FTR QUARTERLY

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JUDICIAL REVIEW – DIFFERENT LITIGATION, DIFFERENT STRATEGIES

We often think of "legal decisions" as those written by judges after a courtroom trial. But the fact is that thousands of important decisions are made each year through administrative law channels. These include those of arbitrators under collective agreements and tribunals that regulate elements of the employment relationship, ranging from formal tribunals such as the Ontario Labour Relations Board and the Human Rights Tribunal of Ontario, to internal tribunals such as university disciplinary bodies.

Just as you can appeal most courtroom litigation, there is a mechanism for appealing administrative law decisions – known as judicial review. A judicial review application involves asking the court to review a decision in order to confirm that it is reasonable, was made fairly and was made in accordance with the powers of the decision-maker.

While that sounds like wide scope for a decision change, in reality, it is anything but.

COURTS DEFER TO DECISION-MAKERS

"Courts are sending a clear signal that they do not feel compelled to wade into these matters simply because they might have reached a different conclusion," says Ian Dick, Chair of the Litigation Group. "More and more, they're strictly adhering to Supreme Court of Canada decisions that state that decision-makers with particular expertise are entitled to

a high level of deference and that those decisions should not be second-guessed absent some significant error that goes to the very heart of the decision."

This deference is also shown by the unwillingness of courts to become involved in the review of matters during the course of a proceeding.

"A number of recent decisions have reconfirmed that courts will generally require that a tribunal has an opportunity to reach a final determination in a matter before the court will review any alleged errors in reaching that decision," says Christopher Riggs, a partner in the Toronto office. "Courts will not allow parties to pick away at the process."

There is also an increasing attempt on the part of courts and administrative tribunals to co-ordinate their efforts and avoid duplication – especially in the employment law area where several tribunals may have some kind of jurisdiction over the adjudication of the very same statutes.

"Recent cases have focused on the deference that one tribunal should show when another tribunal has already dealt with – or is dealing with – what are essentially the same issues," says Michael Hines, a partner in the Hicks Morley Toronto office.

"Given the ability of many tribunals to deal with the same issues, employers and service providers should be proactive in guiding their administrative law issues into the forum that is best suited to recognize and respond to their particular concerns. This has the added benefit of decreasing the need for a judicial review as more of the decisions will fall in their favour."

> Courts are sending a clear signal that they do not feel compelled to wade into these matters simply because they might have reached a different conclusion.

INCREASING THE CHANCES OF SUCCESS

While there is an increasing trend of deference by courts to the decisions of arbitrators and tribunals, that deference is not absolute. Decisions do get overturned – and the use of a few strategies can help with the chances of success. One of the more crucial ones is ensuring that all key issues are raised at the initial hearing itself.

"There's an increased unwillingness by courts to consider issues on judicial review that were not raised at first instance at the tribunal level," says Leanne Fisher, an associate in the Hicks Morley Ottawa office. "The Supreme Court of Canada has been quite clear that while courts have the discretion to overturn a ruling, this discretion should not be exercised if the issue could have been raised – but wasn't raised – before the tribunal."

This means that employers need to be thinking about all relevant issues and arguments early on if they are considering a future judicial review application.

"A good example is the question of bias in a hearing," says Frank Cesario, a partner in Hicks Morley's Toronto office. "There's a general principle that you can't allege that your tribunal was biased on judicial review unless you made that submission to the tribunal first. By not raising it at the hearing, you could lose the right to pursue a possibly meritorious argument."

Another strategy for increasing the chances of judicial review success is ensuring that your arguments on key issues are framed by you – and not the arbitrator or tribunal.

"On important cases where I think the matter will be proceeding to judicial review, I encourage the use of written submissions in order to have a full record of all of our arguments and positions before the court," says John-Paul Alexandrowicz, a partner in the Hicks Morley Toronto office. "This ensures that our arguments can't be mischaracterized by the adjudicator in his or her reasons."

SEEKING REVIEW – EXPERT GUIDANCE REQUIRED

The bar is definitely being raised on the degree of deference that courts are giving arbitrators and boards dealing with labour and employment law issues. For this reason, it is more important than ever that employers gain an appreciation for how courts approach judicial review applications and how to best frame a judicial review application for success.

"Our expertise in litigating these matters is extensive – we probably handle more labour and employment-related judicial review applications for employers than any other firm in Canada," says Dick. "But of equal importance is the guidance we can give clients in assessing their chances for success and making a strategic decision on moving forward."

IS YOUR BUSINESS READY FOR A LABOUR DISRUPTION?

