

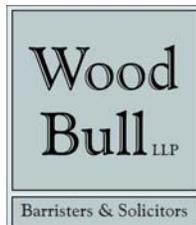
# The Planning Act: What's New, What Remains, What You Should Know

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## The Court and the OMB

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June 2006



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## ***Introduction***

Matters before the Ontario Municipal Board (the “Board”) may come before the Courts in three ways:

- (a) through a statutory appeal pursuant to subsection 96(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 (the “*OMB Act*”);
- (b) by the commencement of an application for judicial review pursuant to subsection 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (the “*JRPA*”); or
- (c) through a ‘stated case’ to the Divisional Court pursuant to subsection 94(1) of the *OMB Act*.

Each particular avenue is governed by different statutory provisions, and the appropriateness of each will depend on the nature of the issue the party wishes the Court to address, and the remedy the party is seeking.

The purpose of this paper is to present an overview of the statutory provisions and law that apply to each avenue, and provide some guidance as to the circumstances in which each avenue may be appropriate.

### ***A. Statutory Appeals to the Divisional Court***

A statutory right of appeal from a decision of the Board is provided in subsection 96(1) of the *OMB Act*, which specifies that a statutory appeal from a decision of the Board lies to the Ontario Superior Court, Divisional Court, with leave of the Divisional Court, but only

on a question of law. The Divisional Court cannot be called upon to review findings of fact.

**(i) Seeking Leave to Appeal**

Before the Divisional Court will hear an appeal from a Board decision on the question of law, the appellant must obtain “leave” (that is, permission from the Court) to hear the appeal. This leave is granted by the Divisional Court.

The distinction between seeking leave to appeal and the appeal itself is that the motion for leave to appeal is heard by a single judge of the Court on a summary basis. This approach is intended to weed out those cases that are unworthy of consideration of a full three judge panel of the Divisional Court and to provide for a more expeditious determination of the merits of a potential appeal so as to reduce the potential delay in achieving a final determination of a matter before the Board.

Accordingly, the first step of any would-be appellant is to bring a motion for leave to appeal. Motions for leave to the Divisional Court are governed by Rule 61.03 of the *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194, as amended (the “*Rules of Civil Procedure*”). Essentially, a notice of motion must be served within 15 days after the decision which is sought to be appealed is made, and filed five days thereafter. A supporting motion record, factum and transcripts of any evidence must be served within 30 days of filing the notice of motion for leave to appeal.

The Court will decide the leave motion on the basis of the record of the Board's proceedings, inclusive of the Board's decision and exhibits filed at the hearing and, if available, the transcript of the evidence at the hearing. Where leave is granted, the appellant is required to serve a notice of appeal within seven days after being granted leave.<sup>1</sup>

The test on a motion for leave from a decision of the Board that has been traditionally applied by the Court is twofold:

- (i) there must be some reason to doubt the correctness of the Board's decision; and
- (ii) the proposed appeal must raise a point of law sufficient to merit the attention of the Divisional Court.<sup>2</sup>

As to the first branch of the test, in the recent decision giving leave, *Rosedale Golf Assn, Ltd.*, the Court addressed the submission that the first prong of the test should substitute the word "reasonableness" for the word "correctness", as follows:

"The respondents argue that the test on a motion for leave to appeal a decision of the OMB has been modified by *Essex (City) v. The Material Handling Problems Solvers Inc.*, [2003] O.J. No. 4619 (Div.Ct.). In that case, Blair J. (as he then was) held that where the standard of review is reasonableness (as it would be given the OMB's specialized expertise in the developing, interpreting and applying its own policies) the

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<sup>1</sup> Rule 61.03(6) of the *Rules of Civil Procedure*.

