Curial Deference and the Ontario Municipal Board

Background

For counsel appearing before the Divisional Court and the Court of Appeal attempting to overturn the decisions of administrative tribunals, such as the Ontario Municipal Board ("OMB" or "Board") the long established legal principle of "*Curial Deference"* poses a significant hurdle. Deference by the courts to administrative decisions is founded on the concept that the administrative tribunal has special expertise that the courts do not possess. Often, the legislation creating the tribunal will contain a "*privative clause"* attempting to prevent appeals of the decisions of the tribunal. The legislature was attempting to prevent courts from interfering with decisions made by tribunals or government officials. The legislature viewed such decisions as simply instruments for the implementation of government policy. Section 96 of the Ontario Municipal Board Act allows an appeal, with Leave, to the Divisional Court, but only on a question of law. No appeal lies with regard to an error of fact or of mixed fact and law. So there is already a level of '*privity*' and '*deference*' to the OMB within Section 96.

Consistent with this 'hands off' principle is the long standing practice of '*Judicial Restraint*' or the reluctance of the Courts to interfere with a decision of a tribunal on motions made prior to or during the hearing. The Court's preference is to allow the tribunal to complete the hearing and render its decision before an application is made to the Court.[1]

The Board always provides written reasons for all its substantive and disputed matters. However, there is no legislative direction as to what the required standard is to meet an *'adequacy of reasons'* test. The common law historically set down 2 basic principles. The appellant is entitled to know the reasons why the tribunal ruled against him and an appellate court is entitled to similarly know and understand the tribunal's reasons in order for it to determine if judicial interference is warranted. The difficulty has been that the Courts have created different standards for different tribunals and for different factual situations.

Traditionally, the adequacy of the reasons of a decision of the OMB was given considerable judicial deference. Until recently, it was not uncommon for OMB decisions to simply recite the evidence of the various witnesses and for the Board to simply express a preference of one or more witnesses and to render a decision. What was often missing was a careful analysis of the evidence and how it related to official plan or legislative requirements. It appeared to be that the Courts were more concerned with the adequacy of reasons of tribunals that affected a person's welfare or security such as in immigration cases or decisions of governing tribunals where one right to continue to their profession is at risk.

In 2003 the Ontario Divisional Court [2]considered an appeal by a Dr. Lee from a decision of the College of Physicians and Surgeons to revoke Dr. Lee's Certificate of Registration after having found him guilty of sexually abusing a patient who was seeing him for counseling. The patient's allegation was made when she was receiving therapy from another counselor. Lee brought a motion to have the counsellor's notes produced and transcribed in order to test the reliability of the complainant's testimony. The tribunal ruled it did not have the jurisdiction to make such an order. The Court ruled that the "*lack of reasons*

[1] Ontario College of Art v. Ontario (Human Rights Commission) (1993) 11 O.R. (3d) 798
[2] Lee v. College of Physicians and Surgeons of Ontario [2003] O.J. No.3382; 66 O.R. (3d) 592

given by the panel for its decision made it impossible to know what motivated the panel to come to the opposite decision". The Court went on to review the type of cases where the inadequacy of reasons could amount to a denial of natural justice resulting in an error in law that was reviewable by a Court. Reference was made to several decisions of the Supreme Court of Canada between the years 1994 - 2002 in criminal cases. The Divisional Court then reviewed decisions relating to administrative decisions, in particular the 1999 decision of the Supreme Court of Canada[3] dealing with judicial review of an Immigration Officer who refused an application for permission to remain in Canada on humanitarian grounds. The key part of the decision was the importance of the tribunal's decision to the individual.

> "*The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed for example by Dickson J. in Kane v. Board of Governors of the University of British Columbia [1980] 1 S.C.R. 1105 at 1113, 110 D.L.R. (3d) 311:*
>
> > *A high standard of justice is required when the right to continue in one's profession or employment is at stake…A disciplinary suspension can have grave and permanent consequences upon a professional career."*

The Divisional Court, relying on the above concluded:

> *"In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written decisions suggest that, in cases such as this where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circumstances, some form of reasons should be required…It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached".*

It is important to understand that the tribunal had given reasons for refusing to order production and transcription of the counsellor's notes, namely, because they felt they did not have the necessary jurisdiction. However, the tribunal gave no reasons to support the jurisdictional point. The failure not only prevented Dr. Lee from understanding their decision, but it also prevented the appellate court from understanding the tribunal's motives. As a result the Divisional Court found the failure to provide adequate reasons was a denial of natural justice and a lack of procedural fairness, and allowed the appeal and ordered a new hearing before a differently constituted panel.