Times of fiscal constraint can, and often do, lead to labour unrest. Strikes and picketing are sometimes inevitable. It is important employers plan accordingly. Here are some best practices that you can adopt to minimize the effects of a potential strike and associated picketing.

BY: SEAN SELLS AND CAROLYN CORNFORD GREAVES

INJUNCTIONS

Courts are reluctant to interfere in labour disputes. But when picketing begins to unduly interfere with your rights or those of others, it may cross the line and become unlawful. In such cases, you may have to seek an injunction as a tool of last resort. Before an injunction is granted, courts require clear evidence that:

- the union's picketing involves an unlawful act;
- you have made reasonable efforts to obtain police assistance to prevent or control the illegal picketing, which have been unsuccessful; and
- irreparable harm would result to you if the injunction was not granted.

In light of these requirements, advance planning about who is responsible for gathering information and coordinating with counsel is essential. This planning will prepare your employees for a labour disruption – and can help ensure a union stays at the bargaining table knowing that you are prepared for a strike and prepared to seek an injunction if necessary.

EIGHT BEST PRACTICES EVERY EMPLOYER SHOULD FOLLOW

Here are eight best practices to consider when preparing for a potential labour dispute.

1. **Have a bargaining strategy and a strike plan.** Have a strategy for bargaining and a plan in place in the event an agreement cannot be reached with the union. A detailed and well-developed bargaining strategy can, and often does, reduce the chances of a strike and ensures that you are better prepared if a strike occurs. Having a comprehensive strike plan is an essential component of any set of negotiations, as it provides you with understanding about how to deal with a strike and minimizes the possibility of making unnecessary or undesirable concessions out of fear.

2. **Think about timing.** A key consideration for any employer is the timing of a potential strike. While there is no best time to have a labour disruption, there may be a particular time during the year when your business is in a better position to endure a strike.

3. **Think about your business operations and locations.** Keeping a business operating during a strike can be difficult, but must be considered. Prior to bargaining, identify what operations are essential to your business and plan how these operations will be maintained throughout a strike. Assess whether it is possible for your business to use an alternative method that would minimize the disruption to your operations. Think strategically about which business locations will remain operational during a strike and which locations are most likely to be picketed – and how disruptions can be minimized at those locations.

Prior to bargaining, identify what operations are essential to your business and plan how these operations will be maintained throughout a strike.

4. **Create a team of key individuals.** Establish and train a team of key individuals who are equipped to manage a strike. Once a team is assembled, have legal counsel conduct a training session to explain what is lawful and unlawful picketing and what type of information must be gathered to support an injunction, and to address practical issues that arise on the picket line. You may want to consider including members of the negotiating team on the strike planning and management team, although it is important not to overburden the members of these teams, as doing so may diminish your effectiveness in both areas.

5. **Consider negotiating a picket line protocol.** Consider whether to negotiate a picket line protocol with the union prior to a labour disruption. The police will expect you to have had these discussions, and doing so can reduce the need to bring an injunction to stop illegal picketing activities.

6. **Think about your communication strategy.** Establish plans for both internal and external communications. Unions are sophisticated organizations and communications can be a game-changer during a strike. In the age of social media, public perception can affect a union's willingness to go out, and remain, on strike.
7. **Assess your security needs.** Security personnel can play a key role by collecting evidence of unlawful conduct to support an injunction. Determine whether your business has sufficient internal security resources or whether you will need to hire an external security service.
8. **Plan on living with picketing.** An injunction should be viewed as a tool of last resort – and will not be an option until the facts exist to meet the stringent requirements of the courts. In the meantime, make plans for your business to carry on despite the presence of picketers.

WE CAN HELP

Thinking about how your business will deal with a strike can be daunting. Our firm's highly experienced team of lawyers has helped clients from both the public and private sectors successfully navigate strikes. We can provide strategic legal and bargaining advice at all stages of labour relations. Prior to bargaining, we can help you design and execute a comprehensive bargaining strategy, create a strike plan and provide training for key employees. During a strike we can provide strategic advice, help you successfully execute your strike plan and successfully argue an injunction and contempt proceedings.