<sup>2</sup> *Juno Developments (Parry Sound) Ltd. v. Parry Sound (Town)* (1997), 99 O.A.C. 95 (Ont. Div. Ct.) [hereinafter referred to as *Juno Developments*], at para 7; *Rosedale Golf Assn. Ltd. v. DeGasperis*, [2004] O.J. No. 1153 (Ont. Div. Ct.) [hereinafter referred to as *Rosedale Golf Assn Ltd.*], at para 3.

branch of the test dealing with the correctness of the decision ought to be more aptly worded: "is there reason to doubt the reasonableness of the OMB's decision". I am not sure this modification is appropriate. When questions of law are involved, correctness is the standard of review and simply because an administrative tribunal has a specialized expertise does not in my view mean that on questions of law the correctness standard ought to be modified."<sup>3</sup>

Given the ultimate disposition in *Vincent v. DeGasperis*, [2005] O.J. No. 2890

[hereinafter referred to as *Vincent v. DeGasperis*], wherein the Court applied a standard of review of "reasonableness", not "correctness", it may be that the first part of the test for leave should be changed to being whether "there must be some reason to doubt the reasonableness of the Board's decision" where the decision from which leave is being sought is one grounded in a home statute of the Board, such as the *Planning Act*.

As to the second branch of the test, the Court in *Rosedale Golf Assn. Ltd.* held that the point of law need only be relevant to the parties themselves:

"The question of law involved need not be of general importance, but rather may be limited to matters relevant to the parties while raising a question of sufficient importance to merit the court's attention."<sup>4</sup>

By way of contrast, in an earlier decision called *Central Park Lodges Ltd. v. Caregard Group*, [2000] O.J. No. 2516 [hereinafter referred to as *Central Park Lodges*], the Divisional Court denied leave where it found that the dispute was essentially one between two competitors, and therefore "not of general significance."<sup>5</sup> It is difficult on the surface to reconcile these two decisions, but when the latter case is read more closely, the Court

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<sup>3</sup> *Rosedale Golf Assn. Ltd.*, at para 4.

<sup>4</sup> *Rosedale Golf Assn. Ltd.*, at para 3.

<sup>5</sup> *Central Park Lodges*, at para 26.

denied leave on the grounds that the appellant failed to raise “genuine, legitimate and authentic planning reasons” for the appeal, and therefore raised no point of law at all. In light of this reasoning, the test set out in *Rosedale Golf Assn. Ltd.* will likely still stand, with a caveat that the test for leave will not be met when the appeal is motivated solely by the competition interests of one party.

Again, the Court will only review a Board decision regarding a matter of law. As was noted in the judgment *Neebing (Municipality) v. Dale* (2004), 43 M.P.L.R. (3d) 263 [hereinafter referred to as *Neebing v. Dale*]:

“In applications for leave to appeal, the onus is on the applicants, (EMR and Neebing), to show that the Board made an error in law. (see: *Green v. Barrie (City)* (1991), 6 M.P.L.R. (2d) 60, 51 O.A.C. 278 (Gen. Div.)).

The Supreme Court of Canada has commented on the distinction between questions of law, fact, and mixed fact and law, in the case of *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748. At paragraph 35 of that judgment, Justice Iacobucci stated:

‘Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed fact and law are questions about whether the facts satisfy the legal tests.’”<sup>6</sup>

Where the Court decides that leave should be granted, it will identify the questions of law upon which the leave has been granted. These questions then become the matters upon which the Court (three judges) will make its determination on the appeal.

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<sup>6</sup> *Neebing v. Dale*, at paras 12, 13

As a general rule, no appeal lies from an order made on a motion for leave to appeal.<sup>7</sup>

There is an exception only in the limited circumstance where the Court has accepted or refused a motion for leave as a result of the Court's mistaken application of its own jurisdiction to hear the matter.<sup>8</sup> To the extent that an order on a motion for leave may be set aside or varied, the statutory authority to conduct the review is found in subsection 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.<sup>9</sup>

## **(ii) Stay**

A stay operates to prevent any steps being taken to enforce the Board's decision, except in very narrow circumstances.<sup>10</sup> An appeal from a decision of the Board acts as an automatic stay on the Board's decision, pursuant to subsection 25(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "SPPA"). It should be borne in mind, however, that a decision has not been appealed, for the purposes of subsection 25(1) of the SPPA, until leave has been granted.<sup>11</sup>

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<sup>7</sup> *Milton (Town) v. Kalmoni Establishments Inc.* (1997), 31 O.R. (3d) 157 (Ont. C.A.) [hereinafter referred to as *Milton v. Kalmoni*]

<sup>8</sup> *Denison Mines Ltd. v. Ontario Hydro* (2001), 56 O.R. (3d) 181 (Ont. C.A.), at paras 6, 11.

<sup>9</sup> See *Milton v. Kalmoni*.