<u>Ontario Municipal Board</u>

Against this backdrop we need to review the progression of how the Courts have traditionally treated OMB decisions and what I perceive as significant recent changes and the reasons for such.

Let us go back almost 20 years and review the decision of MacFarland J. of the Divisional Court[4] dealing with an OMB decision [5]by a very experienced Board Member P.B. Wilkes, Vice Chair. The appellant, a ratepayer, had obtained Leave to appeal the Board's decision on the grounds (inter alia) that Member

[3] Baker v. Canada (Minister of Citizenship and Immigration) (1999), 174 D.L.R. (4th) 193 (S.C.C.)
[4] Green v. Barrie (City) [1991] O.J. No.1248
[5] Roman Catholic Episcopal Corp. v. Barrie (City) [1991] O.M.B.D. 232

Wilkes' reasons failed to comprehensively deal with the two main issues of the hearing, parking and density. On these two issues the residents, represented by a fellow resident Mr. Green, called an expert planner and the City of Barrie, who was also opposed called an expert planner and a transportation engineer. The Church called an expert planner and a transportation engineer. The parking issues related to neighborhood concerns that the already existing parking problem for the Church would be made worse by the development of a seniors' housing project on the church property. On the parking issue the Board ruled:

> "*The Board does not intend to go into all of the details with respect to this issue. The evidence satisfies the Board that the introduction of the residential use and the proposed changes to the arrangement of paved areas will not make the situation any worse than it is now."*

In reading the decision, I have no idea what the competing evidence was from these many experts on this important issue, nor why any one witness was preferred over another.

The Divisional Court noted that Mr. Wilkes' Decision concluded that the proposal "*would not make the matter worse than it is now*." The Court noted the reasons dealt with the issue '*albeit somewhat briefly'.* I even find it difficult to understand in reading the Court's decision why the Court found the Board's reasons were found to be adequate.

On the density issue, the City had argued that the density of the proposed seniors' residence would violate the standards set down in the Official Plan, if density was calculated on the site proposed for the residence. This was relevant because the Church was also seeking consent for a lease for the site in excess of 21 years, rather than a severance for a new lot. Had the Church applied for a severance the retained parcel would not have met zoning standards for the existing church. The severed parcel was to be leased to a different corporation and financed separately, because church law did not allow a church property to be mortgaged.

Similarly, the residents had raised a density issue and complained that density should be considered with regard to the site for the proposed residence only and not for the entire site that also included the existing church. The Court found that the Board's conclusion on this point was adequate. The Board's conclusion, as noted by the Court was:

> *"This and other means of support for the residents will be an integral part of the Church's programs."*

Perhaps you understand what this sentence means relative to the issue of density, but I have no idea.

The deference of the Court in this decision is indicative of the level of deference the Divisional Court was prepared to grant to the OMB at that time.

<u>The Board's Expanding Mandate</u>

Since those early Court decisions the Province has introduced a significant amount of new planning legislation that requires the Board's decisions to '*have regard to'* matters of Provincial interest[6],

[6] Planning Act, R.S.O. 1990, c.P.13, section 2.

decisions of a municipal council and any materials that were before the Council[7]. The Board's decisions shall also be '*consistent with'* policy statements and provincial plans that are in effect.[8] Comments provided to the local board or Council as well as the OMB are to also be '*consistent with'* the Provincial policy statements and are required to also '*conform'* with the Provincial plans that are in effect.[9]

The list of 'Plans' has steadily grown to now include:

