

CANADA

FEDERAL COURT OF APPEAL AND FEDERAL COURT

Introduction

Canada is a Parliamentary democracy with a federal system of government. In addition to dividing powers between the provincial and federal levels of government, the Constitution entrenches the fundamental individual rights set out in the *Canadian Charter of Rights and Freedoms*. Canada is also bi-jural: the province of Quebec is a civil law jurisdiction, while the rest of Canada is common law. However, administrative law throughout Canada is based on the common law. Hence, the jurisdiction of the superior courts includes both private law and public law proceedings.

Canada has a well-developed system of specialized, independent administrative tribunals at both the provincial and federal levels of government. Some hear appeals by individuals from decisions made by various public authorities and officials; others exercise original decision-making power, especially in the regulation of particular industries and the professions; while others adjudicate disputes between individuals under labour, employment, anti-discrimination, and landlord-tenant legislation, for example. However, unlike Australia, Canada has no general administrative appeal tribunal at the federal level, although the *Tribunal administrative du Québec* is similar in some respects to the AAT.

Each of the ten Provinces and the three federal Territories has its own court system, comprising a lower court (with jurisdiction over summary criminal offences, child welfare, and aspects of family law, for example), a superior court of general jurisdiction which hears civil and criminal matters and administers both provincial and federal law, and a court of appeal. An appeal on questions of both provincial and federal law, and public and private law, lies from the courts of appeal to the Supreme Court of Canada with leave of that Court. Judges of the lower court of a province are appointed by the provincial government, while the more than one thousand judges of provincial superior courts and courts of appeal are appointed by the federal government.

In 1971, the Parliament of Canada enacted the *Federal Court Act* which created the Federal Court of Canada to complement the court systems in the provinces by adjudicating cases arising under specified areas of federal law. Originally, the Federal Court comprised two divisions, the Trial Division and the Appellate Division. However, in 2003, the Federal Court of Canada and its two divisions were replaced by two separate courts: the Federal Court replaced the Trial Division, and the Federal Court of Appeal replaced the Appellate Division. An appeal lies from the Federal Court to the Federal Court of Appeal, which also hears appeals from the Tax Court of Canada, and appeals and applications for judicial review directly from certain federal administrative tribunals specified in the *Federal Courts Act*.

An appeal from the Federal Court of Appeal lies to the Supreme Court of Canada with leave of that Court. However, because the Supreme Court of Canada grants leave to appeal in between 70 and 80 cases a year from courts of appeal across Canada in every area of the law, the Federal Court of Appeal is for nearly all federal administrative law cases, the final court of appeal. Administrative law also comprises a larger percentage of its caseload than that of any provincial court of appeal.

Judges of the Federal Courts reside in Ottawa, the national capital, where the Courts' central administration is also based. However, in order that the Courts are accessible to people across Canada, Registries are located in the capital cities (and some other major cities) of each province where litigants may file their documents. Judges of the Courts travel to those cities in order to conduct hearings. The Federal Courts are bi-lingual; proceedings may be conducted in either French or English as the parties wish. They are also national courts, in the sense that their orders are binding and enforceable across Canada.

1. Jurisdiction or competence

Before the creation of the Federal Court in 1971, the provincial superior courts judicially reviewed administrative action by both federal and provincial bodies and public officials. The Supreme Court of Canada held that provincial courts' inherent power to ensure that administrative tribunals do not exceed their jurisdiction could not constitutionally be removed by a privative clause that purported to preclude judicial review for jurisdictional error: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 230. It would be contrary to the rule of law to permit tribunals

to determine the legal rights and duties of individuals without any supervision of the legality of their decisions by an independent judiciary.

The Federal Courts exercise jurisdiction in a number of areas within the competence of the federal Parliament, including intellectual property, admiralty and maritime law, actions for damages against the federal government, and income tax. Most importantly for present purposes, of course, the Federal Courts exercise exclusive jurisdiction over most federal administrative law matters. Although the Courts' administrative law jurisdiction is statutory, it is to a large extent a codification of the common law of judicial review.

The Federal Courts may also decide any question of constitutional law that arises in the course of a judicial review proceeding, whether concerning the division of powers between the federal and provincial levels of government or the *Canadian Charter of Rights and Freedoms*. Thus, for example, a litigant may challenge administrative action on the ground that the legislation under which it was taken should not be interpreted as authorizing it since it breached a constitutional right of the applicant. To the extent that legislation authorizes unconstitutional administrative action, the Courts may declare the legislation itself to be invalid.