<sup>10</sup> A stay does not operate to the extent that the presiding Court so orders, nor does it prevent the settling, signing and entering of an order or the assessment of costs, or the issue of a writ of execution or the filing of a writ. See Rule 63.03 of the *Rules of Civil Procedure*.

<sup>11</sup> See *Toronto (City) v. Toronto (City) Committee of Adjustment* (1997), 35 O.M.B.R. 46 (O.M.B.) [hereinafter referred to as *Toronto v. Toronto Committee of Adjustment*], at para 2.

Although an automatic stay will not be operational until leave has been granted, the parties are free to bring a motion to stay an order at any time. The proper venue for the motion is not clear, however. There is case law that suggests that where the statute empowering the tribunal to make a decision also empowers it explicitly to issue a stay of its decisions/orders, the appropriate way to proceed is to seek a stay from that tribunal before bringing a motion for a stay to the Divisional Court,<sup>12</sup> however that rationale was questioned on an appeal from the Ontario Environmental Appeal Board.<sup>13</sup> Absent a definitive statement in respect of the appropriate venue for a motion for a stay from decisions of the Board, a party is free to bring a motion to either the Board or the Court. The decision of the Appeal Board noted above set out five factors to be considered in determining the appropriate forum for bringing the stay motion: the timing of the application; the appearance of bias inherent in asking a tribunal to review the merits of its own decision; the issues to be determined; institutional resources; and the forum in the best position to hear the application.<sup>14</sup>

Although the Board does not have explicit statutory authority to grant a stay, such powers are available to the Board by sections 37 and 38 of the *OMB Act* and Rule 63.02(1)(a) of

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<sup>12</sup> *Re Rose* (1982), 38 O.R. (2d) 162 (Ont. H.C.J.) (an appeal from the Commercial Registration Appeal Tribunal)

<sup>13</sup> *Re Canadian National Railway* (1991), 6 C.E.L.R. (N.S.) 187, at paras 63, 64.

<sup>14</sup> *Re Canadian National Railway* (1991), 6 C.E.L.R. (N.S.) 187, at para 66.

the *Rules of Civil Procedure*.<sup>15</sup> As a matter of expedience, it is likely that a motion to the Board would be heard more quickly than a motion to the Divisional Court.

In order for a stay to be granted, the appellant must establish the following three elements:

- (a) there is a serious issue to be determined;
- (b) compliance with the order would cause irreparable harm; and
- (c) staying the order would favour the balance of convenience, taking into account prejudice that results to any parties and the public interest.<sup>16</sup>

Rule 63 of the *Rules of Civil Procedure* governs the procedure on a motion for a stay.

### **(iii) The Appeal**

#### **Standard of Review: Extent of Deference to Board Decision**

The first question that must be determined on an appeal to the Divisional Court is what standard of review the Court will apply in reviewing the Board's decision. It has been established that the proper standard of review of Board decisions is either "correctness", meaning the Court will quash the Board's decision if the decision is not correct on the

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<sup>15</sup> *Toronto v. Toronto Committee of Adjustment*, at para 5; *Wonderland Power Centre Inc. v. London (City) Committee of Adjustment* (2005), 51 O.M.B.R. 350 (O.M.B) [hereinafter referred to as *Wonderland Power Centre*] at paras 6, 12.

<sup>16</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Wonderland Power Centre*, at para 6.

law, or the lower standard of “reasonableness”, meaning the Court will only quash the Board’s decision if the decision is unreasonable.<sup>17</sup>

The standard of review applied in any given case will depend on the nature of the particular question in issue. In general, questions of law that engage the expertise of the Board will be reviewed on a reasonableness standard, while questions of law of a more general application will be reviewed on a correctness standard.<sup>18</sup> In other words, the Courts will grant more deference to the Board where it was making a determination on an issue within its area of expertise.

Given that the Board frequently deals with matters involving the interpretation of the *Planning Act* and Official Plans, and accordingly has greater experience in these matters than the Courts, the Courts will apply the reasonableness standard in reviewing decisions relating to these matters, notwithstanding the Courts’ experience in statutory interpretation generally.<sup>19</sup> Greater deference will also be accorded by the Courts where the decision involved the application of the *OMB Act*<sup>20</sup> or the Board’s expertise in the market evaluation process under the *Expropriations Act*, R.S.O. 1990, c. E.26.<sup>21</sup>

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<sup>17</sup> *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (Ont. C.A.) [hereinafter referred to as *London v. Ayerswood*], at para 7.

