Approaching Judicial Review[1]

A. INTRODUCTION

Government regulation of environmental harm and the use of land, water and air has made judicial review – the practice of asking courts to review decisions made by a government body – a staple of public interest environmental law. Judicial review is an appeal to the courts, where available, of tribunal and administrative decisions make in the context of application processes and the issuance of approvals, permits and licenses. In particular, 2009-2010 has been a fruitful year for judicial reviews that address public interest environmental law with aquaculture wrested from provincial jurisdiction and the federal government chastised for its narrow scoping of environmental assessments and failing to adequately designate critical habitat for endangered species.[2]

The most recent success at the Supreme Court of Canada is the story of scoping of the federal environmental assessment for the proposed Red Chris mine in northwestern BC 80 kilometres south of Dease Lake[3] The 17,254 hectare property is located in the Tahltan Nation's traditional territory with the open pit mine proposed to be 1.8 kilometres in length and up to 1 kilometre wide.[4] MiningWatch, represented by Ecojustice, challenged the federal administrative approach of narrowly scoping significant projects such that the projects required only a screening under the *Canadian Environmental Assessment Act* (CEEA) rather than a comprehensive study involving public participation. The court ruled unanimously that CEAA and its regulations require that the environmental assessment track be determined according to the project as proposed; responsible authorities cannot change that track using scoping decisions. Where a project as proposed is listed on the *Comprehensive Study List Regulations*, it must proceed by comprehensive study rather than screening, and public participation is mandatory per s. 21 of CEAA. While the Court allowed the proponent Red Chris' environmental assessment approval to stand because there had not been a challenge to the substantive decisions made by the responsible authorities, the effect of the decision is to overturn an administrative and judicial approach to narrowly defining projects undergoing federal environmental assessment that prevented the vast majority of

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[1] Thanks to Micah Carmody, Articled Student with the Environmental Law Centre, for summaries of the recent case law in this area.

[2] These cases are, respectively, *MiningWatch Canada v. Canada (Fisheries and Oceans)* 2010 SCC 2; *Morton v. British Columbia (Agriculture and Lands)* 2009 BCSC 136, [2009] 7 W.W.R. 690; and *Alberta Wilderness Association v. Canada (Environment)*, 2009 FC 710, 45 C.E.L.R. (3d) 48, *Nooksack Dace: Environmental Defence Canada v. Canada (Fisheries and Oceans)*, 2009 FC 878, 45 C.E.L.R. (3d) 161.

[3] Lara Tessaro, staff lawyer with Ecojustice and counsel for MiningWatch, provided general information about this judicial review. Personal communication, January 31 2010. See also *MiningWatch Canada* v. *Canada (Fisheries and Oceans)*, 2010 SCC 2.

[4] Imperial Metals web site http://www.imperialmetals.com/s/RedChris.asp. Viewed February 4, 2010.

proposals from being subject to more comprehensive study and public scrutiny.[5] The decision undercut a systemic bias in the CEAA decision-making structure.

At the other end of the development spectrum are judicial reviews in the local government context that aim to thwart what citizen organizations believe to be "dumb growth" often on agricultural or ecologically sensitive sites. Municipalities in the Capital Regional District in Greater Victoria regularly experience formal and informal challenges to their decisions from citizen groups. Two of the most recent judicial review applications, launched in 2009, involve decisions that would likely lead to new suburban development on greenfield (undeveloped) sites. The Mount Newton Neighbourhood Association challenged the validity of a bylaw enacted by the District of Central Saanich, a small municipality north of Victoria the landbase of which is 70 per cent agricultural. The bylaw created a local service area authorizing municipal spending for a watermain to a rural part of the municipality with funding from taxation of the benefitting properties. The watermain would facilitate the subdivision and development of land in its corridor.[6] The City of Langford is also facing a judicial review application by the Vancouver Island Forest Action Network. The Network is challenging the validity of a zoning bylaw enabling the development of lands around Skirt Mountain based on failure to disclose information and a faulty public hearing process.

On a macro scale, judicial review can fundamentally rearrange senior government jurisdiction. At the local level, judicial review is often used as an attempt to hold local governments to community plans. At all scales it is a staple in the public interest environmental law toolkit.