- 1994 Niagara Escarpment Planning and Development Act
- 1994 Ontario Planning and Development Act, and Plans
- 1996 Provincial Policy Statement
- 2001 Oak Ridges Moraine Conservation Act, and Plan
- 2005 Provincial Policy Statement
- 2005 Places to Grow Act, and Plan
- 2005 Greenbelt Act, and Plan

Much of the said plans and policy statements relate to fundamental environmental issues such as the preservation of land and its inherent resources such as water, natural features, vegetation, wildlife and the like. The economic performance of municipalities is also an increasingly important factor. In particular, we see this with the Province's lead in the protection of pure (i.e.: non-retail) employment lands. The Province's amendments to the Planning Act in Bill 51 removing a landowner's right to appeal Council decisions on official plan amendments with regard to altering or expanding '*Settlement*' boundaries or creating new '*Settlements*' and decisions regarding the removal of lands from '*areas of employment'*. [10]As municipalities struggle with the need to provide soft and hard services to meet the demands created by dramatic population growth, the Board's decisions on municipal finances and Development Charges will take on a new perspective. One can reasonably expect further provincial legislative intrusion into these various areas. We will soon see an update from the Province of the 2005 P.P.S. Accordingly, the level of expertise often required to obtain land use approvals has also significantly increased in recent years. The Board's ability to comprehensively understand these new legislative mandates and the related expert evidence will also test Board Member's skills, in particular, their ability to write decisions that meet the mandated legislative test.

Recent Court Decisions

Recent decisions of the Divisional are now demonstrating less reluctance to interfere in Board Decisions.

i) Concerned Citizens[11]

In 2000, the Divisional Court in the decision Concerned Citizen's and King Township case, Justice Campbell recited the longstanding jurisprudence that:

[7] Planning Act, subsection 2.1.
[8] Planning Act, Subsection 3.5.
[9] Planning Act, subsections 3.6 (a) and (b).
[10] Planning Act Subsection 22 (7.2 -7.4)
[11] Concerned Citizens of King (Township) v. King Township [2003] O.J. No..3517 (Ont. Div. Ct.)

> *"a court should not parse the reasons for judgment in search of verbal errors. As the Respondents point out, good reason to doubt the legal correctness of the decision means good reasons to doubt the correctness of the order of the Board made by the OMB, not the verbal correctness of isolated passages of the reasons for judgment."*

The Court then went on to confirm that since no Ontario Court had previously considered the OMB's interpretation of those policies that affected the Oak Ridges Morraine and their environmental significance, the 'public interest' test for leave to appeal had been met. The Court also wanted to consider the proper interpretation to the phrase "*have regard to*". The Court weighed in on what amounted to a 'comprehensive hydrogeological study' and a 'growth management study' and an 'environmental assessment of water servicing' and the meaning of 'rural settlement area' all of which were required by the Region's Official Plan.

The Court also focused on the Board Member's reasons relating to the 'Need for Expansion' which the Court found were premised more on the political issues than on factual expert evidence. The Court commented:

> *"…(the reasons) reflect a narrow piecemeal decision of bygone days rather than a focus on overall regional concerns in the context of comprehensive and strategic planning that takes into consideration all relevant land use planning concerns, including environmental concerns."*

Leave to appeal was granted on all these issues.

ii) Zeller s [12]

In 2001, Justice Epstein appeared to soften this approach. The is case involved the Board's dismissal of my client Zeller's appeal and those of certain merchants to the proposal for a new Wal-Mart anchored power centre in Cobourg in a pre-hearing motion. The Court's central point was:

> *" There is a requirement in law to give reasons and meaning must be given to that requirement. It is important that those with am interest in the process understand how and why those interests have been dealt with in a certain fashion. However, the OMB only needs to give the general substance of the reasoning behind its decision to dismiss Zellers' appeal".*

*(*As Counsel to Zellers I thought that if it took 10 pages to say 'No' that I was entitled to Leave).

iii) Urban Corp [13]

The Ontario Municipal Board in 2007, after a very lengthy hearing relating to the conversion of industrial lands to residential uses on the north side of the Gardiner Expressway in an area known as the West Queen West Triangle in the City of Toronto, dismissed all the City's evidence and arguments relating to the preservation of employment lands and the substantial proposed density. The Board held two prehearing conferences which resulted in a Procedural Order identifying issues relating to the proper interpretation of the Planning Act, the 1996 and 2005 Provincial Policy Statements, the City's Official

[12] Zellers Limited v. Royal Cobourg Centres Limited (2001) M.P.L.R. (3d) 122 (Ont. Div. Ct.)