<sup>18</sup> *London v. Ayerswood*, at para 7.

<sup>19</sup> *1300488 Ontario Ltd. v. Ramara (Township)*, [2005] O.J. No. 3870 (Ont. Div. Ct.) [hereinafter referred to as *1300488 v. Ramara*], at para 4.

<sup>20</sup> *London v. Ayerswood*, at para 7.

<sup>21</sup> *Tri-Lag Corp. v. York Region District School Board*, [2003] O.J. No. 208 (Ont. Div. Ct.) [hereinafter referred to as *Tri-Lag v. York Region*] at para 11.

In this regard, the Ontario Court of Appeal in *London v. Ayerswood* (2002) drew the following conclusions regarding the standard of review in the context of a decision of the Board regarding matters under the *Planning Act*:

“In our view, the Divisional Court erred in its conclusion as to the appropriate standard of review. The matter came before the Divisional Court by way of an appeal under s. 96(1) of the OMBA, which provides for an appeal from the Board to the Divisional Court, with leave, on a question of law. The proper standard of review was one of either correctness or reasonableness, depending on the nature of the particular question of law. Questions of law that engage the specialized expertise of the Board, such as the interpretation of its own statute, attract a standard of reasonableness. Questions of law that are of general application for which the Board has no special expertise are reviewed on a standard of correctness. See for example: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 S.C.C. 11, 209 D.L.R. (4th) 1 at para. 61. The proceeding before the Divisional Court was not a judicial review and the privative clause in s. 96(4) of the OMBA, therefore, had no application.”<sup>22</sup>

This judgment was followed by *Tri-Lag v. York Region* (2003) which discussed the matter of standard of review in regard to a decision of the Board on an expropriation matter as follows:

“In our view the "pragmatic and functional" approach to analyzing the standard of review leads to the conclusion that the standard of review in these circumstances is that of reasonableness simpliciter: see, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Pezim v. B.C. (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748. Although the Supreme Court of Canada suggested in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority* (1997), 142 D.L.R. (4th) 206, at paras. 47-48 that the standard of review from decisions of the Ontario Municipal Board is that of correctness, the issue in that case was a pure question of law (i.e. whether as a matter of law damages as a result of delay could constitute disturbance damages under the Expropriations Act). The issue here has to do with the exercise of the OMB's expertise with respect to market valuation. The Ontario Court of Appeal has recently confirmed that the expertise of the OMB in the market valuation process warrants deference: *747926 Ontario Limited v. Upper Grand District School Board* (2001), 56 O.R. (3d) 108, per Finlayson J.A. at p. 116.”<sup>23</sup>

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<sup>22</sup> *London v. Ayerswood*, at para 7.

<sup>23</sup> *Tri-Lag v. York Region*, at para 11.

The Court in *Vincent v. DeGasperis*, on an appeal from a Board decision dealing with a minor variance application under the *Planning Act*, addressed the matter of standard of review as follows:

“The most recent guidance from the Court of Appeal can be found in *Mississauga (City) v. Erin Mills Corp.*, 71 O.R. (3d) 397; [2004] O.J. No. 2690. The relevant portion of the judgment in which the related but different issue before the Court is described and the issue of standard of review is addressed is found in the following excerpt from the reasons for judgment of Goudge, J.A.:

[33] The Board's fundamental task in each case was to determine the test to be used to decide if there was "a conflict" between the various subdivision agreements and the relevant development charge by-law. In other words, what meaning should be given to that term in s. 17(2)? Having settled on a definition of conflict, the Board's task was to go on to apply it to each instance where the developer alleged that a conflict existed.

[34] In my view, the Board's interpretation of "conflict" in s. 17(2) is properly reviewed using a standard of correctness. The considerations relevant to the pragmatic and functional approach to determining the proper standard of review all point in this direction. Those considerations are well known: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193.

[35] There is no privative clause protecting the Board's decisions when they come before the Divisional Court on appeal with leave pursuant to s. 96(1) of the Ontario Municipal Board Act. This suggests a less differential standard of review.

