

JUDICIAL REVIEW IN SASKATCHEWAN

by Anne M. Wallace and Shelley L. Joyce
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I. INTRODUCTION

The rules of procedure for judicial review applications in Saskatchewan are found in Part 52 of the Queen's Bench Rules: Rules 664 to 676 inclusive. Part 52 was new to the Rules in 1983 and resulted in some significant changes to the procedures for judicial review in our province. Now, both prerogative remedies and private law remedies are available in a single summary proceeding.

Saskatchewan legislation does not codify the available grounds for judicial review. We must look to the common law for assistance with respect to proper grounds, scope of remedies and standing requirements.

This paper provides an overview or "checklist" of things to consider when undertaking a judicial review application, including the procedures to be followed.

II. PRACTICE NOTES FOR JUDICIAL REVIEW APPLICATIONS

A. Privative Clauses

Before you begin preparing a judicial review application it is essential that you examine the statute which governs the particular board or administrative agency from which you have received a decision. The relevant legislation may well contain a privative clause that will protect the decision from review even where there is an error of law as long as the decision-maker was within its jurisdiction in making its decision. If the legislation does contain a privative clause, you will want to determine its scope and then determine whether you have grounds for judicial review.

B. Standing

A judicial review application may be made by any person having such interest as the court considers sufficient in the matter to which the application relates. In any event, an application may be made or continued with the fiat or consent of the provincial Attorney-General, with a copy of such consent being filed and served on every party to the proceedings [Rule 665].

C. Commencing the Proceedings

Applications for judicial review may be commenced by Notice of Motion. Form 47 in the Rules provides a precedent for the basic Notice of Motion. In general, every Notice of Motion must set out the precise relief sought, the grounds to be argued, including any statutory provisions and Rules of Court, and a list of the documentary evidence to be used at the hearing of the motion [Rule 441B].

The Rules dealing specifically with judicial review applications require that every application state the grounds on which it is made and the relief sought [Rule 664(1),(3)].

In the style of cause, the person making the application is to be shown as the only applicant, while any two or more persons, who acting together exercise power under a collective title, may be named as respondent [Rule 666].

D. The Record

On an application for certiorari or to quash proceedings, the Rules provide for a specific notice that must be served on the board or agency whose decision is the subject of the review. The precise language of this notice is set out in Rule 669(1).

The notice required the tribunal to return to the Court the conviction, order, decision, and the reasons therefore, together with the process commencing the proceedings and the warrant, if any. These documents are deemed to be part of the record for purposes of judicial review [669(2)].

The record has been held to include parts of documents which were incorporated by reference in the board's award. This does not include a minority dissenting opinion (see *Yorkton Credit Union Ltd. v. Sask. Joint Board, R.W.D.S.U.* (1987), 61 Sask. R. 96 (Q.B.)).

Compliance with Rule 669 is a condition precedent to the Court entering upon a determination of the issues. Until a proper return containing the record is made to the Court, the Court is not in a position to hear the application or make any decision. As such it is prudent to search the court file before the return date of the application to be certain the proper return has been filed.

E. Timeliness of the Application

Subrules 675(1) and (2) provide that subject to any statutory limitations with respect to time for applications, where there has been undue delay in making an application the court may refuse to grant any relief sought if the order would be likely to cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration. Notwithstanding that, no application for certiorari may be made after the expiration of six months from the date of the judgment or decision without leave of the court.

You should be aware of two decisions of the Saskatchewan Court of Appeal holding that Rule 675 is *ultra vires* the rule-making powers of the Court of Queen's Bench. In *Bassett v. Government of Canada* (1987), 53 Sask.R. 81 (C.A.) the court explained that Rule 675 derived from the Crown Practice Rules, which derived from *The Laws Continuance Act of 1740*, 13 Geo. II, c.18 (U.K.). The Act set the time limit of six months, which Rule 675 attempts to alter by extending the time for the application with leave of the court. The Court of Appeal held that the Queen's Bench Court does not have the power to make rules that are substantive in nature, such as a limitation period. As a result the Court of Appeal held that Rule 675(2) is *ultra vires* in so far as it purports to extend the time limit for a judicial review application.

In the second decision the Court of Appeal held that to the extent that Rule 675 exceeded the scope of its original statutory base and depends on the court's common law power to make rules it is *ultra vires* (see *Ostrowski v. Beef Stabilization Board* (1993), 109 Sask.R. 40).

In any event if the certiorari application is brought to quash judgments based on a jurisdictional defect, the application may be brought without reference to time limits at all, though each case will be considered on its merits and any unexplained delay may be fatal to your application.

F. Parties

Any person who desires to be heard in opposition to or in support of the application, and who the court considers to have sufficient interest, may be heard with leave of the court, notwithstanding that the person was not named or served as a party [Rule 672].

With leave of the court a party may be substituted or added at any stage of the proceedings [Rule 670(1)].

In either case a Notice of Motion with supporting material should be filed.

G. Requirements for Service and Filing

i. Service

The general requirements with respect to service, be it by registered mail, personal service or fax are set out in Part 3 of the Rules. You should note that there must be at least three days between the service of a Notice of Motion and the return date on which the hearing will be held [Rule 447].

Each person interested or likely to be affected by the judicial review application shall be served with the Notice of Motion and supporting materials. The provincial Attorney-General must be served in any case where he or she would appear to have an interest [Rule 667(1),(2)].

