CARSWELL

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

BY

DONALD J.M. BROWN, Q.C.

AND

THE HONOURABLE JOHN M. EVANS

Public Law Counsel, Goldblatt Partners LLP
Formerly Judge of the Federal Court of Appeal and
Professor, Osgoode Hall Law School of York University

WITH THE ASSISTANCE OF

DAVID FAIRLIE

VOLUME 2 C2


THOMSON REUTERS®

A cataloguing record for this publication is available from Library and Archives Canada.

ISBN 0-9683686-0-3 (set) - ISBN 0-9683686-1-1 (v.1)
ISBN 0-9683686-2X (v. 2)
ISBN 0-9683686-2X (v. 3)

Printed in Canada by Thomson Reuters.

THOMSON REUTERS®

THOMSON REUTERS CANADA, A DIVISION OF THOMSON REUTERS CANADA LIMITED

One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4

Customer Relations
Toronto 1-416-609-3800
Elsewhere in Canada/U.S. 1-800-387-5164
Fax 1-416-298-5082
www.carswell.com
Contact www.carswell.com/contact
Email: www.carswell.com/email

CHAPTER 2

THE APPLICATION FOR JUDICIAL REVIEW

2:1000 INTRODUCTION

Ontario, British Columbia, Prince Edward Island and the federal government all have statutes that govern judicial review of administrative action. The two provincial statutes introduced in the 1970s, first in Ontario,[1] and then in British Columbia,[2] are very similar in both overall design and detail. Their main purpose, as noted in the McRuer Report[3] on which the Ontario statute was based, was to create a single application to the court to take the place of the prerogative remedies and proceedings for a declaration or an injunction, and thereby to do away with the legal technicalities that had grown up in connection with them.[4] Subsequently, Alberta,[5] Saskatchewan,[6] and Nova Scotia[7] have essentially achieved the same result through amendment of the Rules of Court.[8]

The Prince Edward Island *Judicial Review Act* of 1988[9] differs significantly from these earlier models. So does the *Federal Courts Act*,[10] which after its 1992 amendments[11] comprises a statutory code governing all aspects of the judicial review of federal administrative action,

---

[1] *Judicial Review Procedure Act, 1971*, S.O. 1971, c. 48 (now R.S.O. 1990, c. J.1) (App. Ont. 3).

[2] *Judicial Review Procedure Act*, S.B.C. 1976, c. 25 (now R.S.B.C. 1996, c. 241) (App. BC. 4).

[3] Ontario, *Report of the Royal Commn. of Inquiry into Civil Rights*, Rep. 1 (Toronto: Queen's Printer, 1968), vol. 1.

[4] Ontario, *Report of the Royal Commn. of Inquiry into Civil Rights*, Rep. 1 (Toronto: Queen's Printer, 1968), vol. 1.

[5] See topic 5:5000, *post*.

[6] See topic 5:6000, *post*.

[7] See topic 5:8300, *post*.

[8] Although the rule changes have been minimal in Manitoba, New Brunswick and Newfoundland, the earlier technicalities associated with the common law remedies rarely cause an impediment to the relief being sought.

[9] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3 (App. PEI. 1).

[10] *Federal Court Act*, S.C. 1970-71-72, c. 1 (now *Federal Courts Act*, R.S.C. 1985, c. F-7, [as am. S.C. 2002, c. 8]) (App. Fed. 3); see topic 2:4000, *post*.

[11] S.C. 1990, c. 8, s. 1-19 and 78(1).

including the grounds of review, the remedies available and the procedure for applying for relief.

The one common feature of all four statutes, however, is that they create a new form of proceeding, an application for judicial review,[12] whereby a litigant may invoke the courts' supervisory jurisdiction over administrative action. In this single proceeding, an applicant may ask for any one or more of the forms of relief previously available through the courts' jurisdiction either to grant the prerogative orders of *certiorari*, prohibition and *mandamus*,[13] or to award a declaration or an injunction. Moreover, it has been held that an application for judicial review of a statutory power of decision is exclusive and precludes the alternative of claiming such relief in an ordinary civil suit.[14]

2:2000 THE BRITISH COLUMBIA AND ONTARIO *JUDICIAL REVIEW PROCEDURE ACTS*

2:2100 Introduction

The *Judicial Review Procedure Acts* of British Columbia and Ontario provide three bases for the courts' supervisory jurisdiction. First, they expressly incorporate the common law jurisdiction to issue the prerogative orders of *certiorari*, prohibition, and *mandamus*. Second, this common law jurisdiction is extended by statute, by use of the concept of "statutory power of decision." And third, jurisdiction to grant declarations and injunctions is provided for where that relief is sought

---

[12] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1 [as am. S.C. 2002, c. 8]; *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 2(1); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1); *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(1).

[13] In addition, the Federal Court has a very limited jurisdiction to grant *habeas corpus*: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18(2) [as am. S.C. 2002, c. 8] (App. Fed. 3). Furthermore, British Columbia's *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 18 (App. BC. 4), and Prince Edward Island's *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 11 (App. PEI. 1), abolish the writs of, and an information in the nature of, *quo warranto*. Instead, on an application for judicial review, a judge may enjoin persons from assuming or acting as if they were entitled to hold an office, and may declare the office to be vacant.

[14] ***Lockyer-Kash v. British Columbia (Workers' Compensation Board)***, 2013 BCCA 459 at paras. 17-28 (judicial review only procedure to challenge decision of WCB): *Stewart v. Clark*, 2012 BCSC 1093 at paras. 17-8, aff'd 2013 BCCA 359; *J.N. v. Durham (Regional Municipality) Police Service*, 2012 ONCA 428 at para. 21. **See also** *Elbaz v. Prince Edward Island*, 2012 PESC 4 at paras. 20-25; *Cooper v. Ganter Estate*, 2012 ABQB 695 (under Alberta Rules, public law remedies to be sought by way of application for judicial review). **Compare** *Silveira v. Ontario (Minister of Transportation)*, 2012 ONSC 3328 (in Ontario, application judge has a discretion as to whether to deal with matter as a judicial review proceeding).

in respect of the exercise of a statutory power. However, since these three bases of the court's jurisdiction are separate and independent, the fact that relief cannot be obtained under one does not preclude it under one of the others.[15] Furthermore, the *Judicial Review Procedure Acts* expressly preserve the discretionary nature of the court's jurisdiction to grant any of the relief that an applicant may request on an application for judicial review.[16]

2:2200 The "Prerogative Order" Basis of Jurisdiction

Section 2(1) of the Ontario *Judicial Review Procedure Act* provides as follows:

> On an application by way of originating notice, which may be styled 'Notice of Application for Judicial Review', the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:
>
> 1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari...

And the corresponding section of the British Columbia statute[17] provides:

> 2 (2) On an application for judicial review, the court

---

[15] *Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority*, 2013 BCSC 2074 at para. 30, referring to *Western Stevedoring Co. v. British Columbia (Workers' Compensation Board)*, 2005 BCSC 1650 at paras. 21-3.

[16] Section 2(2) of the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 provides that "the court *may* grant" the prescribed relief; s. 8 states that the court may refuse to grant relief on an application for judicial review on the same grounds that it could have refused to grant relief on an application for one of the prerogative remedies or a declaration or injunction; and s. 9 provides that relief may be refused where "(a) the sole ground for relief established is a defect in form or a technical irregularity, and (b) the court finds that no substantial wrong or miscarriage of justice has occurred," appl'd in *Solex Developments Co. v. Taylor (District)* (1998), 16 Admin. L.R. (3d) 60 (BCCA), suppl. reasons [1999] B.C.J. No. 538 (BCCA). Sections 2(1) and (5), and s. 3 of the Ontario *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3), are substantially the same, although s. 2(6) also provides that the relief in any of the proceedings enumerated in s. 2(1) may not be refused "on the ground that the relief should have been sought in other proceedings enumerated in subsection (1)." This subsection refers to the refusal of some courts in the past to grant a declaration of invalidity or an injunction in respect of a decision that was within the scope of the prerogative remedies: see generally topic 1:1100, *ante*.

[17] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2) (App. BC. 4).

> may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> > (a) relief in the nature of mandamus, prohibition or certiorari...

2:2210 *Generally*

Pursuant to these provisions, a court may set aside a decision or order, restrain proceedings, or order the performance of a public duty in the same circumstances and on the same grounds as if an application were made for an order of *certiorari*, prohibition or *mandamus*. And while technically the legislation does not abolish the prerogative orders,[18] by providing that an application for one of them will be treated as if it were an application for judicial review,[19] they have become obsolete. That does not mean, however, that the grounds on which relief may be granted under section 2(1), or the bodies, powers or duties in respect of which relief may be granted, are confined to those available at common law at the time that the statutes were enacted.[20] Rather, the courts have continued to develop the law governing the award of the prerogative remedies, and to take into account developments in other jurisdictions, as well as the changing institutions and instruments through which public power is exercised. For example, in determining whether the exercise of a non-statutory power of the Crown could be set

---

[18] E.g. *Thomson v. College of Physicians and Surgeons (British Columbia)* (1998), 10 Admin. L.R. (3d) 201 (BCSC). The British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (App. BC. 4) does, however, expressly abolish *quo warranto*, and in its place substitutes an injunction and a declaration: s. 18.