[36] The appeal to the Divisional Court can only be on a question of law. Thus, what is reviewed by the court is a finding of law, not one of fact. In this case the legal question is the interpretation to be given to the term "conflict" in a regulation to the 1997 DCA. This is not the Board's home statute nor is there any other reason to presume that the Board has unique experience in interpreting it. Neither is it apparent that the Board's general expertise in matters of planning and land use is engaged in defining this term. The Board would seem to have no greater expertise than the court in giving meaning to the concept of "conflict" between a contract and a by-law. This points to closer scrutiny of the Board's decision.

In the case at bar, however, the Act is the Board's home statute and there is good reason to presume that the Board does have "unique experience in interpreting it" in relation to the provisions dealing with minor variances. In *London (City of) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (C.A.), the Court of

Appeal held that a reasonableness standard should be applied to decisions in which the OMB is interpreting its own statute. A similar analysis was made and the same conclusion reached by this Court in *Eastpine Kennedy-Steeles Ltd. v. Markham (Town)* [2004] O.J. No. 644, a case involving another provision of the Act. Accordingly, I conclude that reasonableness is the standard of review that must be applied here.

In the circumstances of this case, I am persuaded that the Board's Reasons cannot withstand the somewhat probing examination involved in the reasonableness test. The errors of the Board are so serious and extensive that they fail to meet the standard of reasonableness.”<sup>24</sup>

The most recent case on the matter of standard of review is *1300488 v. Ramara* (Sept 2005), in which the Court held as follows:

“From that Order, the Township brings this appeal. Under section 96 of the Ontario Municipal Board Act, R.S.O. 1990 c. O.28, the appeal is brought with leave (which has been granted) upon a question of law. The standard of review on such an appeal is either correctness or reasonableness, the former if it is a question of law of general application; the latter if the question engages the Board's special expertise: *London (City) v. Ayerswood Development Corp.* [2002] O.J. No. 400 (Div. Ct.) aff'd [2002] O.J. No. 4859 (C.A.). The central legal issue raised before us is the meaning of a clause in an Official Plan, enacted under the Planning Act, and also the meaning of certain sections of that Act. The Planning Act is an act which the Board deals with daily, as it does with Official Plans. These are matters as to which the Board has considerable expertise, relative to the Court, notwithstanding the Court's own experience in statutory and other interpretation generally. On the whole, we conclude that reasonableness is the appropriate standard on which to review these decisions.”<sup>25</sup>

As noted in *London v. Ayerswood* and *Mississauga (City) v. Erin Mills Corp.*, 71 O.R. (3d) 397, the privative clause in subsection 96(4) of the *OMB Act* that purports to protect Board decisions from Court review does not apply in the context of the exercise of the statutory right of appeal in subsection 96(1) of the *OMB Act*.<sup>26</sup>

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<sup>24</sup> *Vincent v. DeGasperis*, at paras 29-31.

<sup>25</sup> *1300488 v. Ramara*, at para 4.

<sup>26</sup> *Bernard Homes Ltd. v. York Catholic District School Board*, [2004] O.J. No. 2650 (Ont. Div. Ct.), at para 10.

The onus rests with the appellant to establish that the Board made an error at law on a statutory appeal to the Divisional Court.<sup>27</sup>

## **B. Judicial Review**

An alternative available to a party who wishes to question a decision of the Board is to bring an application for judicial review. The judicial review process is governed by the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (the “*JRPA*”). The key operative provision in the *JRPA* is section 2(1), which states the following:

“On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.”

Although subsection 2(1) expressly provides that an application for judicial review may be brought “despite any right of appeal”, the Divisional Court has held that where the

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<sup>27</sup> *Neebing v. Dale*, at para 12.

appellant has a statutory right of appeal, such as the one found in subsection 96(1) of the *OMB Act*, the Court will only entertain a judicial review in “special circumstances”.<sup>28</sup>

In general, judicial reviews are appropriate in circumstances where the issue is not the misinterpretation or misapplication of the law, which errors fall within the purview of subsection 96(1) of the *OMB Act*, but are in the nature of procedural defects, such as insufficient notice or apprehension of bias, which may give rise to a denial of natural justice.