The purpose of this backgrounder is to set out some of the considerations that public interest environmental lawyers take into account when seeking, framing and litigating a judicial review. The goal is to share some of the basic thinking behind crafting a judicial review. This backgrounder does not, except in a very cursory way, address the substantive law of judicial review or differentiate between federal court practice and judicial review in the BC Supreme Court. Section B briefly considers developments in the substantive law of judicial review. Section C canvases some of the issues that must be considered when contemplating judicial review in a public interest environmental law context. Section D invites the reader to consider questions posed in anticipation of the ELC Associates teleconference on Monday, February 8, 2010.

B. SUBSTANTIVE DEVELOPMENTS IN JUDICIAL REVIEW

While the fine points of judicial review embodied in administrative law are voluminous, this section sets out in brief the jurisdictional foundational for judicial review in BC and the gross

[5] Judicial treatment of a similar approach is found in *Miningwatch Canada. v. Canada (Minister of Fisheries & Oceans)* [2009] 2 F.C.R. (known as the "True North" decision).

[6] Irene Faulkner, counsel for the Mt Newton Neighbourhood Association and Vancouver Island Forest Action Network provided general information about these applications for judicial review. Personal communication February 2 2010.

standards of review that courts will apply to decisions. Federal decisions of a federal board, commission or other tribunal may be reviewed exclusively via the *Federal Court Act* and Rules, the particularities of which will not be addressed here.[7]

In a provincial context,[8] judicial review is governed by the *Judicial Review Procedure Act*,[9] and the *Administrative Tribunals Act*.[10] Up until 2004, the *Judicial Review Procedure Act* (JRPA) was the statute through which courts exercised their jurisdiction to review a "statutory power of decision" unless specific legislation provided for a statutory right of appeal.[11] A statutory power of decision "means a power or right conferred by an enactment to make a decision deciding or prescribing the legal rights, powers, privileges, immunities, duties or liabilities of a person, or the eligibility of a person to receive, or to continue to receive a benefit or licence whether or not the person is legally entitled to it."[12] It includes the making of regulations, rules, bylaws or orders.[13]

The provincial government enacted the *Administrative Tribunals Act* in 2004 to establish procedures and standards of review for the judicial review of decisions by specified entities. It provides for public access to information about tribunal processes (ss.11-13), hearings that are open to the public (s.41) and written decisions with reasons that are available to the public (ss.50-51). Section 59 also creates statutory standards of review that supplant the well-known common law standards of review of correctness and patent unreasonableness/reasonableness.[14] Courts have confirmed that the statutory standard prevails over the common law standard.[15]

Turning to the common law standards by which statutory decisions are evaluated where there are no statutory standards, discussion of the potential for judicial review in the public

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[7] R.S.C. 1985, C. F-7, Federal Courts Rules, SOR/98-106. For more detail on this subject see McDade, Gregory J., QC and Maegen Giltrow (January 2009). Grounds and Issues - How-to Tips With a Focus on Federal Court (Vancouver: Continuing Legal Education Society of B.C.) and Park, Helen C.H. and Philip C. Rankin (2007). Federal Court Practice Guide (Vancouver: Continuing Legal Education Society).

[8] For a thorough lay explanation of judicial review in the B.C. context see Mossop, David Q.C. (2006). Judicial Review: A Lay Person's Guide (Vancouver: Community Legal Assistance Society).

[9] R.S.B.C. 1996, c.241.

[10] S.B.C. 2004, c.45.

[11] For example, s.262 of the *Local Government Act* R.S.B.C. 1996, c. 323 provides that an elector of a municipality or person interested in a bylaws of the council may apply to the Supreme Court to set aside all or part of the bylaw for illegality. Notice of the application to set aside a bylaw must be served on the municipality at least 10 days before the hearing and not more than one month after adoption of the bylaw.

[12] At s.1.

[13] *Ibid.*

[14] Section 59(1) of the *ATA* mandates a standard of correctness for all questions "…except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness." Sections 59(3) and (4) of the *ATA* sets out the standard of review for discretionary decisions as one of patent unreasonableness, defined as discretion that: (a) is exercised arbitrarily or in bad faith, (b) is exercised for an improper purpose, (c) is based entirely or predominantly on irrelevant factors, or (d) fails to take statutory requirements into account.