[19] Ontario *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 7 (App. Ont. 3); British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 12 (App. BC. 4); **and see** *Farm Credit Corp. v. Pipe* (1993), 16 O.R. (3d) 49 (Ont. C.A.), where the court held that relief in the nature of *mandamus* could only be obtained by following *Judicial Review Procedure Act* procedure. **See also** *Behe v. R.* (1977), 15 O.R. (2d) 603 (Ont. Div. Ct.) (application for prohibition in relation to *quasi*-criminal matters; provincial offences are governed by the *Judicial Review Procedure Act* and heard in Divisional Court), **as well as** *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)* (1999), 12 Admin. L.R. (3d) 261 (BCSC) (claim for *mandamus* and declaration to be pursued under *Judicial Review Procedure Act*, not by way of action).

[20] See *Culhane v. British Columbia (Attorney General)* (1980), 108 D.L.R. (3d) 648 at p. 663 (BCCA), where Lambert J.A., dissenting, rejected the view that the effect of the statutory reform was to "freeze the substantive law of judicial review, for the purposes of the *Judicial Review Procedure Act*, as that law stood in 1976," a point, however, on which the majority, McTaggart and Craig JJ.A., expressed no opinion.

aside on an application for judicial review, an Ontario court[21] referred to the broadened scope of *certiorari* which now includes the review of powers of a purely administrative nature,[22] and to a decision of the English Court of Appeal[23] in which the scope of *certiorari* was expanded to include the non-statutory powers exercised by a self-regulatory body.

Accordingly, the suggestion in a relatively early case that "the prerogative writs and orders in lieu thereof we have buried, but they rule us from their graves"[24] seems somewhat exaggerated. Nonetheless, the court's jurisdiction to grant relief under these provisions is subject to the remaining limitations on the availability of the prerogative orders as public law remedies. For example, it has been held that since *certiorari* is still generally not available to review the exercise of powers of a legislative nature,[25] the court could not quash a Regulation on an application for judicial review. Rather, the appropriate relief was a declaration to the effect that the subordinate legislation was invalid as an unlawful exercise of a statutory power.[26]

2:2220 *"Statutory Powers" and "Statutory Powers of Decision"*

Despite some earlier statements to the contrary,[27] the concepts of "statutory power" and "statutory power of decision," which appear in the

---

[21] ***Masters v. Ontario*** (1993), 16 O.R. (3d) 439 (Ont. Div. Ct.), aff'd (1994), 18 O.R. (3d) 551 (Ont. Div. Ct.).

[22] ***Martineau v. Matsqui Institution***, [1980] 1 S.C.R. 602. At one time it was thought that *certiorari* lay only to quash decisions made in the exercise of powers of a judicial nature: **see also** topic 1:2210, *ante*.

[23] *R. v. Panel on Take-Overs & Mergers, Ex p. Datafin PLC*, [1987] 1 Q.B. 815 (Q.B.), aff'd [1987] 1 All E.R. 564 (C.A.).

[24] *Hershoran v. Windsor (City)* (1973), 1 O.R. (2d) 291 at p. 312 (Ont. Div. Ct.), aff'd (1974) 3 O.R. (2d) 423 (Ont. C.A.).

[25] Topic 1:2220, *ante*.

[26] *O.P.S.E.U. v. Ontario (Attorney General)* (1995), 26 O.R. (3d) 740 (Ont. Div. Ct.); **see generally** topic 2:2400, *post*. *Quaere* whether a Regulation may be regarded as made "in the exercise of a statutory power of decision," and thus liable to be set aside under s. 2(4) of the Ontario *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3), and s. 7 of the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (App. BC. 4); the definition of this term is a decision "deciding or *prescribing*" the legal rights, privileges, duties, *etc.* of any *person* or party: see topic 2:2341, *post*.

[27] E.g. *Maurice Rollins Construction Ltd. v. South Fredericksburg (Township)* (1975), 11 O.R. (2d) 418 (Ont. H.C.J.). **See also** *Dodd v. Ontario (Chiropractic Review Committee)* (1978), 23 O.R. (2d) 423 (Ont. Div. Ct.); *Raney v. R.* (1974), 47 D.L.R. (3d) 533 (Ont. C.A.).

Judicial Review Procedure Acts,[28] do not *limit* the court's ability to grant relief "in the nature of *mandamus*, prohibition or *certiorari*."[29] For example, it has been held in Ontario that although a declaration of invalidity could not be granted in respect of a report because it had not been commissioned in the exercise of a statutory power, it was nevertheless amenable to an order in the nature of *certiorari*.[30] And a similar conclusion was reached in British Columbia, where it was held that while a medical officer of health had no statutory power to conduct appeals, the duty of fairness applied, and his decisions could be quashed on an application for judicial review under the prerogative order head of the court's jurisdiction.[31]

2:2230 *"In the Nature of"*

Where the subject matter of an application for judicial review falls within the scope of any of the three specified prerogative remedies, the court will have jurisdiction to hear the application and to grant the relief

---

[28] "Statutory power," as defined in the legislation, restricts the court's jurisdiction to grant declaratory or injunctive relief on an application for judicial review. As well, some minor extensions of the court's jurisdiction to quash apply to decisions made in the exercise of a "statutory power of decision," which is a species of "statutory power." See **generally** topics 2:2300, 2:2400, *post*.

[29] ***Setia v. Appleby College***, 2013 ONCA 753 at paras. 29-32.

[30] ***Masters v. Ontario*** (1993), 16 O.R. (3d) 439 (Ont. Div. Ct.), aff'd (1994), 18 O.R. (3d) 551 (Ont. Div. Ct.). **See also**; *Arts v. London & Middlesex (County) Roman Catholic Separate School Board* (1979), 27 O.R. (2d) 468 (Ont. H.C.J.); ***Paine v. University of Toronto*** (1981), 34 O.R. (2d) 770 (Ont. C.A.), leave to appeal to SCC ref'd (1982), 42 N.R. 270; *Haber v. Wellesley Hospital* (1986), 56 O.R. (2d) 553 (Ont. Div. Ct.), aff'd (1988), 62 O.R. (2d) 756 (Ont. C.A.), leave to appeal to SCC ref'd (1988), 63 O.R. (2d) x; *Hryciuk v. Ontario (Lieutenant Governor)* (1994), 18 O.R. (3d) 695 (Ont. Div. Ct.), rev'd on other grounds (1996), 139 D.L.R. (4th) 577 (Ont. C.A.), leave to appeal to SCC ref'd (June 26, 1997); *Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 8 Admin. L.R. (2d) 29 (Ont. Div. Ct.); *MacPump Developments Ltd. v. Sarnia (City)* (1994), 20 O.R. (3d) 755 (Ont. C.A.), add'l reasons (Jan. 19, 1995), Doc. CA C16439 (Ont. C.A.). **And see discussion** in *Certified General Accountants Assn. of Canada v. Canadian Public Accountability Bd.* (2008), 77 Admin. L.R. (4th) 262 (Ont. Div. Ct.) (whether professional body exercised "statutory power" for *J.R.P.A.* purposes).

[31] *Christina Lake Development Ltd. v. British Columbia (Ministry of Health, Central Kootenay Health Unit)* (1996), 36 Admin. L.R. (2d) 290 (BCCA); **see also** *McDonald v. Anishinabek Police Service* (2006), 83 O.R. (3d) 132 (Ont. Div. Ct.); *Parks (Guardian ad Litem of) v. B.C. School Sports* (1997), 145 D.L.R. (4th) 174 (BCSC); *Culhane v. British Columbia (Attorney General)* (1980), 108 D.L.R. (3d) 648 (BCCA); **and see** *Caputo v. Workers' Compensation Board (British Columbia)* (1986), 13 B.C.L.R. (2d) 145 (BCCA).

sought.[32] However, a question has arisen as to whether the words "in the nature of" extend the jurisdiction of the courts to grant relief on an application for judicial review *beyond* the scope of the prerogative writs. This concern has arisen particularly in the context of consensual arbitration awards where review under the *Arbitration Acts* is excluded,[33] and in respect of the proceedings of domestic tribunals, particularly trade union committees.[34] As well, there is some question as to whether statutory remedies that have the effect of quashing decisions of consensual arbitrators or municipal bylaws should also be regarded as "in the nature of *certiorari*," and thus within the jurisdiction of the court to grant on an application for judicial review.[35]

In Ontario, it has also been held that on an application for judicial review, a court has jurisdiction to set aside decisions of a disciplinary tribunal of a trade union, since the relief sought was "in the nature of *certiorari*."[36] However, the British Columbia Court of Appeal has come to the opposite conclusion for two reasons: first, on the ground that the *Judicial Review Procedure Act* was procedural only and not intended to extend the reach of the remedies, and second, that the court's jurisdiction was "limited to public, in contradistinction to private, rights

---

[32] E.g. ***Masters v. Ontario*** (1993), 16 O.R. (3d) 439 (Ont. Div. Ct.), aff'd (1994), 18 O.R. (3d) 551 (Ont. Div. Ct.); *British Columbia Ferry & Marine Workers Union v. British Columbia Ferry Corp.* (1988), 34 Admin. L.R. 219 (BCSC); *Emerson v. Law Society of Upper Canada* (1983), 41 O.R. (2d) 729 (Ont. H.C.J.).

[33] E.g. *Insurance Corp. of British Columbia v. Gain* (1985), 62 B.C.L.R. 342 (BCSC). **See also** *Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority*, 2013 BCSC 2071 (not "plain and obvious" that Minister did not have a statutory basis for directing BC Hydro to negotiate).

[34] In England, the proceedings of the discipline committees of trades unions are reviewable for breach of the duty of fairness, for example, but declarations and injunctions, not *certiorari*, are the appropriate remedies: **see *Lee v. The Showmen's Guild of Great Britain*,** [1952] 2 Q.B. 329 (C.A.); **see also *Kelantan (Government) v. Duff Development Co. Ltd.*,** [1923] A.C. 395 (H.L.).