Not every procedural error will result in the denial of natural justice sufficient to warrant a judicial review. The Divisional Court has found that in order for a procedural defect to give rise to a right of judicial review, the defect must be serious enough that it can be characterized as a “breach” of natural justice:

“... not every error results in a denial of natural justice that justifies the intervention by the court. The error must have such an impact upon the fairness of the proceeding that one is led to the conclusion that there has been a breach of natural justice.”<sup>29</sup>

As noted above, subsection 96(4) of the *OMB Act* contains a privative clause that purports to protect the Board’s decisions from review by the Courts:

“Save as provided in this section and in sections 43 and 95,  
(a) every decision or order of the Board is final; and

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<sup>28</sup> *Juno Developments (North Bay) Ltd. v. Northgate Square Ltd.*, [2000] O.J. No. 1337 (Ont. Div. Ct.), at para 4.

<sup>29</sup> *Ontario (Ministry of Municipal Affairs and Housing) v. Ontario (Municipal Board)*, [2001] O.J. No. 922 (Ont. Div. Ct.), at para 32.

- (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.”

It is now clear that a privative clause such as that above does not oust the supervision of the Courts in all instances, as noted in *Canada (Attorney General) v. Berrywoods Farms Inc.*, [2006] O.J. No. 798 [hereinafter referred to as *Canada v. Berrywoods*],

“Although s. 96(4) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 (OMBA), purports to eliminate judicial review by the Superior Court, it cannot and does not do so. See: 156621 *Canada Ltd. v. Ottawa (City)*, [2003] O.J. No. 5375 at paras. [1], [2], [7] and [10] (Div. Ct.).

In *Crevier v. Québec (A.G.)*, [1981] 2 S.C.R. 220, 234, 236, Laskin C.J.C. said:

“... a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction ...”

While the privative clause does not eliminate the possibility of a judicial review, it is one factor in determining the applicable standard of review in any particular case.<sup>30</sup> The other factors that will be considered are the expertise of the tribunal, the purpose of the act and the specific provision in question, and the nature of the problem.<sup>31</sup> Given the existence of the privative clause, the standard of review applied by Courts will range from patently unreasonable to correctness, a somewhat narrower range than that which is applicable in a statutory appeal.

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<sup>30</sup> *Canada v. Berrywoods*, at para 42.

<sup>31</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

In the *Canada v. Berrywoods* case, since the matter to be determined by the Court was the extent of jurisdiction of the Board in the face of certain provisions in the *Greenbelt Protection Act, 2004*, the standard of review was “correctness”. As the Court noted,

“This judicial review application raises the following jurisdictional issues:

- (a) whether the actions/decisions/absence of decisions with reference to the Berrywoods' applications by Pickering and Durham were ultra vires those municipalities, and
- (b) whether any appeals to the OMB were available from the actions/decisions/absence of decisions of the same municipalities.

Each issue is one of jurisdiction. Each is reviewable on a standard of correctness. See: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 at para. [5]; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, at para. [29].<sup>32</sup>

On the other hand, where there is a matter of a denial of natural justice, the approach is quite different, as noted below in *London v. Ayerswood*:

“When considering an allegation of a denial of natural justice, a court need not engage in an assessment of the appropriate standard of review. Rather, the court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly.”<sup>33</sup>

The remedies available on an application for judicial review are statutorily prescribed in the *JRPA*. The remedies available are orders in the nature of:

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<sup>32</sup> *Canada v. Berrywoods*, at paras 46, 47.

<sup>33</sup> *London v. Ayerswood*, at para 10.

- (a) *mandamus* (an order to compel the performance of a statutory duty where a prior demand for performance has been refused);
- (b) *certiorari* (an order bringing a tribunal's order to court for review);
- (c) prohibition or injunction (an order preventing a prescribed action; and/or
- (d) declaration (an order asserting the status of some matter).<sup>34</sup>

The *JRPA* requires that, except for cases of urgency, all applications for judicial review be heard by the Divisional Court.<sup>35</sup> An application for judicial review is governed by Rule 68 of the *Rules of Civil Procedure*.

An appeal from an order of the Divisional Court on a judicial review lies to the Ontario Court of Appeal, with leave of the Court of Appeal.<sup>36</sup>

### **C. Stating a Case**

A party may request that the Board state a case in writing for the opinion of the Divisional Court, pursuant to subsection 94(1) of the *OMB Act*. The question being raised must be one of law. The Court is required to hear and determine the question of law, and present its opinion to the Board.