1.1-3. Which categories of administrative decisions are eligible for review (administrative regulations/individual decisions)? Are there certain decisions of the Executive or public authorities which cannot be submitted to review, by reason of the nature or substance of such decision?

The Federal Courts have exclusive judicial review jurisdiction over "federal boards, commissions or other tribunals" which are defined as any body or person "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament [that is, the federal legislature] or by or under an order made pursuant to a prerogative of the Crown". Such bodies or persons include all manner of agencies of the federal government, and federal public officials (including individual Ministers and the Governor in Council or Cabinet), as well as any non-governmental body or person on whom the federal Parliament has conferred statutory powers or duties.

However, they do not include bodies incorporated under federal legislation exercising only powers of a private or commercial nature. Powers exercised by governmental bodies in relation to contracts straddle public and private law. In some circumstances, their exercise is subject to the judicial review jurisdiction of the Federal Courts, in others it is not.

The categories of administrative action taken by a federal board, commission, or other tribunal pursuant to a statutory power reviewable in the Federal Courts are equally broad. They include the unlawful failure to do an act or thing, or the unreasonable delay in so doing, and any “decision, order, act or proceeding” of a federal board, commission or other tribunal. In addition to individual decisions or orders, regulations and other forms of delegated legislation (including guidelines and policies) issued pursuant to powers conferred, expressly or implicitly, by federal legislation are subject to judicial review, although purely internal rules, such as those governing the management of the public service, may not be.

Nor is the Courts’ jurisdiction limited to “final” administrative action determining the legal rights of individuals, but may include action taken preparatory to a final determination. The Courts will ask whether the impugned action has a sufficiently significant effect upon the ultimate decision, and hence on the rights of individuals, to warrant judicial intervention at that stage of the decision-making process. Because matters of this kind are rarely black or white, the Courts are as likely to take the non-final nature of the action into account by relaxing the intensity of judicial or exercising their discretion to withhold the relief sought, as they are to characterize the issue as one of their jurisdiction.

At one time in common law jurisdictions, administrative action taken pursuant to the inherent or prerogative powers of the Crown were considered to be beyond the judicial review jurisdiction of the courts. The prerogative governs matters such as the conduct of international relations, national defence, the prorogation and dissolution of Parliament, the issue of passports, the award of honours, the appointment and dismissal of senior public office holders, and the making of *ex gratia* payments.

However, nowadays whether the Courts have jurisdiction to review administrative action is not determined solely by reference to whether the source of the legal authority for it is found in legislation or Crown prerogative. Indeed, as noted above, the *Federal Courts Act* specifically brings within the Federal Courts' administrative law jurisdiction bodies acting under an order made pursuant to the prerogative of the Crown.

Nonetheless, the exercise of some prerogative powers is likely to continue to be unreviewable as involving a political question, such as the Governor General's grant or refusal of a request by the Prime Minister to dissolve Parliament, the appointment or dismissal of a Minister, the making of an international treaty, or a declaration of war. In other contexts, however, the Courts may be prepared to intervene if a flagrant abuse of power was involved or an important individual right was at stake. For example, the Courts have assumed jurisdiction to review the refusal to issue a passport, and have prohibited the extradition of a Canadian citizen pursuant to a treaty if the individual may face a sentence of death if found guilty by a court in the requesting country.

2. Procedure

2.1 General description of applicable procedural rules

a) Where can these rules be found; by which statute or regulations are they defined?

The *Federal Courts Rules*, made pursuant to the *Federal Courts Act*, contain the rules of procedure relevant to all the proceedings of the Federal Courts, including applications for judicial review of federal administrative action and appeals from the decisions of administrative tribunals, when a statutory right of appeal exists.

The Courts' procedures are modern and accessible. For example, they include provisions for the active case management of litigation and alternative dispute resolution, and must be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The Rules are kept under constant review by the Rules Committee, a body comprising judges of the Federal Courts, members of the Bar, and academic consultants.

b) Are the various procedural steps in the hands of the parties and/or the court and which role do they respectively play?

The *Federal Courts Rules* prescribe procedures respecting the various proceedings brought before the Court. Subject to the rules, the pre-hearing procedural steps are largely in the hands of the parties. Parties are required to adhere to specific timelines. For instance, an application for judicial review must be perfected and a requisition for a hearing date submitted within 180 days of commencement of the proceeding in the Courts.

