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Standing to Seek Judicial Review of a Statutory Decision

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Case Commented On: *Kozina v Knecht*, 2019 ABQB 355

This is a decision by Mr. Justice Brian R. Burrows ruling that the applicant (Kozina) has standing to seek judicial review of a decision made by the Alberta Law Enforcement Review Board (Board). It seems that the applicant's standing was contested at the outset of the judicial review hearing on March 29, and thus Justice Burrows initially heard submissions on standing. The merits of the judicial review application will now proceed at a later date. This ruling is of interest to me because of my ongoing work on standing to commence proceedings and also because the case involves the relationship between judicial review and a statutory right of appeal.

Kozina suffered injuries during his arrest by officers with the Edmonton Police Services in 2010. He filed a complaint with the Edmonton Chief of Police under Part 5 of the *Police Act*, RSA 2000 c P-17 and his complaint was denied. Kozina appealed this denial to the Board and was successful in having the Board order the Chief to re-consider the complaint. Upon reconsideration, the Chief formed the opinion that the matter should go to a hearing under section 45(3) of the Act, with the officers facing charges for misconduct under the *Police Service Regulation*, Alta Reg 356/1990 . In July 2016 the complaint against the officers was dismissed by the Presiding Officer who conducted the hearing. Kozina appealed this decision to the Board, and in January 2018 the Board dismissed Kozina's appeal in *Kozina v Edmonton (Police Service)*, 2018 ABLERB 002. This Board decision is the one subject to the judicial review application for which Justice Burrows has now ruled Kozina has standing to proceed with.

Justice Burrows relies primarily on *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 (CanLII) to set out the principles governing standing to seek judicial review of a statutory decision. These general principles are:

1. The general rule is that a person must have a legally-recognized interest in the decision subject to review. In this regard, the law tends to recognize property, economic, or liberty interests.
2. The decision should have a greater impact on the applicant's interest than what it has on the public generally.
3. The provisions in the governing legislation which are applicable to the impugned decision-making process are relevant considerations on whether an applicant has standing to seek judicial review, but are not determinative.
4. It is preferable to not to decide legal issues in the absence of parties whose interests are directly affected by the judicial review application.

The overarching direction under these principles is one which seeks to restrict access to judicial review and holds that an applicant must demonstrate they are specifically aggrieved or directly affected by the statutory decision in order to having standing to proceed with judicial review. Busybodies need not apply and frivolous applications waste scarce judicial resources. Some remedies such as *mandamus* even require the applicant for judicial review to demonstrate the statutory official has a public duty to act and that the obligation is owed to the applicant (see *Apotex Inc. v Canada (Attorney General)*, [1994] 1 FC 742, 1993 CanLII 3004 (FCA)).

However, it would be a mistake to conclude that access to judicial review is as restricted as these principles suggest. An important exception is the authority of a court to grant public interest standing for judicial review to an applicant who is not specifically aggrieved or directly affected by the statutory decision, but who can otherwise establish they have a genuine interest in a serious and justiciable matter. The leading authority for public interest standing is *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, 2012 SCC 45 (CanLII) and this Supreme Court judgment was summarized on ABlawg here. I would suggest public interest standing is increasingly becoming less of an exception to the general principles, and more of a mechanism employed by courts to ensure that the exercise of statutory power is subject to legal review in those cases where there is no specifically aggrieved applicant but serious questions linger over the legality of the statutory decision. But that discussion is for another day, as public interest standing is not at issue in *Kozina v Knecht*.

The crux of the standing matter in *Kozina v Knecht* is that the statutory proceedings are disciplinary. In other professional disciplinary contexts, the initial complainant is not necessarily a recognized party and the disciplinary proceedings seem more like a public interest undertaking than one which is personal to the complainant. In these other proceedings, it seems that questions would arise on the standing of the complainant to seek judicial review of the disciplinary outcome. Justice Burrows distinguishes these other scenarios from the proceedings under Part 5 of the *Police Act* (at paras 24 – 27).