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<sup>34</sup> *JRPA*, subsection 2(1).

<sup>35</sup> *JRPA*, subsection 6(1).

<sup>36</sup> *JRPA*, subsection 6(4).

This approach may be taken where there is a preliminary matter of law in a proceeding that is of such pivotal importance that it is sensible to obtain a court determination prior to the Board proceeding further with the hearing on the merits on the matter, in particular where there is some doubt as to the Board's jurisdiction to decide the matter. This may arise where the Board is being called upon to interpret a statute that is not within its usual jurisdiction, such as the *Municipal Act*.

Where this approach is taken, it is necessary to persuade the Board that a case should be stated on one or more clearly defined questions. Argument before the Board may be required if there is a lack of consent amongst the parties to the proceeding as to the questions and/or the appropriateness of stating a case to the court on those questions.

The Board may refuse to state a case where not all of the parties consent to bringing the application, as was explained in a case called *Regional Assessment commissioner, Region No. 3 v. Middaugh*, [2000] O.M.B.D. No. 36 [hereinafter referred to as *Regional Assessment commissioner, Region No. 3 v. Middaugh*],

“The Board's usual practice upon receipt of any applications under Section 94 of the Ontario Municipal Board Act, as amended, such as those received in this case, is to only grant such applications where all parties involved consent to such applications being granted.

The Board, simply said, does not have the resources to prepare and present such stated cases to the Divisional Court in the normal course on its own accord.

Where such stated cases occur, it is because all of the parties involved believe it is advisable to do so. They, then, agree to prepare, at their cost, the stated case for the "signature", so to speak, of the Board. They, then, at their cost, present the stated case on behalf of the Board to the Divisional Court. They make all the

arrangements for the hearing of the Stated Case and the remittance of the Divisional Court's Opinion to the Board.

In this case, Middaugh, supported by 739531 Ontario Limited, one of the successor property owners, which sought and received Party Status, was not prepared to consent, nor take part in the preparation and presentation of the Stated Case, nor share in the costs of same.

Middaugh and 739531 Ontario Limited were prepared to argue the matters before the Board, leaving it to any of the parties, including themselves, to seek leave to appeal, if they so wished, on any questions of law under Section 96 of the Ontario Municipal Board Act, as amended.

In the face of that opposition, the Board, in accordance with its usual practice, refused the applications to state a case.”<sup>37</sup>

Examples of issues for which the Board has stated a case to the Divisional Court include the constitutional validity of by-laws and the jurisdiction of the Board to compel a municipality to assume a public lane and accept all municipal services constructed with the public lane, amongst other positive obligations.<sup>38</sup>

## Summary

There are three alternative approaches to engaging the courts in matters before the Board; each of which will be appropriate in different circumstances:

- Where the party wishes the Court to review the Board’s interpretation and application of the law, the desirable route is to proceed by way of statutory right

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<sup>37</sup> *Regional Assessment Commission, Region No. 3. v. Middaugh*, at paras 30-35.

<sup>38</sup> *Re Ellice (Township)*, [1995] O.J. No. 4983 (Ont. Div. Ct.) (see also *Vanderschot v. North Easthope (Township)* (1995), 24 O.R. (3d) 286 (Ont. Div. Ct.), and *Mattamy (Rouge) Limited v. City of Toronto* (2003), 68 O.R. (3d) 677 (Ont. Div. Ct.), respectively.

of appeal. The appeal will only be heard, however, where the party can demonstrate that the legal issue being raised has met a certain threshold.

- Where a party seeks redress for defects in procedural fairness, the appropriate avenue of redress is commencing an application for judicial review.
- Finally, where a party seeks to have the “opinion” of the Court, the appropriate approach may be to request the Board to state a case to the Divisional Court.

In either a statutory appeal or a judicial review, the first determination that the Court will make is the standard of review that applies. This standard of review is not fixed, and will depend on the particular facts of the case. In the case of statutory appeals, the Courts will be more deferential to the Board in instances where the nature of the issue before the Board engaged an area of the Board’s expertise. By comparison, the existence of the privative clause in the *OMB Act*, which has no effect in the statutory appeals, will mediate in favour of greater deference being accorded to the Board in the case of a judicial review.