Sean Sells *advises public and private sector clients on a range of labour and employment matters. Sean has particular expertise in employment litigation, injunction proceedings and administrative law and judicial review proceedings, including human rights matters involving pension plan issues. He regularly advises clients with respect to the enforcement of restrictive covenants and wrongful competition by former employees and business owners. Sean has appeared as counsel in all levels of courts in Ontario.*

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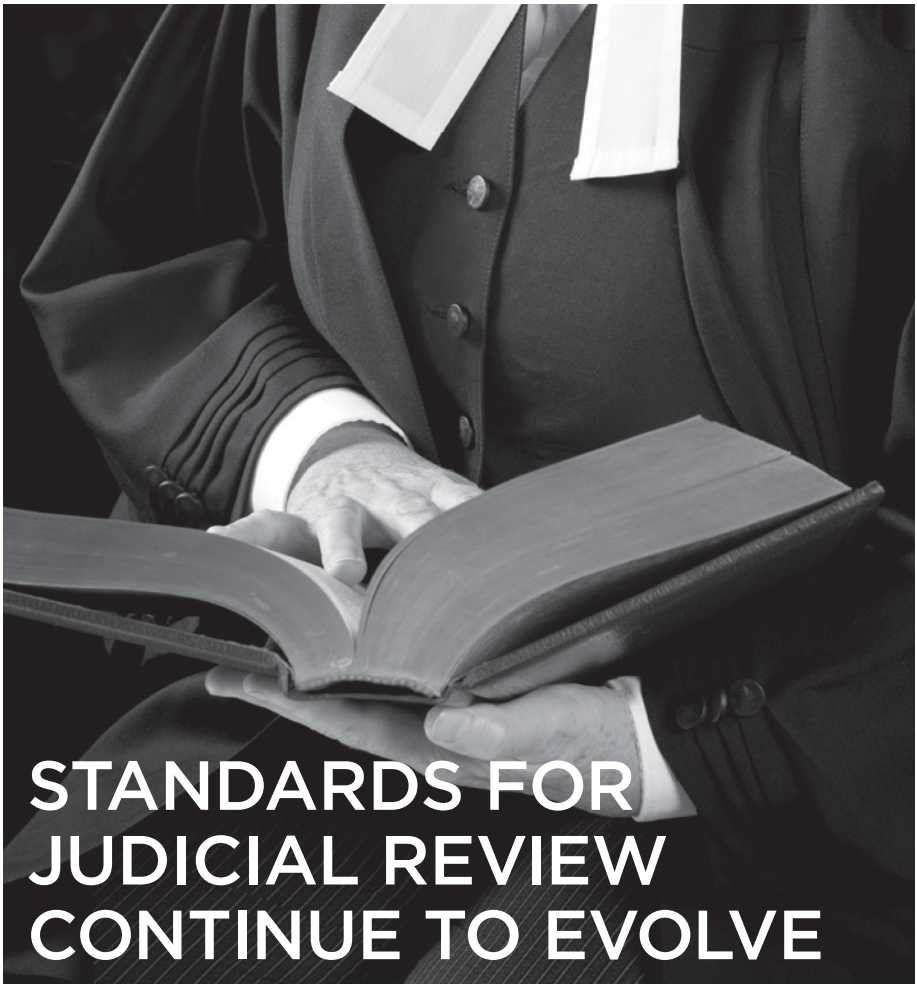

STANDARDS FOR JUDICIAL REVIEW CONTINUE TO EVOLVE

The Supreme Court of Canada recently revisited its landmark decision in *Dunsmuir v. New Brunswick*, which set out a new framework for the standard of review analysis undertaken by a court reviewing a decision of an administrative tribunal.

BY: FRANK CESARIO AND JOHN-PAUL ALEXANDROWICZ

In *Dunsmuir*, the Supreme Court concluded that there were only two standards of review to be applied in such cases: correctness and reasonableness. The Supreme Court has recently reaffirmed that courts will be deferential toward most administrative decisions. This is noteworthy for clients and counsel who have cases in arbitration or before tribunals, such as the Ontario Labour Relations Board or the Human Rights Tribunal of Ontario.

DUNSMUIR: STANDARD OF REVIEW

The standard of review is the level of deference or respect given to the decisions of administrative tribunals on judicial review. The correctness standard requires that the adjudicator be correct in answering the question at issue. The court will undertake its own analysis and substitute its own decision if it disagrees with the adjudicator.

For the most part, this applies only to decisions that raise: (1) a constitutional issue; (2) a question of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise"; or (3) an issue of drawing jurisdictional lines between administrative tribunals or determining a true question of jurisdiction.

In most other instances, deference will be afforded and the court will merely inquire into whether the decision was reasonable. This requires looking into the "justification, transparency and intelligibility" of the decision-making process and whether the decision is defensible as one that falls within a range of acceptable outcomes based on the facts and the law. This means that the court does not need to agree with the decision to uphold it.

The courts have recognized that labour arbitrators, the Ontario Labour Relations Board and the Human Rights Tribunal of Ontario have broad legislative mandates and significant expertise in their respective areas. As a result, the decisions of these adjudicators are almost always reviewed on the reasonableness standard on judicial review. (In practice, courts read the statutory standard of patent unreasonableness, to which Tribunal decisions are expressly subject, as reasonableness.)