[35] See J.M. Evans, "Case Comment: Judicial Review in Ontario: Recent Developments in the Remedies - Some Problems of Pouring Old Wine Into New Bottles" (1977) 55 *Can. Bar Rev.* 148 at pp. 161-69.

[36] *Rees v. U.A., Local 527* (1983), 43 O.R. (2d) 97 (Ont. Div. Ct.), distinguishing *Pestell v. Kitchener-Waterloo Real Estate Board Inc.* (1981), 34 O.R. (2d) 476 (Ont. Div. Ct.) on the ground that the "in the nature of" argument was not considered, and that, unlike real estate boards, trades unions are actors in a statutory scheme of regulation. For a criticism of this expansive interpretation, see J.M. Evans, "Case Comment: Judicial Review in Ontario: Recent Developments in the Remedies - Some Problems of Pouring Old Wine Into New Bottles" (1977) 55 *Can. Bar Rev.* 148 at p. 159.

and obligations."[37]

In Ontario, it has also been held that consensual labour arbitrations are subject to judicial review on the basis that the common law motion to quash is "in the nature of *certiorari*."[38] However, a British Columbia court has held that since the resolution of a Premier's alleged conflict-of-interest was based on a private agreement, it did not come within the jurisdiction of the court for purposes of the *Judicial Review Procedure Act*.[39]

2:2300 "The Exercise of a Statutory Power of Decision"

2:2310 *Generally*

2:2311 *Ontario*

The Ontario *Judicial Review Procedure Act* explicitly confers jurisdiction on a court to quash certain decisions made in the exercise of a "statutory power of decision,"[40] a concept which is defined as follows:

> 'statutory power of decision' means a power or right conferred by or under a statute to make a decision deciding or prescribing, (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not, and includes the powers of an inferior court.[41]

---

[37] *Mohr v. Vancouver, New Westminster & Fraser Valley District Council of Carpenters* (1988), 32 B.C.L.R. (2d) 104 at p. 108 (BCCA).

[38] *Ont. Provincial Police Assn. v. R.* (1974), 46 D.L.R. (3d) 518 (Ont. Div. Ct.); *Major Holdings & Development Ltd. v. Huron (Diocese)* (1979), 22 O.R. (2d) 593 (Ont. Div. Ct.); *University of Guelph v. Canadian Assn. of University Teachers* (1980), 112 D.L.R. (3d) 692 (Ont. H.C.J.).

[39] *Vander Zalm v. Hughes (Acting Commissioner of Conflict of Interest)* (1991), 56 B.C.L.R. (2d) 37 (BCSC).

[40] In Ontario, "statutory power of decision" is one of the elements in the definition of the scope of application of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (App. Ont. 2), the province's general code of administrative procedure: see topic 8:4200, *post*.

[41] And for all practical purposes, the definition of "statutory power of decision" in the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (App. BC. 4) is the same. Section 1 provides that:

> "statutory power of decision" means a power or right conferred by an enactment to make a decision deciding or prescribing

This definition comes into play in three ways. First, section 2(2) of the Ontario *Judicial Review Procedure Act* extends the power of the court to set aside a decision for error of law on the face of the record to any decision made in the "exercise of any statutory power of decision." Second, section 2(3) extends the power to set aside a decision on the ground that there is no evidence to support a finding of fact in relation to any decision made in the "exercise of any statutory power of decision." And third, section 2(4) confers the power of the court to set aside a decision made in the "exercise of a statutory power of decision" where the applicant is entitled to a declaration that a decision is unauthorized or otherwise invalid.

2:2312 *British Columbia*

Similarly, section 3 of the British Columbia *Judicial Review Procedure Act* extends the power of the court to set aside a decision made pursuant to a "statutory power of decision" for error of law on the face of the record. And where an applicant is entitled to a declaration that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, section 7 provides that the court may set the decision aside instead. More recently, a court's jurisdiction under the Act was extended to apply to first nations treaty decisions where expressly provided for by agreement.[42] As well, section 5, which has no equivalent under the Ontario Act, elaborates on the court's power to remit in relation to a "statutory power of decision."[43] On the other hand, unlike the Ontario statute, the British Columbia *Judicial Review Procedure Act* does not enable a court to review decisions made in the

---

(a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or

(b) 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,

and includes the powers of the Provincial Court.

As to the meaning of the words conferred "by or under a statute" in the Ontario *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3), and "by an enactment" in the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, see topic 2:2410, *post*.

[42] *Judicial Review Procedure Act*, R.S.B.C., c. 241, s. 21 (App. BC. 4).

[43] See topic 5:2230, *post*.

exercise of a statutory power of decision for "no evidence."

In any event, today these statutory extensions of the court's jurisdiction are of little practical significance, since the restrictions they were designed to overcome have, for the most part, been removed by judicial reform.[44] Indeed, it is difficult to imagine the practical advantages to be gained from the grant of jurisdiction to quash decisions made in the unauthorized exercise of a statutory power of decision rather than declaring them to be invalid.[45]

2:2320 *Inferior Courts and Personae Designatae*

The Ontario definition of "statutory power of decision" specifically includes powers exercised by "inferior Courts"[46] whereas British Columbia's *Judicial Review Procedure Act* refers to "Provincial Courts."[47] Moreover, in Ontario it has been stated that the *Judicial Review Procedure Act* also applies to court officers and to courts other than the Ontario Court.[48] However, because compulsory appeal procedures

---

[44] Topics 1:2210, *ante*; 15:2122, *post*.

[45] One advantage might be that pursuant to the provisions of some municipal statutes, a claim for damages may be made for anything done pursuant to a bylaw after the bylaw has been quashed, and the statutory remedy to quash is generally available only within a shorter limitation period than that applicable to applications for judicial review. See also J.M. Evans, "Case Comment: Judicial Review in Ontario: Recent Developments in the Remedies - Some Problems of Pouring Old Wine Into New Bottles" (1977) 55 *Can. Bar Rev.* 148 at pp. 164-68. **Compare** *Allan v. Toronto (City)* (1984), 46 O.R. (2d) 641 (Ont. Co. Ct.) (declaration refused that plebiscite was unlawful because it had been held under a bylaw that had been neither quashed nor repealed; *semble*, no jurisdiction to quash bylaw outside limitation period for statutory remedy); **but see** *Canadian National Railway Co. v. Fraser-Fort George (Regional District)* (1994), 29 Admin. L.R. (2d) 97 (BCSC), aff'd (1996), 26 B.C.L.R. (3d) 81 (BCCA) (jurisdiction to set aside bylaw on an application for judicial review, despite expiry of time for seeking statutory quashing remedy); and *Stadium Corp. of Ontario v. Toronto (City)* (1992), 10 O.R. (3d) 203 (Ont. Div. Ct.), rev'd (1993), 12 O.R. (3d) 646 (Ont. C.A.) (bylaw quashed on an application for judicial review without reference to the propriety of this form of relief). **See also** *Costello v. Calgary (City)* (1989), 60 D.L.R. (4th) 732 (Alta. C.A.), leave to appeal to SCC ref'd (1990), 102 A.R. 160(n) (whether a declaration of invalidity is the equivalent of a quashing for this purpose left open).

[46] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 1 (App. Ont. 3).

[47] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 1 (App. BC. 4).

[48] *1147335 Ontario Inc. v. Thyssen Krupp Elevator (Canada) Inc.*, 2012 ONSC 4139 (allegation of bias in Master); *Schorr v. Selkirk* (1977), 15 O.R. (2d) 37 (Ont. Div. Ct.), although in that case the requested relief, an order in the nature of prohibition directed to a taxing master, was denied in the exercise of the court's discretion; see also *Huffmon v. Breese* (1974), 3 O.R. (2d) 416 (Ont. H.C.J.); *London Gardens Ltd. v. Westminster (Township)* (1975), 9 O.R. (2d) 175 (Ont. Div. Ct.). And in Prince Edward Island, a decision of a Justice of the Peace to issue a search warrant under a regulatory statute has been

usually exist,[49] other than where a right of appeal does not exist [50] judicial review of inferior courts and court officials has been rare. Nonetheless, when a judge is sitting not as a judge, but as a *persona designata* under a particular statute, and notwithstanding that the concept of *persona designata* has become quite restricted,[51] in principle his or her decisions or orders are subject to judicial review.[52]

2:2330 *Definition of "the Exercise of a Statutory Power of Decision"*

2:2331 *Introduction*

To invoke this aspect of the court's jurisdiction, the statutory power of decision "must be a specific power or right to make the very decision in issue."[53] Accordingly, it has been held not to include an automatic suspension of a driver's licence resulting from a guilty plea to a charge

---

held to be reviewable: *R. v. Gaudette Farms Inc.* (1993), 331 A.P.R. 346 (PEITD). As to the application of the Prince Edward Island *Judicial Review Act* generally, see topic 2:3000, *post*.

[49] *Patland Investments Ltd. v. Ferron* (1977), 16 O.R. (2d) 514 (Ont. Div. Ct.). Indeed, in that case, there was a division of opinion as to the applicability of the *Judicial Review Procedure Act* to court officials.

[50] E.g. ***Baldwin v. Baldwin***, 2013 BCCA 35 at para. 11 (appeal lies only where there is a trial; the remedy for other small claims decisions is judicial review); *C. (O.C.) v. C. (A.)*, 2013 BCSC 682 at para. 2 (interlocutory decisions of provincial court not appealable therefore subject to judicial review).