The Courts monitor the progress of cases and order a status review of any proceeding which fails to meet its “major milestones.” As such, the Rules include a case management system which consists of status reviews and specially managed proceedings and applies to both applications and appeals. Status reviews arise when parties fail to reach specific steps within a certain time. An applicant or appellant may be required to show cause why the proceeding should not be dismissed for delay.

Orders can be made for a specially managed proceeding and overseen by a case management judge. A case management judge may give any directions that are necessary for the just, most expeditious and least expensive determination of the proceedings on its merits. The Rules also provide for various forms of dispute resolution processes.

c) Is there a prosecutor? If so which role does he/she play?

There is no prosecutor. However, invariably one of the parties is a government agency or corporation and therefore represented by Department of Justice lawyers. The administrative tribunal whose decision is the subject of a judicial review application participates in the proceeding as an intervener.

d) Are the court proceedings mainly written or oral, i.e. do the parties communicate by exchanging written presentations or in the form of an oral debate before the court?

At the pre-hearing stage, communications between the parties are normally in writing. Prior to hearing of the application for judicial review, the parties submit a record of the relevant

documents, a book of the authorities on which they rely, and a memorandum of fact and law of normally no more than 30 pages in length. In addition, the parties have a right to make oral representations to the panel of the Court that will decide the case. A typical application for judicial review will be set down for a hearing of 3 hours, although other may be longer depending on the complexity and number of the issues, and the number of parties and interveners.

e) Is the case determined by a single judge or a panel of judges?

Subsection 16(1) of the *Federal Courts Act* requires a panel of at least three judges of the Federal Court of Appeal for “every appeal and every application for leave to appeal to the Federal Court of Appeal, and every application for judicial review or reference ...” A panel of three judges is the norm. However, most pre-hearing motions before the Federal Court of Appeal (which are normally disposed of without an oral hearing) are decided by a single Judge. All proceedings in the Federal Court, including applications for judicial review, are heard by a single Judge.

2.2. What conditions must be fulfilled in order to confer the right to make a claim for review? Must the plaintiff show some form of personal interest? If so, is it defined in a broad or narrow manner? Please provide relevant case-law.

The Federal Courts may not conduct a review of administrative action on their own motion. Subsection 18.1(4) of the *Federal Courts Act* stipulates that “an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.” This provision has been interpreted liberally and is not confined to the protection of rights recognized by private law.

In addition, the apparently limiting words of this provision have not prevented the Courts from also exercising discretion to give standing to individuals, and non-governmental organizations, claiming to represent the public interest, provided that there is a justiciable issue at stake, and there are no other effective and practical means of getting the issue before the courts. See, for example, *Canadian Parks and Wilderness Society v. Superintendent of Banff National Park*, 1996 CanLII 3819 (F.C.A.); *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

2.3 Does the plaintiff have direct access to the court, or is he/she obliged to submit his/her demand through a counsel/attorney?

Most applicants for judicial review are represented by counsel, but may represent themselves. However, they are cautioned that proceedings in a court of law can be complicated and on the advisability of seeking legal assistance. Finally, litigants are advised of the possibility of having to pay some or all of the legal costs of the other party if they are unsuccessful in a proceeding.

On the other hand, unlike the position before administrative tribunals, an individual may normally only be represented by a person who is a member of the Bar of one of the Provinces, although more latitude is exercised when the litigant is a corporation.

2.4 Can a legal demand be submitted to an administrative court using electronic technologies (Internet)?

A pilot project initially begun in November 2008 was recently expanded in July 2009. It allows for the electronic filing and service of documents electronically. Guidelines are provided to the profession by way of a notice available on the Court's website or from the Registry. In addition, hearings may be conducted by video-conference.

2.5 Is there some form of public or private legal aid system aimed at providing assistance to a person who cannot afford an attorney?

The availability of legal aid is governed by the relevant legislation of the province or Territory where the litigant resides. The extent to which legal aid may or may not be available as well as the types of matters for which it may be available is a provincial or territorial responsibility. Those challenging a refusal by the Immigration and Refugee Protection Board to recognize them as refugees normally do receive legal aid, because their constitutional rights are at stake. The Court also retains the authority to order the payment of certain costs under the *Federal Courts Rules*.

2.6 When a claim is made to the court, is the right of the relevant public authority to implement the decision stayed or suspended until the court has determined the case?

An application for judicial review does not automatically stay the administrative action being challenged. However, on a motion by an applicant, the Federal Courts have the discretion pursuant to subsection 18.2 of the *Federal Courts Act* to “may make any interim orders that it considers appropriate pending the final disposition of the application.”