[15] See, for example, *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 and *Carter v. Travelex Canada Limited*, 2009 BCCA 180 at para. 27.

interest environmental law context tends to become bogged down by the somewhat strict standard of review applied in challenging administrative decisions. While jurisdiction is reviewed by a standard of correctness, discretionary decisions, i.e. whether the decision was right from an environmental perspective, had been held in many cases to a standard of patent unreasonableness. This standard is now contained in the *ATA*. The 2008 Supreme Court of Canada decision in *Dunsmuir v. New Brunswick* settled on a standard of reasonableness for discretionary decisions,[16] which has been held not to displace statutory standards such as those found under the ATA.[17] A legislature's specific standard of review must be applied and the common law will fill any gaps in the legislation.[18]

In summary, public interest litigants must craft a judicial review that challenges the jurisdiction of the decision maker using a standard of correctness or challenges the substance of the decision or its discretionary aspect using a standard ranging from patent unreasonableness to reasonableness.

C. JUDICIAL REVIEW IN THE PUBLIC INTEREST CONTEXT

Given this jurisdictional context and standard of review that makes it difficult to challenge the discretionary decisions on their merits, this section explores some of the considerations that lawyers who are entertaining a judicial review in the public interest take into account before filing court documents.

1. Identifying the Client

Lawyers engaged in public interest environmental law usually come to judicial review from one of two perspectives. The first is where prior judicial reviews have established a negative legal precedent that requires a specific set of facts to challenge it. The second is in response to a community organization that is anticipating or facing a decision that is contrary to their interests and has adverse environmental impacts.

In the first instance, lawyers look for an appropriate set of facts and a client who has an interest in challenging a decision that those facts involve. Like in the lawyerly activity of ambulance chasing, professional ethics require transparent communication with a potential client to ensure that the client's goals and capacity are in accord with the goals of the lawyer interested in the test litigation. The lawyer may in fact approach the potential client pursuant to a general request for information via email or on the basis that the potential client organization had challenged government decisions previously. It is the lawyer's responsibility to ensure that their interest in establishing a legal precedent fulfills the client's goals. This is particularly important when the remedy a client desires is to stop an activity or development. The evidence and argument required to establish a legal principle may not obtain the client's

[16] 2008 SCC 9.

[17] *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12.

[18] For a more complete treatment of this topic see Connell, Jessica M. and Katherine A. Hardie (November 2009). Judicial Review Update 2009 (Vancouver: Continuing Legal Education Society).

desired result. Due diligence in this area may require the lawyer to write a lengthy legal opinion setting out the grounds for judicial review and evaluating the likelihood of success.

Lawyers who are responding to a specific request often become involved before a decision is made. It is at this point that the lawyer can begin to identify the record that would be required for judicial review. The lawyer can also give the client a road map of what may happen from a regulatory perspective. Specifically, the lawyer can inform the client of what approvals or decisions are required before the project can proceed, advise them to monitor decision-making activities and collect documentary evidence, and make freedom of information requests about the project itself and the background of the decision makers. In short, the lawyer and client will be building the record, monitoring activities and ensuring the public authority is correctly disposing of its duties before a decision (or legal issues) arises.

The notion of identifying the "client" is also relevant in the context of working with an environmental organization or community group. It is most efficient to have the organization pass a board motion authorizing one member of the executive, i.e. the president, to communicate with and give direction to the lawyer. It is also advantageous to have periodic meetings with the board of directors to keep them apprised of strategic direction and answer any questions they may have. Most challenging is working with multiple organizations where obtaining unanimity on each step taken is a trial in itself or an organization where a group of people insist on providing input. No Environmental Dispute Resolution Fund grant pays public interest environmental lawyers adequately to submit to editing by committee.