[51] ***Canada (Minister of Indian Affairs & Northern Development) v. Ranville***, [1982] 2 S.C.R. 518; see also topic 2:4332, *post*.

[52] E.g. *Zerr v. Zerr* (1978), 14 B.C.L.R. 333 (BCSC); *Canada Building Materials Co. v. London (City)* (1978), 22 O.R. (2d) 98 (Ont. Div. Ct.); **compare** *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471 (no right to seek judicial review from a legal fee review decision of the Chief Adjudicator made pursuant to the authority derived from the implementation orders, as approved by the relevant provincial and territorial superior courts); *Connie Steel Products Ltd. v. Greater National Building Corp.* (1977), 3 C.P.C. 327, where the Divisional Court held that local judges' decisions under the *Mechanics' Lien Act*, R.S.O. 1970, c. 267 were not reviewable; see also *Olympic Towers Ltd. v. Flanigan* (1978), 20 O.R. (2d) 670 (Ont. H.C.J.); **and see** topic 2:4332, *post*, as to when a judge is *persona designata*.

[53] ***Paine v. University of Toronto*** (1981), 34 O.R. (2d) 770 at p. 722 (Ont. C.A.), leave to appeal to SCC ref'd (1982), 42 N.R. 270; **see also** *B. v. W.* (1985), 52 O.R. (2d) 738 (Ont. H.C.J.). **And see** topic 8:4200, *post*, for those instances in which the issue arose in connection with the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (App. Ont. 2).

under the *Criminal Code*.[54] Furthermore, the definition has been held not to include actions that have been taken in the exercise of statutory powers that are "administrative" in nature. For example, the action of the OHIP General Manager in determining the amount of an overpayment was held not to be an exercise of a statutory power of decision since it was purely administrative.[55] And for the same reason, neither was a closing of a file following investigation of a complaint by a Complainants' Review Committee,[56] nor a referral of a chiropractor's practice to the Chiropractic Review Committee.[57] Similarly, the approval of a community college's budget by its Board of Governors was held to be "administrative" and therefore not an exercise of a statutory power of decision.[58]

2:2332 *Legal Rights, Powers, Privileges, Liabilities, Immunities and Duties*

Whether a statutory power of decision has been exercised may turn on whether the administrative action in question decides or prescribes a person's "legal rights, powers, privileges, liabilities, immunities and duties," a concept which, it has been urged, should not be given a narrow or technical interpretation.[59] Accordingly, legal rights, powers,

---

[54] *Lamoureux v. Ontario (Registrar of Motor Vehicles)* (1973), 32 D.L.R. (3d) 678 (Ont. C.A.); **see also** *P.L.D. v. Prince Edward Island (Registrar of Motor Vehicles)* (2001), 600 A.P.R. 101 (PEISC). **Compare** *Hoffbeck v. Jackman* (1985), 67 B.C.L.R. 67 (BCSC), which held the Superintendent of Motor Vehicle's clerical act of assigning demerits points to be the exercise of a statutory power.

[55] *S & M Laboratories Ltd. v. R.* (1979), 99 D.L.R. (3d) 160 (Ont. C.A.); **compare** *Redhill v. Ontario Health Insurance Plan* (1990), 75 O.R. (2d) 258 (Ont. Div. Ct.).

[56] *Harrison v. Law Society of British Columbia*, 2015 BCSC 211 at para. 51.

[57] *Dodd v. Ontario (Chiropractic Review Committee)* (1978), 23 O.R. (2d) 423 (Ont. Div. Ct.); **see also** *Greene v. Law Society of British Columbia*, [2005] 8 W.W.R. 379 (BCSC), suppl. reasons (2005), 35 Admin. L.R. (4th) 93; *Pierce v. Law Society of British Columbia* (1993), 103 D.L.R. (4th) 233 (BCSC) (decision to issue citation); *Weston v. Ontario (Chiropody (Podiatry) Review Committee)* (1980), 29 O.R. (2d) 129 (Ont. C.A.).

[58] *Hancock v. Algonquin College of Applied Arts & Technology* (1981), 33 O.R. (2d) 257 (Ont. H.C.J.).

[59] *Middlesex (County) v. Ontario (Minister of Municipal Affairs)* (1992), 10 O.R. (3d) 1 (Ont. Div. Ct.). **See also** *Allan v. British Columbia (Chief Electoral Officer)* (2010), 322 D.L.R. (4th) 219 (BCSC); *N.(J.) v. Durham Regional Police Services*, 2012 ONCA 428 at para. 18, rev'g (2011), 106 O.R. (3d) 346 (Ont. Sup. Ct. J.); *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)* (2005), 33 Admin. L.R. (4th) 123 (BCSC) ("The concept of 'decision' should not be strictly applied when there is legislative enablement for a government initiative that directly affects the constitutional rights of First Nations";

privileges, immunities, duties or liabilities have been held to be "decided" by: a Minister of Health's decision to terminate a Pharmacy Participation Agreement for criminal conviction for fraud;[60] a municipality's decision to sell the assets of a co-operative;[61] a tribunal's decision as to which statutory regime governed a complaint;[62] a Minister's decision to change the location of an entrance road to a provincial park;[63] a Director of Maintenance Enforcement's decision to suspend, for arrears, a passport under federal legislation;[64] a minister's decision to withdraw funding from a charity dealing with the disabled;[65] the granting of consent to withdraw a pension surplus by the Pension Commission;[66] an arbitration under the *Police Act*[67] termination of a constable by the Chief of Police;[68] and under the *Fire Departments Act*;[69] an award of a statutory arbitrator;[70] the report of an arbitrator under the *Municipal Boundary Negotiations Act*;[71] a municipality's decision under

---

judicial review available respecting failure to consult First Nations. **Compare** *Insurance Corp. of British Columbia v. Gain* (1985), 62 B.C.L.R. 342 (BCSC). **And see** topic 8:4230, *post*.

[60] *Delivery Drugs Ltd. v. British Columbia (Deputy Minister of Health)* (2007), 286 D.L.R. (4th) 630 (BCCA).

[61] *Co-Operative Housing Federation of Canada v. York (Regional Municipality)* (2009), 89 Admin. L.R. (4th) 305 (Ont. Div. Ct.) at paras. 58, 79.

[62] *Graywood Investments Ltd. v. Ontario Energy Board* (2005), 194 O.A.C. 241 (Ont. Div. Ct.), rev'd on other grounds (2006), 80 O.R. (3d) 492 (Ont. C.A.).

[63] *West Kootenay Community EcoSociety v. British Columbia (Min. of Water, Land and Air Prot'n)* (2005), 42 B.C.L.R. (4th) 184 (BCSC).

[64] *G.B.I. v. British Columbia (Director of Maintenance Enforcement)* (2005), 47 B.C.L.R. (4th) 369 (BCSC).

[65] *Byl (Litigation Guardian of) v. Ontario* (2003), 67 O.R. (3d) 588 (Ont. Div. Ct.).

[66] *Collins v. Ontario (Pension Commn.)* (1986), 56 O.R. (2d) 274 (Ont. Div. Ct.). **See also** *C.U.P.E. v. Saskatchewan School Boards Assn.*, 2009 SKQB 332 (such decision properly subject of application for *certiorari*) at para. 29.

[67] *Metropolitan Toronto (Municipality) Commissioners of Police v. Police Assn. (Metropolitan Toronto)* (1974), 5 O.R. (2d) 285 (Ont. Div. Ct.), aff'd (1975), 8 O.R. (2d) 65 (Ont. C.A.), leave to appeal to SCC ref'd (1975), 8 O.R. (2d) 65(n).

[68] *McDonald v. Anishinabek Police Service* (2006), 53 C.C.E.L. (3d) 126 (Ont. Div. Ct.) (police service established pursuant to a prerogative power; actions reviewable under *Judicial Review Procedure Act*).

[69] *Windsor (City) v. I.A.F.F., Local 455* (1974), 5 O.R. (2d) 690 (Ont. Div. Ct.).

[70] *Keeprite Workers' Independent Union v. Keeprite Products Inc.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.).

[71] *Middlesex (County) v. Ontario (Minister of Municipal Affairs)* (1992), 10 O.R. (3d) 1 (Ont. Div. Ct.).

several land use statutes;[72] an order of the Pension Commission vesting employees' contributions;[73] the abatement of an assessment by the Workers' Compensation Board;[74] a decision of the Workers' Compensation Board to terminate benefits;[75] a commissioner's decision as to a judge's misconduct under the *Courts of Justice Act*;[76] a decision not to recommend tenure;[77] the setting of university tuition fees;[78] the holding of a hearing under section 124 of the Ontario *Securities Act*;[79] a discipline proceeding under the *Law Society Act*;[80] the investigation of a physician by a Medical Review Committee;[81] the service of a notice of intention to make a cease-and-desist order under the *Business Practices Act*;[82] a decision of the Ontario Secondary School Teachers' Federation to proceed with a hearing which would affect rights and privileges of membership;[83] an exercise of discretion by the Independent Police

---

[72] *Canada (Attorney General) v. Berrywoods Farms Inc.* (2006), 208 O.A.C. 82 (Ont. Div. Ct.).

[73] *Grant Bus Lines Ltd. v. Ontario (Pension Commn.)* (1980), 30 O.R. (2d) 180 (Ont. Div. Ct.), aff'd (1981), 33 O.R. (2d) 652 (Ont. C.A.), leave to appeal to SCC ref'd (1981), 41 N.R. 374; see also *Metropolitan Toronto (Municipality) Commissioners of Police v. Ontario (Municipal Employees' Retirement Board)* (1985), 53 O.R. (2d) 83 (Ont. Div. Ct.), rev'd on other grounds (1989), 56 D.L.R. (4th) 562 (Ont. C.A.), leave to appeal to SCC ref'd (1989), 100 N.R. 160(n).