[13] City of Toronto v.2059946 Ontario Limited, et al(including Urban Corp subsidiary) Div Ct File No 79/2007 (Ont. Div. Ct. LAX J.)

Plan and Secondary Plan. The hearing lasted many weeks and the Board provided very lengthy reasons. However, with regard to these issues the Court noted that:

- "*Apart from a passing reference to 'the existing statutory and policy framework' there is no indication that the Board gave consideration to these issues".*

The most fundamental requirement of the OMB is to render decisions that are in the public interest. On this issue the Court found:

- "*At the core of the Board's decision-making in planning cases is the determination of the public interest*. *The Board provides no rationale or analysis to support its conclusion that the projects were in the public interest: Re: Cloverdale Shopping Centre Ltd et al (1966 57 D.L.R. (2d) 206 (Ont C.A.).*

In conclusion, the Court ruled:

- *"The Board's reasons are deficient in justifying its decision and provide no indication that the Board considered this or had regard to whether the projects were consistent with the Planning Act and provincial policy."*

- *"Those engaged in the planning process are entitled to know the appropriate weight and consideration to be given to provincial policies as well as to official plan policies in decisions concerning land use planning. The proper interpretation and application of the Planning Act provincial policy to land use development in the downtown area of a major Canadian city is sufficient importance to warrant the attention of the Divisional Court."*

Then, to remove the hurdle where the OMB clearly has specialized expertise and had been traditionally be granted deference, Court ruled:

- *"The proper interpretation of the Planning Act and the proper consideration of matters of provincial interest are questions of law. The proper interpretation and application of an Official Plan and the conformity of a proposed development with an Official Plan is a question of law."*

I was Counsel to Urban Corp. on the Leave application. Andrew Paton of MLC was Counsel to Urban Corp at the Board hearing. What was surprising to both of us was the Board Member was very experienced and did an excellent job in running a very difficult hearing. It was apparent from his very lengthy reasons that he went to considerable length to review the evidence. However, there was not a 'whif' of analysis with regard to the most critical legislated mandated issues.

iv) Aon v. Towerhill [14]

I act for Aon in this matter. Aon was successful in bringing a motion to dismiss the Towerhill appeals without a hearing. In the subsequent motion for costs on a substantial indemnity basis Aon filed affidavit evidence alleging that the Towerhill appeals were in retribution for an appeal Aon had filed

[14] Aon Inc. v Towerhill Developments Limited, Ont Div. Court File No. 114/09 (July 10,2009)

against one of Towerhill applications several years earlier. Aon's evidence included a memo of a telephone conversation at that time whereat a principle of Towerhill had made such a threat. As well there were transcripts of more recent telephone conversations with a principle of Aon with the same principle of Towerhill that took place after Towerhill had filed its appeals against Aon whereat Aon alleges the principle of Towerhill confirmed the earlier threat.

Towerhill brought a successful motion before the Board to have the said affidavit evidence excluded. The Board ruled that such evidence was irrelevant to the Costs motion and that the said evidence took place prior to Towerhill filing its appeal and was not 'in the face of the Board' or 'during the course of the Board's proceedings' and was therefore inadmissible.

In the Leave application Justice Jennings granted Leave and ruled that:

- *"The Board did not explain why it (the affidavit evidence) was irrelevant, other than to say, 'The conduct not only preceded the hearing but is also unrelated to any proceeding on the subject matter that is now before the Board."*

- The Board erred in its interpretation of the Board's own earlier decision in *Trilea Centres Inc. v. Ottawa Carleton (Regional Municipality) [1994] O.M.B.D. No. 1356* when it tried to distinguish the decision which had allowed pre-proceeding conduct as a factor in deciding the costs claim.