RECENT GUIDANCE FROM THE SUPREME COURT

In three recent cases, the Supreme Court reflected upon the application of the reasonableness standard. In two cases, the Court considered when the standard should be applied. In *Nor-Man Regional Health Authority Inc. v. Manitoba*, the Supreme Court rejected the conclusion of the Manitoba Court of Appeal that the correctness standard should apply when a labour arbitrator invokes a common law or equitable doctrine, such as estoppel. The Court emphasized that labour arbitrators have a "broad mandate," and are well-equipped by their expertise to adapt and apply legal and equitable doctrines to the labour relations setting. Therefore, even when invoking common law or equitable principles, labour arbitrators are generally subject to judicial review on the reasonableness standard.

In most other instances, deference will be afforded and the court will merely inquire into whether the decision was reasonable.

Subsequently, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, the Court considered the question of whether the Information and Privacy Commissioner had lost jurisdiction over his inquiry because he had taken 19 months longer than provided for in the legislation.

While the Court unanimously concluded that the reasonableness standard applied, it was divided about the fate of the "true question of jurisdiction" category itself. The majority suggested that there should be a presumption that questions about the interpretation of the tribunal's governing

statute, or those closely connected to its function, are questions of statutory interpretation and should be given deference on judicial review. Only in exceptional circumstances would a question be one of true jurisdiction, and the party requesting that the court apply the correctness standard would be required to rebut this presumption. Justice Cromwell rejected the idea of creating a "presumption" because the courts have a constitutional duty to ensure that tribunals do not exceed their jurisdiction. Justice Binnie took the middle ground, concluding that the simplest answer was to eliminate the jurisdiction category and, instead, consider whether the issue was one of general law of central importance to the legal system. This issue may be resolved in a subsequent decision.

Only in exceptional circumstances would a question be one of true jurisdiction, and the party requesting that the court apply the correctness standard would be required to rebut this presumption.

In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, the Court considered how the reasonableness standard should be applied. It concluded that the standard does not require a two-step inquiry in which the adequacy of the tribunal's reasons is considered separately from whether the decision itself was reasonable. Instead, the review for reasonableness should be "a more organic exercise" of addressing both concerns together. Ultimately, if the reasons are sufficient enough for the court to understand the basis of the decision and to determine whether that decision was within the acceptable range of outcomes, the *Dunsmuir* criteria of "justification, transparency and intelligibility" are met.

Historically, the standard of review analysis has been a challenging and confusing part of the judicial review process for parties, lawyers and courts alike.

Notably, the Court recognized that this was especially the case in the unique setting of labour arbitration in which the parties have an ongoing relationship and require the expeditious resolution of disputes.

IMPLICATIONS

Historically, the standard of review analysis has been a challenging and confusing part of the judicial review process for parties, lawyers and courts alike. The decision in *Dunsmuir* was "transformative" in this area. In its wake, the Supreme Court has had to respond to the ways in which lower courts have interpreted and applied this new framework.

In these three decisions, the Court attempts to solidify and expand upon how the *Dunsmuir* framework should apply, in light of the "feedback" provided by lower courts. In that sense, while *Dunsmuir* was revolutionary, these decisions are merely evolutionary as they focus on developing the nuances of the standard of review framework. These cases continue to highlight the Supreme Court's movement towards more deference to administrative decision-makers, such as labour arbitrators, and are helpful in providing a more complete appreciation of what that level of deference entails.

Frank Cesario *is a partner in the firm's Litigation Group. He has broad experience representing clients in civil litigation and regulatory proceedings, and has particular expertise in administrative law and judicial review proceedings, restrictive covenant litigation, employment litigation, class actions, pension litigation, injunction proceedings and commercial and securities litigation.*

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HR QUICK HITS

Raising the Bar

Hicks Morley's Litigation Practice Group invites you to read and subscribe to *Raising the Bar*, an electronic publication that provides timely information and analysis about the key litigation-related legal developments that will have an impact on employers. Each issue of *Raising the Bar* includes summaries of cases you need to know about, an in-depth analysis to illuminate an important area of law (recent examples have included privilege and expert evidence), and a litigation secret that you may not know about. The focus of *Raising the Bar* is squarely on giving you the practical information that you need, in a form that is easy to digest and interesting to read. *Raising the Bar* is co-edited by Frank Cesario and Elisha Jamieson of the Hicks Morley Litigation Practice Group. If you would like to subscribe to *Raising the Bar*, email **news@hicksmorley.com**

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LITIGATION IN THE FAST LANE

Allyson Fischer was called to the Bar in 2002 and has practised her entire career at Hicks Morley. Litigation has always been her focus – from wrongful dismissal cases, to wrongful competition matters, to labour injunctions. She has argued at all levels of Ontario courts as well as cases in Alberta and Nova Scotia.