[74] *B.C.F.L. v. British Columbia (Workers' Compensation Board)* (1988), 27 B.C.L.R. (2d) 175 (BCSC).

[75] *British Columbia (Workers' Compensation Board) v. British Columbia (Council of Human Rights)* (1990), 70 D.L.R. (4th) 720 (BCCA).

[76] *Hryciuk v. Ontario (Lieutenant Governor)* (1994), 18 O.R. (3d) 695 (Ont. Div. Ct.), rev'd (1996), 31 O.R. (3d) 1 (Ont. C.A.), leave to appeal to SCC ref'd (June 26, 1997). See also *Kipiniak v. Ontario Judicial Council*, 2012 ONSC 5866 (judicial council under statutory duty to investigate complaints).

[77] ***Wade v. Strangway*** (1994), 116 D.L.R. (4th) 714 (BCSC), aff'd (1996), 132 D.L.R. (4th) 406 (BCCA); **compare *Paine v. University of Toronto*** (1980), 115 D.L.R. (3d) 461 (Ont. Div. Ct.), rev'd (1981), 131 D.L.R. (3d) 325 (Ont. C.A.), leave to appeal to SCC ref'd (1982), 42 N.R. 270.

[78] *MacDonald v. University of British Columbia* (2003), 18 B.C.L.R. (4th) 184 (BCSC); *Attaran v. University of British Columbia* (1998), 4 Admin. L.R. (3d) 44 (BCSC).

[79] *Ontario (Securities Commn.) v. Bennett* (1991), 1 O.R. (3d) 576 (Ont. C.A.).

[80] *Stone v. Law Society of Upper Canada* (1979), 26 O.R. (2d) 166 (Ont. Div. Ct.).

[81] *Wakil v. Ontario (Medical Review Committee)* (1977), 15 O.R. (2d) 157 (Ont. Div. Ct.).

[82] *Aamco Automatic Transmissions Inc. v. Simpson* (1980), 113 D.L.R. (3d) 650 (Ont. Div. Ct.).

[83] *Forde v. O.S.S.T.F.* (1980), 115 D.L.R. (3d) 673 (Ont. Div. Ct.).

Review Director to refuse to deal with a complaint;[84] a school board decision to close a school;[85]a law society decision concerning a student's admission to the bar;[86] a decision by the OHIP general manager respecting recovery of unauthorized payments;[87] a decision to hold health authority meetings *in camera*;[88] a decision of the Gold Commissioner concerning a placer lease dispute;[89] the issue of a preliminary building permit which was tantamount to entitlement;[90] the revocation of prison visitations;[91] a decision of a Rent Review Officer;[92] a labour relations board order to take action within a stipulated period of time;[93] a decision of a referee under the Ontario *Employment Standards Act*;[94] the expulsion of a student from a private school;[95] a decision of a municipal officer respecting assessments under the *Assessment Act*;[96] a decision of a municipality concerning payment of

---

[84] *Endicott v. Ontario (Director, Office of the Independent Police Review)*, 2014 ONCA 363, affirming *Endicott v. Ontario (Director, Office of the Independent Police Review)*, 2013 ONSC 2046 (Ont. Div. Ct.).

[85] *Simpson v. Ottawa-Carleton District School Board* (1999), 125 O.A.C. 186 (Ont. Div. Ct.).

[86] *Rajnauth v. Law Society of Upper Canada* (1993), 13 O.R. (3d) 381 (Ont. Div. Ct.).

[87] *Redhill v. Ontario Health Insurance Plan* (1990), 75 O.R. (2d) 258 (Ont. Div. Ct.); **see also** *Wakil v. Ontario (Medical Review Committee)* (1977), 15 O.R. (2d) 157 (Ont. Div. Ct.).

[88] *H.E.U. v. Northern Health Authority* (2003), 2 Admin. L.R. (4th) 99 (BCSC).

[89] *Turcott v. Nolin* (1981), 130 D.L.R. (3d) 562 (BCSC). **See also** *Dupras v. Mason* (1994), 120 D.L.R. (4th) 127 (BCCA).

[90] *Harrison v. Vancouver (Director of Planning)* (1983), 21 M.P.L.R. 173 (BCSC).

[91] *Culhane v. British Columbia (Attorney General)* (1980), 18 B.C.L.R. 239 (BCCA). **Compare** *Davison v. Canada (Commissioner of Corrections)* (1997), 141 F.T.R. 184 (FCTD).

[92] *W.B. Sullivan Construction Ltd. v. Barker* (1976), 14 O.R. (2d) 529 (Ont. Div. Ct.), leave to appeal ref'd (1976), 14 O.R. (2d) 529(n).

[93] *Metal Industries Assn. v. Davis Wire Industries Ltd.* (1980), 113 D.L.R. (3d) 724 (BCSC).

[94] *Becker Milk Co. v. Ontario (Ministry of Labour)* (1973), 41 D.L.R. (3d) 503 (Ont. Div. Ct.); *Downing v. Graydon* (1978), 21 O.R. (2d) 292 (Ont. C.A.).

[95] *D. (C.) (Litigation Guardian of) v. Ridley College* (1996), 44 Admin. L.R. (2d) 108 (Ont. Gen. Div.). **Compare** *Setia v. Appleby College*, 2013 ONCA 753, reversing 2012 ONSC 5369 (Ont. Div. Ct.) (expulsion decision not of a sufficiently public character to be subject to public law remedies); *W. (W.) v. Lakefield College School*, 2012 ONSC 577 (Ont. S.C.J.) (Lakefield College not created by statute).

[96] *Beaver Lumber Co. v. Ottawa (City)* (1976), 12 O.R. (2d) 314 (Ont. Div. Ct.).

legal costs for police officers,[97] and the signing of a default judgment by a Registrar.[98] As well, the issue of a search warrant under a regulatory statute was held to be reviewable on an application for judicial review under Prince Edward Island's *Judicial Review Act* as "a decision of the tribunal in relation to the legal rights, privileges, immunities, duties or liabilities of a person."[99]

2:2333 *Licences and Benefits*

A "statutory power of decision" also includes a decision deciding or prescribing the eligibility of a person to receive or to retain a licence or benefit. Thus, the grant of a liquor licence,[100] a licence for a construction and demolition disposal site,[101] the right to supply oxygen and related respiratory services to the chronically ill,[102] the right to use a courtesy flagpole,[103] a refusal to extend a teacher's contract beyond retirement age,[104] and the termination of an agreement in relation to a home for the elderly and homeless,[105] have all been found to involve the exercise of a "statutory power of decision."

---

[97] *Grant v. Metropolitan Toronto (Municipality)* (1978), 21 O.R. (2d) 282 (Ont. Div. Ct.); *Regional Police Assn. (Durham) v. Durham (Region) Police Assn.* (1978), 21 O.R. (2d) 764 (Ont. Div. Ct.), aff'd (1980), 28 O.R. (2d) 1 (Ont. C.A.), rev'd [1982] 2 S.C.R. 709.

[98] *Hasan v. 260 Wellesley Residence Ltd.* (1995), 24 O.R. (3d) 335 (Ont. Div. Ct.).

[99] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 1(b) (App. PEI. 1); *R. v. Gaudette Farms Inc.* (1993), 331 A.P.R. 346 (PEITD); see also topic 2:3000, *post*.

[100] *Temple v. Ontario (Liquor Licence Board)* (1982), 145 D.L.R. (3d) 480 (Ont. Div. Ct.).

[101] *Greenisle Environmental Inc. v. Prince Edward Island* (2005), 33 Admin. L.R. (4th) 91 (PEISC).

[102] *Associated Respiratory Services Inc. v. British Columbia (Purchasing Commn.)* (1994), 117 D.L.R. (4th) 353 (BCCA), leave to appeal to SCC ref'd (1995), 29 Admin. L.R. (2d) 87(n).

[103] *Vietnamese Association of Toronto v. Toronto (City)* (2007), 85 O.R. (3d) 656 (Ont. Div. Ct.).

[104] *Ontario English Catholic Teachers Assn. v. Essex (County) Roman Catholic Separate School Board* (1987), 28 Admin. L.R. 39 (Ont. Div. Ct.), leave to appeal to Ont. C.A. ref'd (1988), 51 D.L.R. (4th) vii.

[105] *Prysiazniuk v. Hamilton-Wentworth (Regional Municipality)* (1985), 51 O.R. (2d) 339 (Ont. Div. Ct.).

2:2340 *No Exercise of a Statutory Power of Decision*

2:2341 *Generally*

Despite the general disposition of the courts to give a wide interpretation to the concept, not every administrative action will be a "decision made in the exercise of a statutory power of decision."[106] For example, it has been held that there was no "statutory power of decision" exercised by a planning board and a municipality in preparing an official plan, since the plan only became operative upon the minister's approval of it.[107] And the same conclusion was reached in connection with an Ombudsman's recommendations, since there was no obligation to accept them;[108] neither did the terms of reference of a commission of inquiry constitute a statutory power of decision.[109] Neither was a "completeness check" of an application for environmental approval,[110] nor a letter of an enquiry committee stating that a nurse had not acted in accordance with professional standards,[111] nor a conclusion that there were no specific endangered species affected,[112] nor a chief negotiator's report under the *Municipal Boundary Negotiation Act*,[113] nor a letter stating that a golf course was not permitted without approval of the Commission,[114] since they did not dispose of any issue concerning the parties' rights, interests,

---

[106] See also topic 8:4200, *post*.