- As to the main issue the Court ruled that "*denying the opportunity to review conduct that occurred prior to launching the appeal makes a mockery of the power to award costs."*

- As to Towerhill's argument that the Board was entitled to deference since it was interpreting its own Rules of Practice and that the matter was therefore not one of general legal importance, the Court disagreed. "*In my opinion, the question of what conduct can give rise to an award of costs is a matter of importance to all parties coming before the Board."*

v) Judicial Restraint

The Divisional Court in Aon (supra) was faced with the Respondent's argument that the Court had firmly established a disdain for interfering in OMB proceedings prior to the Board making a decision. They argued that the Court should allow the Board to make a ruling on the Costs motion absent the excluded evidence and force Aon to simply rely on the evidence it filed in support of the Motion to Dismiss. That evidence did not include the allegation or evidence of misconduct. It simply relied on the failure of Towerhill to appear or make a written submission of its concerns before the Planning Committee of City Council, contrary to the requirements of the *Planning Act.*

Justice Jennings relied on the 1993 decision of the Divisional Court[15] in which Southey J., citing a decision of O'Driscoll J, created an exception to the rule:

[15] Ontario (Ministry of Health) v. Ontario (Human Rights Commission) (1993)20 C.H.R.R. 421

> *"We need to balance the benefits and disadvantages of intervening at this time. We recognize that intervention at this juncture should only occur when the advantage of doing so far outweighs the advantages of judicial restraint."*

In 2005 the Ontario Court of Appeal[16] dealt with the refusal of the LCBO to issue a subpoena requested by a party, on the ground that they considered the evidence was irrelevant. The Divisional Court had found that the tribunal was in error and that the evidence was potentially relevant and the summons should have been issued. The Court ruled that the appellant's ability lead evidence in support of its stay motion would be severely prejudiced and was a denial of natural justice. The Court of Appeal agreed that the facts warranted judicial interference that was otherwise discouraged.

Jenning J. ruled that to deny Aon the right to lead such evidence of improper motives by Towerhill in a motion for costs on a substantial indemnity basis would likely be fatal to the substantial indemnity claim and would likely lead to a denial of natural justice and that judicial interference was warranted.

The hearing of the appeal before the panel of the Divisional Court is still pending.

vi) Species At Risk Act S.C. 2002, c. 29 (SARA)

This federal legislation requires the federal Minister of the Environment to post a Final Recovery Strategy for the Greater Sage-Grouse and requires the federal Minister of Fisheries and Oceans to do likewise for the Nooksak Dace (minnow). The Federal Court in 2 separate decisions[17] in July and September 2009 respectively, set aside both Recovery Strategies for failing to properly identify critical habitat as require by the Act. The Court thoroughly reviewed the competing expert evidence in reaching its own conclusions.

Conclusion

The Ontario Municipal Board is perhaps the most visible of all administrative tribunal in the Province. The Board plays a significant role in the building of communities and neighborhoods and involves a wide cross section of the public. Accordingly the Board is an easy target for criticism from the media, the public and elected officials. It is of course the decisions of the latter group that the Board reviews. There have been many calls over the years for the abolishment of the Board from these various groups. However, it is this Board that often has to do the 'right thing' while municipal councils to the 'politically correct thing'.

The recent decisions of the Divisional Court, in my view, indicate a greater willingness of the Court to intervene in the Board's decisions in circumstances where previously the principle of '*curial deference*' would have discouraged the intrusion. Perhaps the Court is seeing the need to exercise its own expertise because of an awareness of some limitations on the Board's expertise. Certainly, here can be no doubt that the recent Provincial legislation is placing greater demands of the expertise of the legal and the consulting profession and these demands will continue to increase as the legislative flow increases. These same demands are, of course, placed on the Board.

[16] Ontario(Liquor Control Board) v. Lifford Wine Agencies Ltd. (2005) 76 O.R. (3d) 401

[17] Greater Sage-Grouse in Alberta Wilderness Association v. Minister of Environment, 2009 FC 710; Environmental Defence Canada v. Minister of Fisheries and Oceans, 2009 FC 878

Whatever the reason, it is important to remember that '*curial deference*' by the Courts is an acknowledgement of confidence in the administrative tribunal.

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