The Courts may grant a stay on the basis of the following three factors. Does the underlying challenge raise an arguable legal issue (a relatively low threshold)? Will the applicant suffer irreparable harm (that is, harm, that cannot be compensated by an award of damages) if a stay is not granted? Does the balance of convenience favour staying the administrative action pending the disposition of the application for judicial review or appeal? This latter factor requires the Court to consider whether the harm likely to be caused to the public or a private party if the impugned administrative action is stayed is outweighed by the harm that the applicant is likely to suffer if a stay is refused.

**2.7 Can the court deliver an injunction ordering the Executive or a public authority to produce a document to which the other party could not previously have access?
(Please provide relevant case-law)**

The extent to which the executive or a public authority can be compelled to produce a document has been examined in a number of decisions involving national security issue, notably by the Supreme Court of Canada in *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125.

Of course, document production would be subject to the provisions of the *Canada Evidence Act* and in particular the various privileges which may apply both in the *Canada Evidence Act* and at common law. In particular, when the Executive claims that it would be contrary to disclose a particular document, the Court will normally examine the document before deciding whether to require its production in order to determine if the damage to the public interest caused by its disclosure is greater or less than the damage to the administration of justice if it is withheld.

2.8 Are there emergency or interim procedures? Are they simply aimed at delivering preliminary injunctions (such as a Temporary Restraining Order) or at taking provisional measures, or can they also resolve a fundamental question?

As explained above in 2.6, the Federal Courts may temporarily stay administrative action pending the determination of the application for judicial review. A motion for a stay is normally heard orally, including by telephone. The Court may also grant a short interim stay pending the determination of the motion for the stay.

The merits of the underlying application for judicial review or appeal will not be decided on the basis of the stay hearing. However, as a practical matter, the refusal of a stay may end the litigation. This may be the case, for example, if a non-national is refused a stay of his removal from Canada pending a determination of his application to review the legality of the Minister's refusal to permit him to remain.

3. The powers of the Federal Court of Appeal

3.1 What is the hierarchy of legal standards (Constitution, international law, statutes) that the court takes into account when carrying out review?

Subsection 52 (1) of the *Constitution Act, 1982* provides for the supremacy of the Constitution: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Thus, administrative action, whether an individualized decision or delegated legislation, that is based on a statutory provision that the Court determines is contrary to a provision of the Constitution is itself of no force or effect.

Constitutionally valid statutes are second in the hierarchy of norms applied by the courts in determining the validity of the impugned administrative action and may vary the common law principles on which much of administrative law is based. For example, legislation may prescribe the procedure to be followed before particular administrative action is taken, which may be either more or less than would otherwise be imposed by the common law. In addition, the terms of a

statute may prescribe the factors that an administrative decision-maker must consider before exercising a statutory discretion.

However, Judges may be reluctant to interpret legislation as removing significant common law protection of individual rights, the right to procedural fairness, and other aspects of the rule of law. For example, courts have generally interpreted very narrowly statutory provisions that appear to preclude them from reviewing the decisions of particular administrative tribunals. Such ouster or preclusive clauses have been held not to immunize from judicial review administrative decisions that are beyond the statutory authority of the tribunal in question. Indeed, when a provincial legislature succeeded in drafting a clause that expressly shielded from judicial review such decisions by a tribunal, the Supreme Court held the clause to be unconstitutional: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 230.

Traditionally, international law must be incorporated into domestic law by statute before being generating legal rights in Canadian law. However, international law is now frequently used in the interpretation of both domestic legislation and the *Canadian Charter of Rights and Freedoms*. Thus, the Courts nowadays presume that, in enacting a statute, Parliament did not intend to authorize administrative action that is contrary to a rule of international law that is binding on Canada, even if it has not been incorporated by statute into domestic law. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada relied upon the *Convention on the Rights of the Child*, which had not been incorporated into Canadian domestic law, to conclude that, in considering whether to exercise his statutory discretion to permit a foreign national illegally in Canada to remain, the immigration officer was bound to give significant weight to the best interests of her Canadian-born children.

3.2 When the Executive or a public authority gives its interpretation of a statute, can the lawfulness of such interpretation be challenged in court? If so, according to which standards and criteria? Is the court bound by policy decisions of the Executive or a public authority?