[107] *Starr v. Puslinch (Township)* (1977), 16 O.R. (2d) 316 (Ont. Div. Ct.), aff'd (1978), 20 O.R. (2d) 313 (Ont. C.A.); see also *Maple Leaf Mills Ltd. v. Point Edward (Village)* (1979), 99 D.L.R. (3d) 345 (Ont. Div. Ct.); and *Masiuk v. Carling* (1984), 2 O.A.C. 222 (Ont. Div. Ct.), in the context of a municipal resolution; but see *Chadwill Coal Co. v. Ontario (Treasurer)* (1976), 14 O.R. (2d) 393 (Ont. Div. Ct.), which held that the expression of an intention by hearing officers to make recommendations was the exercise of a statutory power of decision.

[108] *British Columbia (Workers' Compensation Board), Re* (1985), 62 B.C.L.R. 161 (BCSC).

[109] *Taser International, Inc. v. British Columbia (Commissioner)* (2010), 321 D.L.R. (4th) 619 (BCSC).

[110] *Assn. for the Protection of Amherst Island v. Ontario (Director of Environmental Approvals)*, 2014 ONSC 4574 (Ont. Div.Ct.) at paras. 21-2.

[111] *Ridsdale v. Anderson*, 2016 BCSC 942 at para. 82.

[112] *Durham Area Citizens for Endangered Species v. Ontario (Ministry of Natural Resources and Forestry)*, 2015 ONSC 1933 (Ont. Div. Ct.).

[113] *Middlesex (County) v. Ontario (Minister of Municipal Affairs)* (1992), 10 O.R. (3d) 1 (Ont. Div. Ct.).

[114] *Heather Hills Farm Society v. British Columbia (Agricultural Land Commission)*, 2015 BCSC 1108 (court order had already determined status).

or privileges. Likewise, a Ministry of Transport qualifications committee's decision reducing a contractor's rating was held not to involve the exercise of a statutory power of decision since the committee's decision was merely advisory and administrative.[115] The decision of a Children's Aid Society Director merely to review a family member's late application for adoption was held not to be a statutory power of decision, since it did not decide or prescribe anyone's rights, but merely delayed the adoption.[116] Similarly, a Director's decision to discontinue an adoption approval process was held not to involve a statutory power of decision.[117] And the same result was reached in respect of an investigation into and report on allegations of sexual harassment by an official;[118] a Civilian Commission on Police Service's decision not to investigate a complaint;[119] an investigation by a provincial Chief Electoral officer into whether a statute had been breached;[120] a settlement agreement reached between a union and an employer;[121] a settlement agreement between a dentist and the

---

[115] *Raney v. R.* (1974), 47 D.L.R. (3d) 533 (Ont. C.A.).

[116] *C.A.S. for Districts of Sudbury and Manitoulin v. Ontario (Min. of Children and Youth Services)* (2005), 75 O.R. (3d) 431 (Ont. Div. Ct.).

[117] *N.K. v. Child, Family and Community Services Act (Director)* (2008), 61 R.F.L. (6th) 200 (BCSC) at para. 67.

[118] ***Masters v. Ontario*** (1993), 16 O.R. (3d) 439 (Ont. Div. Ct.), aff'd (1994), 18 O.R. (3d) 551 (Ont. Div. Ct.); see also *O.S.S.T.F. v. Shelton* (1979), 28 O.R. (2d) 218 (Ont. Div. Ct.), which dealt with a companion provision in the *Statutory Powers Procedure Act*, S.O. 1971, c. 47 (App. Ont. 2). Under that Act, however, it is specifically provided that proceedings in the nature of an investigation are not covered: s. 3(2)(g); see also topics 2:2342, 8:4420, *post*.

[119] *Dolan v. Ontario (Civilian Commission on Police Services)* (2011), 277 O.A.C. 109 (Ont. Div. Ct.) at para. 97. See also *Batacharya v. College of Midwives of Ontario*, 2012 ONSC 1072 (Ont. Div. Ct.) at para. 16 (complainant not affected by investigation). Compare *Endicott v. Ontario (Director, Office of the Independent Police Review)*, 2014 ONCA 363, affirming *Endicott v. Ontario (Director, Office of theIndependent Police Review)*, 2013 ONSC 2046 (Div. Ct.), affirming *Endicott v. Office of the Independent Police Review Director*, 2012 ONSC 6250 (Div. Ct.) (ss. 58-61 of *Police Services Act* created statutory power of decision at screening stage).

[120] *PC Ontario v. Essensa* (2011), 278 O.A.C. 383 (Ont. Div. Ct.) at para. 25 aff'd 2012 ONCA 453.

[121] *Stark v. Vancouver School District No. 39* (2005), 35 Admin. L.R. (4th) 114 (BCSC), aff'd 2006 BCCA 124.

governing body;[122] a citation by a discipline committee;[123] a city council's decision to refuse a liquor licence, since the liquor commission made the final decision;[124] a Minister's appointment of a mediator;,[125] the selection of an agency store by a provincial liquor control commission;[126] a church's decision to close down;[127] a pension board of trustees' denial of a request to purchase pensionable service;[128] a "conditional approval" by a conservation authority;[129] the failure to characterize a change in a tender as a "material change";[130] the preliminary steps taken as part of a feasibility study concerning toxic waste disposal sites;[131] a bylaw de-registering a plan of subdivision, because no rights were directly affected;[132] the passage of a resolution requesting a Minister to add a condition to a land severance approval;[133] the holding of a meeting pursuant to the *Planning Act* because council had to pass any resulting bylaw and the minister had to approve it before it became effective;[134] the closure of a road which was merely the exercise of a municipal body's rights, as owner of real property;[135] the closure of a school by a school

---

[122] *Stelmachuk v. College of Dental Surgeons of British Columbia*, 2015 BCSC 1766 at para.14.

[123] *Greene v. Law Society of British Columbia*, [2005] 8 W.W.R. 379 (BCSC), suppl. reasons (2005), 35 Admin. L.R. (4th) 93; *Pierce v. Law Society of British Columbia* (1993), 103 D.L.R. (4th) 233 (BCSC).

[124] *Benias v. Vancouver (City)* (1983), 3 D.L.R. (4th) 511 (BCSC).

[125] *British Columbia Teachers' Federation v. British Columbia*, 2012 BCSC 960.

[126] *2169205 Ontario Inc. v. Ontario (Liquor Control Board)* (2011), 23 Admin. L.R. (5th) 335 (Ont. Div. Ct.), suppl. reasons 2011 ONSC 4800.

[127] *Donoghue v. Roman Catholic Episcopal Corp. of Ottawa* (2007), 278 D.L.R. (4th) 718 (Ont. Div. Ct.).

[128] *Ehrcke v. Public Service Pension Board of Trustees* (2004), 32 B.C.L.R. (4th) 388 (BCSC).

[129] *McGregor v. Rival Developments Inc.* (2004), 193 O.A.C. 153 (Ont. Div. Ct.).

[130] *Sims Group Recycling Solutions Canada Ltd. v. Ontario (Minister of the Environment)*, 2013 ONSC 209 (Ont. Div. Ct.) at para. 12.

[131] *Milton (Town) v. Ontario Waste Management Corp.* (1985), 50 O.R. (2d) 715 (Ont. Div. Ct.).

[132] *Maurice Rollins Construction Ltd. v. South Fredericksburg (Township)* (1975), 11 O.R. (2d) 418 (Ont. H.C.J.), although it was held to be the exercise of a statutory power; see also *Hall v. Maple Ridge (District)* (1992), 9 Admin. L.R. (2d) 178 (BCSC).

[133] *Masiuk v. Carling* (1984), 2 O.A.C. 222 (Ont. Div. Ct.).

[134] *Florence Nightingale Home v. Scarborough (Borough) Planning Board* (1973), 32 D.L.R. (3d) 17 (Ont. Div. Ct.).

[135] *Cordsen v. Greater Victoria Water District* (1982), 134 D.L.R. (3d) 456 (BCSC).

board, since the right or privilege of ratepayers to attend a given school was not a "legal" right or privilege;[136] a decision by the Ontario Housing Corporation board of directors;[137] and the establishment of a wolf-kill program.[138]

Furthermore, it would seem that most Regulations, bylaws, orders-in-council and other forms of subordinate legislation of general application are not "decisions made in the exercise of a statutory power of decision," because the word "decision" does not normally refer to subordinate legislation, and the definition of "a statutory power" specifically includes the power to make subordinate legislation.[139] However, the definition of "statutory power of decision" does include a decision "prescribing" the legal rights, privileges, duties, liabilities, immunities and powers of a person or a party. In any event, a court may declare an exercise of a statutory power to be invalid, which includes the making of a Regulation or bylaw, so that whether it can *also* be quashed will usually be of no practical importance.[140]

2:2342 *Advice, Recommendations and Reports*

Whether a tribunal's recommendation, advice or preliminary step in the decision-making process constitutes the exercise of a statutory power of decision depends upon whether it is an *integral part* of the decision. Applying this concept, a resolution of a municipal council not

---

[136] *Robertson v. Niagara South (Municipality) Board of Education* (1973), 41 D.L.R. (3d) 57 (Ont. Div. Ct.); **see also** *Arts v. London & Middlesex (County) Roman Catholic Separate School Board* (1979), 27 O.R. (2d) 468 (Ont. H.C.J.), where the decision was held to be an administrative one. **But note that in** *Arts v. London & Middlesex (County) Roman Catholic Separate School Board* (1979), 27 O.R. (2d) 468 (Ont. H.C.J.), and *Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 8 Admin. L.R. (2d) 29 (Ont. Div. Ct.), and the dissent in *Robertson v. Niagara South (Municipality) Board of Education* (1973), 41 D.L.R. (3d) 57 (Ont. Div. Ct.), it was said that there was nevertheless a duty to act fairly, thus permitting judicial review of the decision. **Compare also** *Simpson v. Ottawa-Carleton District School Board* (1999), 125 O.A.C. 186 (Ont. Div. Ct.).