Justice Burrows considers the complaint, disciplinary hearing and appeal processes set out by the *Police Act*, and points out that these provisions give a complainant some participatory entitlements and obligations including the ability to appeal a disciplinary decision to the Board under section 48 and then subsequently seek leave to appeal that Board decision to the Court of Appeal under section 18. Justice Burrows finds that the provisions governing the disciplinary and appeal procedures under the *Police Act* demonstrate an intention by the Legislature that a person who complains about the conduct of a police officer has a substantial and personal interest in how that complaint is resolved (at paras 11 – 22). While not the sort of interest which is preferred by the common law (property, economic, or liberty), the *Police Act* establishes that a complainant who has suffered excessive bodily harm during an arrest has a personal interest in how or whether the officers in question are disciplined, an interest which is distinct from the public generally in knowing that members of the police services conduct themselves appropriately (at paras 28 – 31). Accordingly, Justice Burrows rules that Kozina has standing to proceed with his judicial review application of the Board's decision to dismiss his complaint.

The next threshold in these proceedings will be whether judicial review should proceed given that section 18 of the *Police Act* provides for an appeal of a Board decision on a question of law to the Court of Appeal, with leave (permission) of the court. Drew Yewchuk and I have previously discussed these leave to appeal provisions on ABlawg here and Nigel Bankes has similarly raised some questions here. The general test to be met for leave is for an applicant to demonstrate: (1) the proposed appeal involves a question of law of sufficient importance to merit consideration by the court and (2) that the appeal has a reasonable chance of success on its merits. We are not told whether the applicant sought or failed to obtain leave of the Court of Appeal under section 18. In relation to the leave to appeal possibility, Justice Burrows notes as follows:

> Mr. Kozina had the right to seek permission and, if granted permission, to appeal from the decision of the Board to the Alberta Court of Appeal on a question of law. The existence of Mr. Kozina's right of appeal to the Court of Appeal may have significance to whether or not the Court should exercise its discretion to grant judicial review when the merits of Mr. Kozina's application are considered. That point is for later. For now, that the Legislature has given Mr. Kozina a right of appeal to the Court of Appeal is a further indication that it recognizes Mr. Kozina's interest in the subject matter of these proceedings to be personal and distinct from the interest of public generally. (at para 22)

In a recent paper I discuss the Alberta case law on the exercise of judicial review in the face of a restricted leave to appeal provision. Alberta courts have struggled to navigate this terrain cleanly. In *Foster v Alberta (Transportation and Safety Board)*, 2006 ABCA 282 the applicant sought judicial review in the Court of Queen's Bench on alleged procedural unfairness and the Court of Appeal ruled that judicial review was not available to the applicant because the legislation provided for an alternative, adequate remedy with a statutory appeal on questions of law (*Foster* at paras 17, 18). This seems appropriate where the applicant fails to seek leave to appeal, but what about where the applicant is refused leave to appeal on a question of law or instances where the applicant seeks review on a question of mixed law and fact or fact alone? Should judicial review still be available in those instances?

In *St Albert Housing v Society v St Albert (City)*, 2016 ABQB 203 the court proceeded to engage in judicial review on a question of mixed law and fact immediately after denying leave to appeal under the applicable statutory provision. However, in *797175 Alberta Ltd v Calgary (City)*, 2017 ABQB 18 the court interpreted a leave to appeal requirement as a partial privative clause to protect board decisions from judicial review on questions of mixed law and fact except in extraordinary circumstances which the court left to be ascertained in a future case.

Perhaps this is exactly what Justice Burrows will address when this judicial review is heard on the merits. If the applicant is seeking to have the court review a question of mixed law and fact, or fact alone, arising from the Board's decision, should judicial review be available in the face of section 18 which only provides for an appeal on a question of law with permission of the court? On the one hand the answer is yes: Judicial review has a constitutional basis and so denying access to judicial review based on the interpretation of a legislative provision (the statutory appeal) seems wrong. Yet on the other hand the answer is no: Allowing judicial review in these

circumstances renders the statutory appeal provision and the leave requirement meaningless. At the core of this difficulty is the familiar tension of giving meaning to a legislative provision which purports to limit the availability of judicial oversight while at the same time adhering to the constitutional principle that all exercises of statutory authority are subject to legal scrutiny.

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