

Standard of Judicial Review

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By Ian J. Lord

The Ontario Municipal Board (OMB) is an expert tribunal representing the pinnacle of planning decision-making in the province, especially since the removal of cabinet petitions in respect of *Planning Act* matters. However, in terms of law and jurisdiction, it is not the final decision-maker. Although it is a court of record, the legislature and common law have seen fit to provide several avenues for the courts to review the decision-making processes of the OMB. The *Ontario Municipal Board Act* provides for a right of appeal, with leave, on questions of law (or jurisdiction). Access to the court system can also be gained by way of an application for judicial review where there is an assertion of a denial of natural justice or the need to obtain a declaration, injunction, order in the nature of prohibition or other special relief from a court.

Issue: When accessed, what degree of deference should a court pay to a tribunal such as the Ontario Municipal Board, being constituted a tribunal with expertise in municipal and planning related matters?

This matter is generally a subject of much consideration. Essentially, the degree of judicial deference is dependent upon the court's perception of the tribunal, the subject matter at issue and the manner in which the matter comes before the court. There are options in the approaches which the courts have defined; moreover, different standards of review may apply to the same tribunal over the course of the same case as a function of the questions involved.

The prospects of an appeal from an OMB decision and the attitude of the court to an OMB appeal are based on a "pragmatic and functional" approach. Is the matter one left to the exclusive decision of the OMB? If so, then there is a very strong reluctance to intervene. With this, an additional factor arises, particularly on an application for judicial review: is there a privative clause? In the case of the OMB, there is.

The OMB Act provides as follows:

96.(4) Save as provided in this section and in sections 43 and 95,

(a) every decision or order of the Board is final; and

(b) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any court.

This is less than a full privative clause as it should be noted that appeals are subject to sections 43 (the review power) and 95 (the petition to the Lieutenant Governor in Council application right) of the *Ontario Municipal Board Act*. In section 95, the standard applied to judicial review is higher. For example, if the OMB's decision is "patently unreasonable". The appropriate spectrum of deference has a number of standards.

(1) "correctness"

no deference, regardless of a privative clause where the issue or question of law goes to the jurisdiction of the tribunal, e.g., a *Charter* interpretation.

In a recent development charges appeal, a conflict between an existing agreement and the current development charge regime was in dispute. At issue was whether the existing agreement specifically precluded future capital charges and created a conflict according to the wording of the statute, as to which document was to govern² the agreement or the by-law. The court found the standard of review to be correctness on the issue of whether the two regimes could co-exist, given the wording in Ontario Regulation 82/98, Section 17.

(2) "reasonableness *simpliciter*"

intermediate deference standard;

(3) "patent unreasonableness"

high level of deference, save for an error on the face of the record or decision.

A court's choice of the standard to apply is influenced by appeal rights under the statute and the express wording of any privative clause.

Valuable facts to remember in assessing prospects on an appeal or possible judicial review of an OMB decision are:

² The strength of a privative clause, e.g., "final and binding" grants deference;

² the nature of the expertise in issue: the relative level of expertise is important; and

² the perspective of the Act.

In a program of the Municipal Law Section of the Ontario Bar Association, David Stratus paraphrased the "Southam" sort analysis to work out the anticipated standards of deference:

(1) the terms of the statute creating the right of review.

(2) the relative expertise.

(3) the nature of the process.

(4) the nature of the problem.

Issue: Is the matter one of fact or law?

Questions of fact are generally not to be entertained by the courts; but questions of law attract scrutiny as to their relationship to the tribunal's expertise. The practitioner must address whether the question of law in issue is one to which the expertise of the tribunal relates.

As the Honourable Justice Blair explained: "There is no standard standard of review. The duty is to ensure that the hearing of an appeal not be hijacked with the search for the standard.

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