[137] *Webb v. Ontario Housing Corp.* (1978), 22 O.R. (2d) 257 (Ont. C.A.).

[138] *Sea Shepherd Conservation Society v. British Columbia* (1984), 55 B.C.L.R. 260 (BCSC).

[139] The express exception in Ontario's *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 3(h) [as am. 1994, c. 27, s. 56(5)] (App. Ont. 2) of the power to make "regulations, rules or bylaws" suggests that the exercise of legislative powers might otherwise have fallen within the definition of a "statutory power of decision," which is defined in section 1(1) of that Act in the same way that it is in the *Judicial Review Procedure Act*.

[140] But see topic 2:2310, *ante*.

to permit a development to proceed was found to be an exercise of a statutory power of decision.[141] Alternatively, the issue can be viewed in terms of whether a recommendation or advice materially affects rights or interests. Where it does, it will likely be seen as the exercise of a statutory power of decision.[142] Conversely, where correspondence proffered a non-binding opinion, it was found not to have constituted an exercise of a statutory power of decision.[142.1]

---

[141] *Olympia & York Developments Ltd. v. Toronto (City)* (1980), 113 D.L.R. (3d) 694 (Ont. Div. Ct.).

[142] *Bezic Construction Ltd. v. Ontario (Minister of Transportation)* (2006), 263 D.L.R. (4th) 328 (Ont. Div. Ct.) (inquiry officer under *Expropriations Act*); *Haber v. Wellesley Hospital* (1986), 56 O.R. (2d) 553 (Ont. Div. Ct.), aff'd (1988), 62 O.R. (2d) 756 (Ont. C.A.), leave to appeal to SCC ref'd (1988), 63 O.R. (2d) x. **See also** *Ontario Conference of Judges v. Ontario (Chair, Management Board)* (2004), 71 O.R. (3d) 528 (Ont. Div. Ct.); *Taku River Tlingit First Nation v. Tulsequah Chief Mine* Project (2002), 211 D.L.R. (4th) 89 (BCCA), rev'd without reference to point 2004 SCC 74; *Ontario (Minister of Health) v. Apotex Inc.* (2002), 60 O.R. (3d) 209 (Ont. C.A.); ***Abel v. Ontario (Advisory Review Board)*** (1979), 46 C.C.C. 342 (Ont. Div. Ct.), aff'd (1980), 31 O.R. (2d) 520 (Ont. C.A.); *Middlesex (County) v. Ontario (Minister of Municipal Affairs)* (1992), 10 O.R. (3d) 1 (Ont. Div. Ct.); ***Wade v. Strangway*** (1994), 116 D.L.R. (4th) 714 (BCSC), aff'd (1996), 132 D.L.R. (4th) 406 (BCCA). **And see** *Leshner v. Ontario (Deputy Attorney General)* (1992), 8 Admin. L.R. (2d) 132 (Ont. Div. Ct.), where the jurisdiction to review a recommendation that an employee be transferred was not questioned by the court; *Lac des Mille Lacs First Nation v. Hogan*, [2000] F.C.J. No. 1826 (FCTD) ("course of conduct" leading to leadership review and election subject to review). **But see** *I.A.B.S.O.R.I.W., Local 97 v. British Columbia (Labour Relations Board)* (2011), 23 Admin. L.R. (5th) 210 (BCSC) (letter containing proposals for interim solution not judicially reviewable) at paras. 31-34; *Ambulance Paramedics of British Columbia v. British Columbia (Attorney General)* (2010), 9 Admin. L.R. (5th)19 (BCSC); *Blaber v. University of Victoria* (1995), 123 D.L.R. (4th) 255 (BCSC); *U.T.U., Locals 1778 & 1923 v. British Columbia Rail Ltd.* (1992), 67 B.C.L.R. (2d) 112 (BCCA). **Compare** *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 3(2)(g) [as am. 1994, c. 27, s. 56(6)], which expressly excludes recommendations and reports that are not legally binding on the decision-maker from the scope of the Act. It might be inferred from this provision that, in its absence, a power to take non-dispositive administrative action would have fallen within the definition of a statutory power of decision. Alternatively, of course, it might just as plausibly be said to have been inserted in the interest of greater certainty. On the other hand, the inclusion in the British Columbia statute of "a power to make an investigation or inquiry into a person's legal rights" etc. in the definition of a "statutory power" suggests that such powers are not included in the term "a statutory power of decision," discussed in *Taser International, Inc. v. British Columbia (Commissioner)* (2010), 321 D.L.R. (4th) 619 (BCSC) (notwithstanding that Study Report by Commissioner of Inquiry involved neither a statutory power nor a statutory power of decision, *certiorari* available to ensure that duty of fairness observed) at paras. 28-34. As to the availability of *certiorari* to review non-final administrative action, see topic 1:2240, *ante*. As to the applicability of the duty of fairness, see topic 7:2653, *post*.

[142.1] ***Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)***, 2016 BCCA 500 at paras. 56-9 (application premature; however, in exercise of discretion, Court addressed merits).

2:2343 *Commercial Decisions*

Because of a policy that judicial review should not take the place of contract remedies,[143] until recently commercial decisions made by a tribunal or government usually have been held not to fall within the definition of a statutory power of decision.[144] For example, a decision to refuse to allow a party to tender was held not to be reviewable.[145] Similarly, a decision of the Minister of Health not to delist a competitor's drug was held not to be made in the exercise of a statutory power of decision, since only commercial interests were at stake, and no legal rights were prescribed.[146] Likewise, a decision of the respondent Metrolinx to enter into a contract to purchase diesel units was not the

---

[143] In the past, courts have also been reluctant to hold that they have jurisdiction to grant *certiorari* to review decisions taken by a public authority in the exercise of its contractual capacity although this position is becoming blurred and some of the more recent cases have permitted resort to judicial review remedies: see topics 1:2257, *ante*; 7:2322, *post*.

[144] *2169205 Ontario Inc. v. Ontario (Liquor Control Board)* (2011), 23 Admin. L.R. (5th) 335 (Ont. Div. Ct.) (no statutory power of decision in selection of agency store by liquor commission) at para. 37, suppl. reasons 2011 ONSC 4800; *B.C.G.S.E.U. v. British Columbia (Minister of Health Services)* (2005), 27 Admin. L.R. (4th) 125 (BCSC) (no exercise of statutory power in decision to contract out services by minister), aff'd in the result (2007), 283 D.L.R. (4th) 307 (BCCA); *Ainsworth Electric Co. v. Exhibition Place* (1987), 58 O.R. (2d) 432 (Ont. Div. Ct.); *Bajor v. Ontario* (1985), 50 O.R. (2d) 705 (Ont. H.C.J.), aff'd (1987), 60 O.R. (2d) 583 (Ont. C.A.), leave to appeal to SCC ref'd (1987), 24 O.A.C. 159(n). **But see** *South March Highlands–Carp River Conservation Inc. v. Ottawa (City)* (2010), 17 Admin. L.R. (5th) 231 (Ont. Div. Ct.) (decision to proceed with construction of road without environmental assessment); *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*, [2009] O.J. No. 3590 (Ont. Div. Ct.) at para. 23 (award of contract was statutory power of decision), rev'd on other grounds 2009 ONCA 879; *Westbank First Nation v. British Columbia* (2000), 191 D.L.R. (4th) 180 (BCSC); *Prysiazniuk v. Hamilton-Wentworth (Municipality)* (1985), 51 O.R. (2d) 339 (Ont. Div. Ct.), where the municipal decision went beyond a commercial contract and affected the applicant's livelihood; and *Associated Respiratory Services Inc. v. B.C. (Purchasing Commn.)* (1994), 108 D.L.R. (4th) 577 (BCCA), add'l reasons (1994), 117 D.L.R. (4th) 353 (BCCA), leave to appeal to SCC ref'd (1995), 29 Admin. L.R. (2d) 87(n), where the commercial nature of the decision was said not to preclude the making of a declaration that the decisions taken were without legislative authority in the purported exercise of a *statutory power*. **And see** topic 2:4312, *post*.

[145] *Midnorthern Appliances Ind. Corp. v. Ontario Housing Corp.* (1977), 17 O.R. (2d) 290 (Ont. Div. Ct.); **see also** *St. Lawrence Cement Inc. v. Ontario (Minister of Transportation)* (1991), 3 O.R. (3d) 30 (Ont. Gen. Div.); *Aboutown Transportation Ltd. v. London (City)* (1992), 9 O.R. (3d) 143 (Ont. Gen. Div.); *Peter Kiewit Sons Co. v. Richmond (City)* (1992), 7 Admin. L.R. (2d) 124 (BCSC). **But see discussion in** *J.P. Towing Service and Storage Ltd. v. Toronto Police Services Board* (1999), 180 D.L.R. (4th) 160 (Ont. Div. Ct.) (dispute involving contracting judicially reviewable, since within power granted to municipal governments); *C.U.P.E., Local 8 v. Health Region No. 4* (1997), 47 Admin. L.R. (2d) 257 (Alta. C.A.).