Allyson spoke to *FTR Quarterly* in March about the evolution of her career.

Tell us a bit about your start in life.

I grew up in Southampton, which is a town on the shore of Lake Huron of about 3,000 people. I was there through high school and went to McMaster to do a degree in political science and geography. I then did my law degree at Western.

What drew you to law school?

I'm not sure where the desire to be a lawyer came from, but I had it from a very early age. While my parents never pressured me into the profession, they certainly pushed me to work hard at whatever I chose to do.

Which interest came first – human resources law or litigation?

It really all came together at once. I definitely wanted something advocacy-related but I felt that areas like criminal law would be a tough practice that I wouldn't enjoy in the end. I took a labour course and an employment course at Western and I found them to be fascinating. These were very people-focused areas with lots of opportunity for on-your-feet advocacy work. That's why I came to Hicks Morley after my call to the Bar.

Most of your work is courtroom litigation, not tribunal work. How did that come about?

While I started out with a broad-based practice, I naturally gravitated to the courtroom work. It definitely takes a certain personality to do it – it can get acrimonious and you have to stand your ground and move your case forward. And unlike tribunal work, where you see many of the same lawyers, you're usually facing a lawyer you've never met before, so that always adds an element of interest – and uncertainty.

But the issues are fascinating, especially in the wrongful competition area. The stakes are high and people are prepared to enforce their rights to the end. And it's happening more often because employees are moving around more and technology makes it easier to take things you shouldn't when you leave.

I'm on the phone with forensic experts at least once a week – it's amazing what can be uncovered through a detailed laptop analysis.

What do you like about it?

I love the fast pace of the work. I specialize in emergency response litigation – seeking a labour injunction during a strike or dealing with wrongful competition issues when a key employee leaves. You need to respond quickly and I really enjoy that type of practice.

I also like the variety of work. For wrongful competition cases, we get both plaintiff and defendant cases, so you become familiar with the strategies on both sides.

Any litigation trends occurring that could be a warning bell for clients?

The days of departing employees stashing paper files in their briefcases are long gone. Everything is electronic. Confidential information can be downloaded with the click of a few buttons.

For employers who are hiring key employees from a competitor, they should ask whether the new employees have any contractual restrictions – and have them acknowledge in their employment contract that they don't have confidential information belonging to their former employer.

For employers who are losing key employees, it's important to sit down with the employees and remind them of their obligations to return all confidential information and, if they have a covenant not to compete or solicit clients, remind them of that and what that means. And if an employee leaves abruptly, I often suggest that we call in forensic experts to analyze the employee's computer. It either provides a smoking gun if the employee has misused information, or provides the employer with reassurance that nothing has gone wrong.

What are your interests/passions outside of the office?

I've got two young kids, ages three and six, so that's a big focus outside of the office. For myself, running is a passion and I get up at 5 a.m. most mornings to fit it in. I did triathlons for 10 years before the kids were born but my focus now is marathons. I've done a number of marathons including the Boston Marathon with my dad in 2005. I'm training for the Toronto Marathon this year. I find running helps me relax and concentrate, and keeps my energy levels high. I really love it – and it makes me better at everything else that I do on the work and family front.

NEW ASSOCIATE

Hicks Morley is pleased to announce that a new associate has joined the firm.

CHRISTOPHER D. BOYKO

Christopher Boyko is an associate lawyer at Hicks Morley's Waterloo office, providing advice and representation to employers and management on a wide range of labour and employment issues including labour disputes, wrongful dismissals, employment standards, employment contracts, and human rights and accommodation. Prior to attending law school, Christopher was awarded the Founder's Scholarship for his undergraduate studies (Bachelor of Commerce, Hons.) at the University of Ontario Institute of Technology. He received his Honours Business Administration degree from the Richard Ivey School of Business in 2010, where he graduated with distinction, and concurrently received his Juris Doctor degree from the University of Western Ontario in 2010. He was called to the Bar in 2011.

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CLIENT CONFERENCES 2012
ON YOUR MARK

Our biennial, complimentary client conferences reflect our commitment to keeping you informed about the latest developments and best practices, including strategies that can help your organization's human resource management.

Please mark the following dates in your calendar, and join us this spring at a location near you.

Waterloo: **April 26** Kingston: **May 17** Ottawa: **May 25**
Toronto: **June 1** London: **June 4**

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