The importance of this process – identifying a client or coming to agreement about approach and possible consequences – is heightened in light of some short statutory limitation periods for judicial review. For example, an application for judicial review to the Federal Court shall be made within 30 days of communication of a decision or order.[19]

2. Standing

Standing rules for pursuing a judicial review usually require an applicant to be a party to the proceeding or a person who is directly affected by the decision. A court may grant public interest standing to a person not directly affected by the decision where there is a justiciable issue in which the applicant has a genuine interest and there is no other reasonable and effective manner in which the issue will be reviewed.[20] While the BC courts are relatively open to granting public interest standing,[21] justifying a client's standing to put the decision before the court is a preliminary issue that the respondent will not overlook.

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19 *Federal Court Act*, s.18.1(2).

20 *Minister of Finance v. Finlay*, [1986] 2 S.C.R. 607 (S.C.C.).

21 See, for example, *Western Canada Wilderness Committee v. British Columbia (Minister of Environment and Parks)*, [1988] B.C.J. No. 436 (S.C.) and *Berg v. British Columbia (Attorney General)*, [1991] B.C.J. No. 502 (S.C.).

3. What is the "Decision" Being Challenged

Identifying the government decision to challenge is difficult from a number of perspectives. A regulatory scheme may not establish a clear channel of discretionary or mandatory administrative decisions. When a decision is actually made may be hard to ascertain. Even when the decision emanates from a tribunal, it can be unclear whether the decision is an order, an interim order, a decision, or something in between.

From a strategic perspective to advance the law, the decision selected at a particular point in a process needs to be the best representative example of the impugned decision making (usually on jurisdictional grounds). Lawyers representing public interest litigants will have a sophisticated understanding of the legal and policy arguments underlying a respondent's reasons for making a decision, so the decision chosen as the trigger must best represent the pattern of decision making that is being challenged. It can also essentially determine the record that is available on which the judicial review will be based.

4. Framing the Judicial Review to Achieve the Desired Remedy

It is self evident that a lawyer must frame a judicial review to achieve the remedy desired by the client. This point bears repeating because clients must understand that remedies in judicial review are often procedural. They do not stop a project or development from proceeding but buy time during which other non-legal strategies can be pursued. It is important to confirm with a client what remedies are available and that that remedy is worth the effort and potential costs.

5. Obtaining or Building the Record

In some cases the record of decision making that forms the basis of a judicial review application is clear, for example a tribunal decision with written reasons that is accompanied by submissions and other information as part of the overall case. An example of this type of relatively complete record is CEAA project files maintained by technical staff in the Environmental Assessment Office. The CEAA project file provides evidence of statutory decisions throughout an environmental assessment process and contains crucial information for drafting a notice of application. Copies of these files are available to the public, or access to them may be expedited by staff in the department that is acting as the responsible authority if they are sympathetic to the public interest position.

In a local government context, many local governments will provide information about projects and applications without having to make formal freedom of information requests. However, there are also circumstances in which FOI requests and reviews are necessary. Clients often assist in this forum by collecting the existing record of decision making at the council level and digitally record public meetings and other proceedings. A best case scenario is a community organization, a few members of which have complete documentation of the

issue. These true citizen watchdogs who are highly organized in an electronic age make building the record relatively straightforward.[22]

6. Costs

While the threat of an adverse costs award has always cast a cloud over public interest environmental litigation,[23] over the past 15 years respondents have increasingly asked for costs against public interest litigants. The newest approach in this area is for respondents to make an application to the court requiring the public interest litigants to post security for costs. For example, this occurred in 2009 in the Central Saanich matter where the lawyers for the municipality made an application for the posting of a bond in the amount of nearly $20,000.[24]

In addition, the decision to pursue judicial review challenges not only the public decision maker but also the private parties that are affected by the decision. The number of parties may be limited, for example where the government decision is for approval of a project by one proponent. However, the number of private parties increases costs. Each party must be served with documents and may also be represented as a party in the judicial review. In the local government context, challenging a zoning bylaw that benefits multiple landowners who are each represented by counsel is potentially additionally debilitating from an expense perspective.

Before pursuing judicial review clients must be certain about how they will deal with an adverse costs award. Some agree to fundraise from their membership; others have no assets and therefore see themselves as judgment proof.