There is no corresponding requirement that the respondent serve opposing counsel with its materials (see *Tataryn v. Bobowski* (1990), 87 Sask.R. 225 (Q.B.)); however, as a matter of professional courtesy, and to avoid delays as a result of adjournments that would inevitably be requested and granted if opposing counsel is not prepared to deal with matters about which she or he had no previous notice, it is advisable that the respondent also serve copies of all materials in advance of the hearing date.

Where the provincial Attorney General is served with the application, service may be made by registered mail with post office acknowledgment of receipt card or by certified mail [Rule 667(2)].

ii. Filing

Generally speaking, the deadline for filing materials to be used in a Chambers application requires one full, "clear" day between the day of filing and the return date of the application; i.e. the deadline for filing materials for a return date in Chambers of 10:00 a.m. Wednesday is 4:00 p.m. Monday. Weekend days do not count in the calculation of the clear day between the date of filing and the return date; therefore for Chambers at 10:00 a.m. Monday the filing deadline is 4:00 p.m. on the previous Thursday [Rule 465]. Rule 465 sets out the precise days and times for filing for all of the possible return days for chambers applications.

An addition to the Rules in 1993 requires that where any brief or submission is filed with the court, a copy of the same must be provided to all interested parties before or concurrent with the filing [Rule 460B].

The rules are more particular with respect to the filing of affidavits. Rule 324 requires that every affidavit to be used in a proceeding must be filed before being used, except with leave of the court. Affidavits on which an application is founded are to be filed **before** the service of the Notice of Motion [Rule 325]; however, failure to do so is an irregularity that may be overlooked by the court and will not defeat your motion as long as no party is misled by the

omission. The general practice of Saskatchewan lawyers is to serve the Notice of Motion and Affidavits on all other parties and then file the originals of those documents at the same time.

H. Constitutional Questions

Section 8(2) of *The Constitutional Questions Act*, R.S.S. 1979, c.C-29 provides that when the constitutional validity or applicability of any law is brought into question, or where an application is made to obtain a remedy pursuant to section 24 of *The Canadian Charter of Rights and Freedoms*, not including a remedy for the exclusion of evidence or any remedy consequential thereto, the applicant must serve notice on both the Attorneys-General of Canada and Saskatchewan before the court can determine the matter.

Such notice must be served on the Attorneys-General at least 14 days before the return date for the application, and must contain the following information:

- the style of cause;
- the law or provision in question or the right or freedom alleged to be infringed;
- the return date; and place for argument of the matter; and,
- the necessary particulars to show the point to be argued [Subsections 8(4) and (6)].

I. Remedies

i. Generally

Prerogative remedies such as certiorari, prohibition, mandamus and quo warranto are available to a party seeking judicial review. The Court, of course, still has the discretion to refuse those prerogative remedies even if the party has standing and sufficient ground to warrant the remedy where, for example, there has been delay, the application is premature, or there are alternative remedies available.

In an application for judicial review other than a proceeding to which the *Criminal Code* applies, the applicant may seek a declaration, injunction or damages as collateral relief [Rule 664(2)].

ii. Interim Relief

The Court may make such interim order as it sees fit, including orders preserving the status quo, and may extend, modify or set aside any such orders [Rule 668(1)]. Interim orders may be granted ex parte, or on such notice as the Court may direct [Rule 668(3)].

In a recent decision, the Saskatchewan Court of Appeal once again reiterated the general principles the Court considers before granting an interim injunction. Those considerations include:

- (i) there must be a clear right of relief;
- (ii) the plaintiff must establish a strong prima facie case as well as a strong possibility that he or she will succeed at trial;
- (iii) the injunction must be necessary to protect the plaintiff against irreparable damage and loss, and not be merely an "inconvenience";
- (iv) the court will determine on a balance of convenience which party would suffer the greater harm if the injunction was not granted as opposed to if it was.

(see *Canadian Bonded Credits Ltd. et al. v. Vance et al.* (1994), 114 Sask.R. 132 (Q.B.)).

An interim injunction under Rule 668 must be collateral to other relief sought under this Rule (see *Pradzynski v. Prince Albert (City)*, [1985] Sask.D. 1893-01 (Q.B.)).

J. Evidence

In most judicial review applications there is no dispute on the facts, and the case is argued in a summary fashion based on the return. Evidence, if any, is usually by way of affidavit. Since most judicial review applications will be final (rather than interlocutory), any affidavit in support must be sworn by someone with personal knowledge of the facts and matters deposed to in the affidavit [Rule 319]. Hearsay will not be considered. It is therefore very important to consider, with respect to each essential element of a ground of review, who is in the position to swear to the necessary facts.

K. Stay of Proceedings

An application for judicial review does not constitute a stay of the proceedings to which the application relates, but the Court has discretion to grant a stay [Rule 668(2)].

L. Amendments

The court may permit a party to alter or amend an application or file additional material for the purpose of determining the real questions or issues raised by the application. Where a party intends to take any of these steps it must give notice of its intention to do so to all parties [Rule 670(2),(3)].

III. CONCLUSION

These practice notes provide the procedural basics for preparing a judicial review application in Saskatchewan. You should first pay close attention to the Rules of Court. Part 52 is not exhaustive, so it is important to have regard to other parts of the Rules when necessary. It is also important to review the Saskatchewan cases, which are quite thorough with respect to judicial review applications and the Rules of Court in general.

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