rule permitting it)

Discretion to refer the matter to Federal Court

Reza v. Canada, [1994] 2 S.C.R. 394

Ahani v. Canada (Attorney General) (2002), 208 D.L.R. (4th) 66 (Ont. C.A.)

May v. Ferndale Institution, [2005] 3 S.C.R. 809

Discretion to stay a judicial review that is related to other proceedings

Nash et al. v. The Queen in Right of Ontario (1995), 27 O.R. (3d) 1 (C.A.)

Schreiber v. Canada (Attorney General) and The Federal Republic of Germany (2000), 48 O.R. (3d) 521 (S.C.J.), rev'd (2001), 57 O.R. (3d) 316 (C.A.)

Pearson v. Canada, [1999] F.C.J. No. 1298 (T.D.)

Discretion to consider new issues in the judicial review (issues that were not before the tribunal)

Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., [2002] 1 S.C.R. 678 at paras. 32-34

Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board (2005), 200 O.A.C. 209 (C.A.) (reviewing court dismisses bias objection that was not raised before the tribunal)

Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General), [2005] 1 S.C.R. 257 at paras. 38-40 (general rule against raising constitutional issues in a judicial review or in another court proceeding when those issues could have been raised in a tribunal that had jurisdiction to deal with them)

Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504 (jurisdiction to consider Charter and other constitutional issues and make findings that legislation is invalid)

R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575 (jurisdiction to consider Charter issues and grant s. 24(1) Charter remedies)

Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 (a court order that infringes the constitution is reviewable on the basis of correctness)

Discretion re admissibility of evidence on judicial review

Re Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd. (1980), 114 D.L.R. (3d) 162 (Ont. C.A.) (classic authority on admissibility of evidence evidence [other than the tribunal record] in judicial review proceedings)

AOV Adults Only Video Ltd. v. Manitoba Labour Board, (2003), 228 D.L.R. (4th) 656 (Man. C.A.) (good review of the law concerning the admissibility of evidence [other than the tribunal record] in judicial review proceedings)

Ontario Secondary School Teachers' Federation v. Thames Valley District School Board, 2004 CanLII 42939 (Ont. Div. Ct.)

Newfoundland (Treasury Board) v. N.A.P.E. (2005), 241 Nfld. & P.E.I.R. 13 (Nfld. C.A.) (definition of record; description of what additional material may be added to judicial review, i.e. where there is alleged reviewable error and the record does not show the basis of the error, or where rules of natural justice have been breached)

Gitxsan Treaty Society v. Hospital Employees' Union, [2000] 1 F.C. 135 at 143 (C.A.) (in circumstances where the only way "to get at the want of jurisdiction is by the bringing of such new evidence before the reviewing Court" extrinsic evidence may be admissible)

Omar v. Canada (Solicitor General) (2004), 23 Admin. L.R. (4th) 56 (F.C.) (new evidence of a serious apprehension of harm to life or health arising as a result of a removal order was admitted for the purposes of a stay motion, even though the proceedings leading up to the removal order did not show such a threat)

Provincial Court Judges Association (New Brunswick) v. New Brunswick (Minister of Justice), [2005] 2 S.C.R. 286 (affidavits showing that the government was taking salary commission's recommendations seriously were admitted)

C.J.A., Local 1985 v. Grah Construction & Engineering Ltd. (2006), 36 Admin L.R. (4th) 302 (Sask. Q.B.) (voluminous transcripts and exhibits need not be filed as part of the record, unless necessary; court may relieve against obligation to file the entire record)

Severance of Issues

K.(B.) v. Franklin (2003), 16 Admin. L.R. (4th) 228 (Ont. Div. Ct.) (may be done as a matter of discretion in the interests of judicial economy)

Confidentiality Orders

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522

Discretion to convert application to action

Del Zotto v. Canada, [1995] F.C.J. No. 1359

Tihomirovs v. Canada (Minister of Citizenship & Immigration) (2006), 31 Admin. L.R. (4th) 265 (F.C.) (conversion to action permitted so proceeding could go forward as a class action)