The Federal Courts are empowered by paragraph 18.1(4)(c) of the *Federal Courts Act* to set aside an administrative decision on the ground of error of law. The interpretation of legislation

is normally regarded as involving a question of law. However, in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the Supreme Court held that, while the *Federal Courts Act* identifies error of law as a ground of review of federal administrative decisions, it does not also prescribe the standard of review to be applied by the Courts in order to determine if the tribunal's interpretation is erroneous in law. Selecting the appropriate standard of review is governed by the common law of judicial review developed by the courts.

The leading case on the standard of review in Canadian administrative law is *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Briefly, that decision establishes the following propositions:

- (i) questions of constitutional law decided by a tribunal are reviewable by a court on a standard of correctness;
- (ii) a tribunal's interpretation of general statutes is reviewable on a standard of correctness;
- (iii) a tribunal's interpretation of its enabling statute, and other statutes closely related to the regulatory scheme administered by the tribunal, are presumptively reviewable only on a standard of reasonableness, unless the statutory provision in dispute concerns a value of importance to the legal system or, perhaps, raises a broad question of the tribunal's authority.

Nearly all cases in which a court has applied a reasonableness standard to the review of an administrative interpretation of enabling legislation have involved decisions by adjudicative administrative tribunals. Whether, or to what extent, deference would also be shown in other administrative contexts (a Minister's interpretation of a statutory provision enabling the making of delegated legislation, for example) is unclear.

Policy decisions of the Executive or a public authority on which an administrative decision are based are also subject to judicial review. An administrative decision that is based on an unreasonable policy is invalid.

3.3 If the executive gives its interpretation of treaty law, is the court bound by such interpretation?

Again, to the extent that decisions affecting individuals may result, the Court is empowered to scrutinize not only the decision but the basis upon which it was made.

3.4 Insofar as discretionary measures are concerned, which type of review does the court exercise? Provide if possible, relevant case law to show how the court verifies the reasonableness of a decision of the Executive or a public authority and checks whether the reasons are consistent with the substance of the decision.

The leading case as it relates to discretionary decision making is the Supreme Court of Canada decision is *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Generally, a decision maker is under a general obligation to act fairly. This obligation varies according to the situation but is understood to include the right to be heard before an unbiased decision maker and be provided with reasons for the decision. Further, the decision must be reasonable. A breach of either or both will attract the intervention of the Court.

3.5 Is the court simply empowered to quash (declare null and void) the decision or to dismiss the legal demand? Instead of quashing the decision, is it within the authority of the court to amend or modify the decision? Can the court substitute an entirely new and different decision? Can the court reconsider the merits of the decision?

The powers of the Federal Courts in judicial review proceedings are outlined in subsection 18.1 (3) of the *Federal Courts Act* whereby it may

- (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
- (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

As a matter of theory, the Courts may not normally substitute their decision for that of the administrator. In fact, however, the reasons of the Court may leave the administrator little room to maneuver when the matter is remitted to him or her, as when, for example, the Court has held the tribunal's interpretation of its enabling statute to be unreasonable. The Court will often remit with a direction to the tribunal to re-determine the matter in accordance with the reasons of the Court.

The powers of the Court in its appellate role are outlined in section 52 of the *Federal Courts Act* whereby it may:

- (a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;
- (b) in the case of an appeal from the Federal Court,
 - (i) dismiss the appeal or give the judgment and award the process or other proceedings that the Federal Court should have given or awarded,
 - (ii) in its discretion, order a new trial if the ends of justice seem to require it, or
 - (iii) make a declaration as to the conclusions that the Federal Court should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in light of that declaration; and
- (c) in the case of an appeal other than an appeal from the Federal Court,
 - (i) dismiss the appeal or give the decision that should have been given, or
 - (ii) in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate.

3.6 When the court quashes a decision taken by a public authority, does this take effect retroactively, when the original decision was made, or simply when the court rules? Does the judge have the power to fix the time from which the annulment operates? On what principles is a date chosen?

Normally, when an administrative decision is set aside, it is deemed never to have been validly made. However, this does not invalidate similar decisions made with respect to other individuals who did not challenge them in court. In some very rare cases, the Court has suspended for a specified period an order declaring a statute or delegated legislation to be invalid in order to avoid administrative chaos and to allow the Government to introduce an amended version.

3.7 What means are available to a judge to compel the administration to enforce a decision which the executive does not wish to carry out?

The Executive is not above the law. As a last resort, the Executive's refusal to comply with an order of the Court may result in contempt of court proceedings. However, I know of no instance in which this has been necessary.