D. DISCUSSION

This paper is a modest attempt to identify some of the issues associated with commencing a judicial review for public interest environmental law purposes. To that end, we invite Associates to consider the following questions at our next teleconference on Monday, February 8 from 4pm to 6pm:

1. Challenging Systemic Decision-Making

Judicial review often seeks to redress systemic problems with government decision making through its application to a specific decision. What factors in choosing cases and crafting

[22] See, for example, the record of interaction between the Mount Newton Neighbourhood Association and the District of Central Saanich at http://www.senanus.net/.

[23] For a complete treatment of the law see Tollefson, Chris "Costs in Public Interest Litigation: Recent Developments and Future Directions" (2009) 35 *Advocates Quarterly* 181-200. http://www.law.uvic.ca/ctollef/publications.html

[24] Personal communication via email from Lori Waters of the Mount Newton Neighbourhood Association.

applications for judicial review assist in overcoming the inherent limitations of using one decision to challenge a pattern of decision making?

2. Identifying the "Perfect" Case (Fact Pattern)

Lawyers who are employed by public interest environmental law organizations have the ability to identify legal precedents that need setting, and the kinds of fact patterns that would lend themselves to setting the precedents. An example of this is the approach taken by lawyers at Ecojustice after the True North decision narrowed the scoping of projects under CEAA. They established a list of criteria that would identify a case to challenge the True North precedent.[25]

Most lawyers dealing with public interest environmental law cases do not have the luxury of evaluating the broader impact of challenging a specific decision. However, most could benefit from a systemic analysis or context. Would it be beneficial for lawyers who practice some public interest environmental law to create a forum in which to discuss judicial review strategies in different areas of environmental law? What are the inherent benefits and limitations to this type of approach (aside from lack of time)?

3. Scope of Judicial Review

Judicial review is one of the mainstays of environmental law in BC. However, its scope is limited to challenging government decisions. Looking ahead, some lawyers identify other areas of law that may prove to be fruitful ways to challenge both state and private action.[26] These include the criminal law, class action proceedings,[27] and consultation and accommodation of aboriginal rights and title.

Are there specific types of environmental harms or prevention of environmental harms that lend themselves better to other challenges outside of the scope of judicial review?

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[25] These were: (1) The environmental assessment would have had to have begun under the new act; (2) The EA would have to have begun before the True North decision was decided (after Nov 1 2003 and before Sept 2004); and (3) Not only did the project have to have been taken off the comp study list by RA's and subject to a screening, but DFO would also had not to have consulted with the public

[26] See, for example, the discussion in Rush, Stuart A. Q.C. (2008). Litigation Strategies: Future Directions for Public Interest Environmental Law (Vancouver: Continuing Legal Education Society).

[27] See the ELC Associates Backgrounder on this topic Climate Change Litigation (Teleconference December 3 2007) (Victoria: Environmental Law Centre) http://www.elc.uvic.ca/associates/documents/Climate-Change-Dec3.07.pdf.

For More Information:

Legislation and Regulations

Administrative Tribunals Act, S.B.C. 2004, c.45
Dunsmuir v. New Brunswick 2008 SCC 9
Federal Court Act, S.C. 1985, C. F-7
Judicial Review Procedure Act, R.S.B.C. 1996, c.241
Khosa v. Canada (Minister of Citizenship and Immigration), 2009 SCC 12
Local Government Act, R.S.B.C. 1996 c. 323 Part 6 Division 2 (ss.260-265)

Cases

Alberta Wilderness Association v. Canada (Environment), 2009 FC 710, 45 C.E.L.R. (3d) 48
Berg v. British Columbia (Attorney General), [1991] B.C.J. No. 502 (S.C)
MiningWatch Canada v. Canada (Fisheries and Oceans) 2010 SCC 2
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Sharma, Neena (January 2009). Drafting tips for Applications Brought Under the Judicial Review Procedure Act, R.S.B.C. 1996, c.241 "JRPA" (Vancouver: Continuing Legal Education Society of B.C.).

Rush, Stuart A. Q.C. (2008). Litigation Strategies: Future Directions for Public Interest Environmental Law (Vancouver: Continuing Legal Education Society).

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at http://www.law.uvic.ca/ctollef/publications.html