Discretion to consider judicial reviews from interlocutory tribunal decisions

Schilthuis v. College of Veterinarians of Ontario, 2005 CanLII 1083 (Ont. Div. Ct.) at para. 9 (rarely permitted; there are very limited exceptions)

College of Physicians and Surgeons of Ontario v. Shiu-Yuen, 2005 CanLII 2037 (Ont. Div. Ct.) (review allowed; exceptional circumstances)

Bouliane c. Québec (Ministre de la Sécurité publique) (2004), 17 Admin. L.R. (4th) 250 (Qué. C.A.) (except in extraordinary circumstances, use of judicial review against interlocutory decisions must be avoided)

Discretions concerning prohibition

Schilthuis v. College of Veterinarians of Ontario, 2005 CanLII 1083 (Ont. Div. Ct.) at para. 9 ("It would not be appropriate for this court to intervene to prevent an administrative body from proceeding with a hearing, in the absence of such unfairness that the damage to the public interest in proceeding would exceed the harm to the public in the enforcement of the legislation if the proceedings were halted. Such an order would not be appropriate unless allowing the hearing to proceed would violate 'fundamental principles of fundamental justice which underlie the community's sense of fair play and decency', or where the proceedings are 'oppressive or vexatious'.)

Quebec (Commission des relations ouvrieres) v. Alliance des professeurs catholiques de Montreal, [1953] 2 S.C.R. 140 (prohibition is available where the decision-maker commences or continues proceedings which are contrary to the rules of procedural fairness or natural justice)

Bachinsky v. Sawyer, [1974] 1 W.W.R. 295 (Alta. Q.B.) (the remedy is available where proceedings are tainted by a reasonable apprehension of bias or lack of independence)

Lilly v. Gairdner (1973), 2 O.R. (2d) 74 (Div. Ct.) (in procedural fairness cases, the court may postpone an assessment of whether a reviewable error has occurred until it has the benefit of the perspectives provided by the record of the completed proceedings

R. v. Jones (1974), 2 O.R. (2d) 741 (C.A.), leave to appeal to S.C.C. refused at 741n (S.C.C.) (prohibition is not available in order to restrain expected or anticipated errors of law by a decision-maker)

Woolworth Canada Inc. v. Newfoundland (Human Rights Commission) (1995), 35 Admin. L.R. (2d) 264 (Nfld. C.A.) (prohibition is not available as a surrogate for the decision-maker's task of assessing the facts and applying the law to the facts as found)

Misra v. College of Physicians & Surgeons (Saskatchewan) (1988), 52 D.L.R. (4th) 477 (Sask. C.A.), leave to appeal to S.C.C. granted (1989), 79 Sask. R. 80n (S.C.C.), appeal to S.C.C. discontinued January 27, 1992 (the court has a responsibility to save affected parties and the decision-maker from the continuation of a process that may be fatally flawed)

Howe v. Institute of Chartered Accountants (Ontario) (1994), 19 O.R. (3d) 483 (C.A.), leave to appeal to S.C.C. refused (1995), 21 O.R. (3d) xvi (S.C.C.) (if the decision-maker has the legal capacity to consider challenges to its jurisdiction or to determine the extent of procedural entitlements, the courts should generally refrain from entertaining an application for prohibition until the tribunal either declines to consider the matter or actually deals with it)

St. John's (City) v. St. John's Development Corp. (1986), 19 Admin. L.R. 1 (Nfld. T.D.) (if the decision-maker deals with a challenge to its jurisdiction as a preliminary matter and resolves the issue in favour of jurisdiction, applying for prohibition is generally appropriate at that point)

Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System) (1997), 142 D.L.R. (4th) 237 (Fed. C.A.), aff'd (1997), 151 D.L.R. (4th) 1 (S.C.C.) (even where a decision-maker resolves a preliminary jurisdiction issue in its favour, the court may be reluctant to intervene on the basis of an application for prohibition unless there is an obvious excess of jurisdiction or an actual flagrant breach of the rules of natural justice)

Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare), [1998] 2 S.C.R. 193 (the accrual of jurisdiction or authority between the date an application for prohibition is filed and the date the application is heard may defeat the claim for prohibition)

Stearns v. Alberta Insurance Council, [2001] A.J. No. 1152 (Alta. Q.B.) (prohibition granted in circumstances of extreme delay by tribunal, substantial prejudice to ability of party to participate in the tribunal's hearing and severe prejudice to practical, non-legal interests of the party arising from delay)

Tribunal disclosure obligations on judicial review; production orders; subpoenas

From third parties – for example: *Ontario Rules of Civil Procedure*, Rules 34, 39 and 53; *Federal Court Rules*, 41, 91, 317

Consortium Developments (Clearwater) Ltd. v. Sarnia (City), [1998] 3 S.C.R. 3

Remedial discretions (additional terms in orders, damage awards, structural injunctions, costs)

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3 (ongoing supervision as a possible 24(1) remedy in constitutional cases)

Centre Académique de Lanaudière c. Québec (Ministre de l'Education), 35 Admin. L.R. (3d) 30 (C.S. Qué.) (discretionary nature of *mandamus*; when a Minister will be forced to make a grant: bad faith or arbitrariness is necessary)

Mah v. Manitoba (Director of Parks & Natural Areas, Department of Natural Resources) (2002), 49 Admin. L.R. (3d) 251 (Man. Q.B.) (discretionary nature of mandamus; good catalogue of factors that could come to bear in granting or refusing *mandamus*)

Bell Canada v. Allstream Corp. (2004), 21 Admin. L.R. (4th) 222 (F.C.A.) (need to raise procedural grounds at the earliest possible opportunity; *semble*, a recognition of procedural unfairness but a refusal to grant relief?)

H.E.U. v. Northern Health Authority (2003), 2 Admin L.R. (4th) 99 (B.C.S.C.) (discretion not to grant any remedy, in this case declaration; reasons were sufficient; practical difficulties and, in the circumstances, uncertainties would be injected into health care system)

Little Sisters Book and Art Emporium *v.* Canada (Minister of Justice), [2000] 2 S.C.R. 1120 (discretion not to grant any remedy; at para. 158: "A more structured s. 24(1) remedy might well be helpful but it would serve the interests of none of the parties for this Court to issue a formal declaratory order based on six-year-old evidence supplemented by conflicting oral submissions and speculation on the current state of affairs. The views of the Court on the merits of the appellants' complaints as the situation stood at the end of 1994 are recorded in these reasons.")

British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371 (power to award interim costs) (the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; the claim to be adjudicated is *prima facie* meritorious; and the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases)

Pottie v. Nova Scotia Real Estate Commission (2005), 37 Admin. L.R. 131 (N.S.S.C.) (inadequate reasons; redetermination required, with additional submissions and new evidence provided if the parties so wish)

Provincial Dental Board of Nova Scotia v. Dr. Clive Creager, 2005 NSCA 9 (remitted back so the tribunal can write proper reasons; the Board can reopen its proceedings if it wishes to engage in a reconsideration)

Dhahbi v. Canada (Minister of Citizenship and Immigration) (2006), 31 Admin. L.R. 38 (F.C.) (adjournment of six months for hearing of application for mandamus on account of delay; the respondent had established a reason for the delay but court did not want to dismiss application, forcing applicant to relaunch proceedings if respondent did delay unduly)

Writing reasons supporting an exercise of discretion

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

R. v. Sheppard, [2002] 1 S.C.R. 869; *R. v. Braich*, [2002] 1 S.C.R. 903

Housen v. Nikolaisen, [2002] 2 S.C.R. 235

H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401