[146] *Ayerst, McKenna & Harrison Inc. v. Ontario (Attorney General)* (1992), 8 O.R. (3d) 90 (Ont. Div. Ct.).

exercise of a statutory power of decision.[147] And a decision of the Canadian National Exhibition to deny an electrical contractor the opportunity to provide services was not reviewable, on the ground that no "licence" had been granted for purposes of the *Judicial Review Procedure Act*.[148]

2:2344 *University Staff and Student Decisions*

Although most universities are established by legislation,[149] courts have been reluctant to find that decisions taken by their governing bodies and committees are made in the exercise of a statutory power, rather than pursuant to the contractual rules that regulate the relationship between the university, and its employees and students.[150] Thus, the Ontario Court of Appeal declined to review the denial of tenure by a university committee, on the basis that it was doubtful that the power of the Governing Council to appoint members of the teaching staff was a statutory power of decision.[151] And it has been held that the refusal of a degree by the Council of the School of Graduate Studies, although made in the exercise of a statutory power, was not an exercise

---

[147] *Clean Train Coalition Inc. v. Metrolinx*, 2012 ONSC 6593 (Ont. Div. Ct.) at para. 16. **Compare** *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Minister of Energy, Mines and Natural Gas)*, 2015 BCSC 16 (minister's power to direct BC Hydro to negotiate had sufficient statutory basis to permit judicial review), aff'd on this point 2016 BCCA 163.

[148] *Ainsworth Electric Co. v. Exhibition Place* (1987), 58 O.R. (2d) 432 (Ont. Div. Ct.).

[149] In Ontario, Queen's University is the exception; it was founded by royal charter.

[150] The result of concluding that university decisions concerning student discipline or the refusal of tenure to a member of the academic staff do not involve statutory powers of decision, the decision-making procedure does not have to comply with the *Statutory Powers Procedure Act*, although it must satisfy the more flexible common law duty of fairness: **see** topic 8:4221, *post*.

[151] ***Paine v. University of Toronto*** (1981), 34 O.R. (2d) 770 (Ont. C.A.), leave to appeal to SCC ref'd (1982), 42 N.R. 270; **see also** *Bezeau v. Ontario Institute for Studies in Education* (1982), 36 O.R. (2d) 577 (Ont. Div. Ct.); *Wong v. University of Toronto* (1989), 45 Admin. L.R. 113 (Ont. Dist. Ct.), aff'd (1992), 4 Admin. L.R. (2d) 95 (Ont. C.A.); **but see** *Bennett v. Wilfrid Laurier University* (1983), 15 Admin. L.R. 42 (Ont. Div. Ct.), aff'd (1984), 15 Admin. L.R. 49 (Ont. C.A.), where judicial review was held to be available because of the public nature of university appointments. **See also** *Diamond v. Hickling* (1987), 24 Admin. L.R. 30 (BCSC), aff'd (1988), 36 Admin. L.R. 129 (BCCA); *MacLean v. University of British Columbia (Appeal Board)* (1993), 109 D.L.R. (4th) 569 (BCCA); ***Wade v. Strangway*** (1994), 116 D.L.R. (4th) 714 (BCSC), aff'd (1996), 132 D.L.R. (4th) 406 (BCCA), where the British Columbia courts have treated such decisions as having been made pursuant to a statutory power without determining the issue.

of a statutory power of decision.[152] Similarly, a statutory power of decision was not involved in a provost's decision to expel a student for sexual harassment,[153] nor in the determination of the results of a student election,[154] nor in giving a warning to a student.[155] Of course, if the court concludes that public decision-making is involved, it may grant relief under the prerogative order basis of its jurisdiction, as occurred, for example, where a court prohibited an internal tribunal from proceeding with academic dishonesty charges by virtue of the quasi-judicial nature of the tribunal's function.[156]

2:2345 *Public Employment*

While the dismissal of a person from a public office may be subject to the duty of fairness[157] and come within the scope of the prerogative remedies,[158] it does not necessarily follow that every employment-related decision will involve an exercise of a statutory power of decision.[159] Thus, for example, the simple acceptance of a constable's resignation was held not to be a decision involving the exercise of a statutory power of decision.[160] Nor was a decision of a public service pension board of

---

[152] *Polten v. University of Toronto* (1975), 8 O.R. (2d) 749 (Ont. Div. Ct.); **see also** *Setia v. Appleby College*, 2013 ONCA 753 (expulsion decision not one intended to be subject of public law remedies); *Dennison v. Algonquin College of Applied Arts & Technology* (1990), 38 O.A.C. 134 (Ont. H.C.J.), where the absence of a Regulation or formal procedure respecting student discipline compelled the conclusion that no statutory power was being exercised.

[153] *B. v. W.* (1985), 52 O.R. (2d) 738 (Ont. H.C.J.). **Compare** *D. (C.) (Litigation Guardian of) v. Ridley College* (1996), 44 Admin. L.R. (2d) 108 (Ont. Gen. Div.).

[154] *Thomas v. Committee of College Presidents* (1973), 37 D.L.R. (3d) 69 (Ont. Div. Ct.).

[155] *Blaber v. University of Victoria* (1995), 123 D.L.R. (4th) 255 (BCSC).

[156] *Aylward v. McMaster University* (1991), 47 Admin. L.R. 198 (Ont. Div. Ct.); **and see** topics 1:2256, *ante*; 7:1624, *post*.

[157] Topic 7:2321, *post*.

[158] Topic 1:2258, *ante*.

[159] Indeed, today, apart from a statute providing otherwise, the presumption is that contract principles will apply: ***New Brunswick (Board of Management) v. Dunsmuir***, [2008] 1 S.C.R. 190 at paras. 81 and 114 (contract principles rather than public law principles apply, unless contrary intention clearly expressed).

[160] *Head v. Ontario Provincial Police Commissioners* (1981), 40 O.R. (2d) 84 (Ont. C.A.), aff'd [1985] 1 S.C.R. 566. **Compare** *Rainbow v. Central Okanagan School District No. 23* (1990), 49 B.C.L.R. (2d) 145 (BCCA), where the court held that the statutory scheme had to be considered together with the contract of employment and concluded that a decision not to renew a principal's contract could be reviewed under the *Judicial Review Procedure*

trustees created by a trust agreement subject to judicial review, on the basis that the board was not a public body.[161]

2:2400 Declarations and Injunctions: "Statutory Powers"

The third basis of the court's judicial review jurisdiction is that it may grant any relief that the applicant would be entitled to in proceedings for a declaration or an injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.[162]

The Ontario *Judicial Review Procedure Act*[163] defines a "statutory power" as follows:

> 1. In this Act,
>
> 'statutory power' means a power or right conferred by or under a statute,
>
> (a) to make any regulation, rule, by-law or

Act, R.S.B.C. 1979, c. 209.

[161] *Ehrcke v. Public Service Pension Board of Trustees* (2004), 32 B.C.L.R. (4th) 388 (BCSC).

[162] Section 2(2)(b) of the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (App. BC. 4) and s. 2(1) para. 2 of the Ontario *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3). But way of contrast, the definition of the analogous jurisdiction in England is much broader. The *Supreme Court Act 1981*, (U.K.), c. 54, s. 31(2) provides:

> A declaration may be made or an injunction granted ..... in any case where an application for judicial review, seeking that relief has been made and the High Court considers that, having regard to
>
> (a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition and certiorari;
>
> (b) the nature of the persons and bodies against whom relief may be granted by such orders; and
>
> (c) all the circumstances of the case,
>
> it would be just and convenient for the declaration to be made or the injunction granted, as the case may be.

Not surprisingly, a substantial body of caselaw has developed in connection with the application of these criteria. **See generally** H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review*, 6th ed. (London: Sweet and Maxwell, 2007), c. 15.

[163] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3).

> order, or to give any other direction having force as subordinate legislation,
>
> (b) to exercise a statutory power of decision,[164]
>
> (c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,
>
> (d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party.

The definition of "statutory power" in the British Columbia *Judicial Review Procedure Act* is substantially the same, except that it includes a power conferred by an enactment

> (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability.[165]

In the result, when declaratory or injunctive relief is sought, the jurisdiction of the courts in British Columbia and Ontario to entertain applications for judicial review is determined by the statutory definitions of "statutory power" and "statutory power of decision." Of course, to the extent that the prerogative orders lie in respect of administrative action that is not taken in the exercise of a "statutory power," as, for example, under the royal prerogative, the courts retain their jurisdiction to set aside, to prohibit, and to order the performance of a public duty.[166]

Furthermore, the court retains its discretion to refuse a declaration or injunction on an application for judicial review on the same grounds as if these remedies had been sought in other civil proceedings, such as an action.[167] Moreover, while applications for *certiorari*, prohibition and

---

[164] For the definition of this term generally, see topic 2:2300, *ante*.

[165] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 1 (App. BC. 4). These words, "legal right, power, privilege, immunity, duty or liability" are also found in the definition of a "statutory power of decision", discussed in *Ambulance Paramedics of British Columbia v. British Columbia (Attorney General)* (2010), 9 Admin. L.R. (5th)19 (BCSC), as well as topic 2:2332, *ante*.

[166] ***Masters v. Ontario*** (1993), 16 O.R. (3d) 439 (Ont. Div. Ct.), aff'd (1994), 18 O.R. (3d) 551 (Ont. Div. Ct.); *Williams v. Canada (Attorney General)* (1983), 45 O.R. (2d) 291 (Ont. Div. Ct.).

[167] See topic 2:2100, *ante*.

mandamus must be treated as applications for judicial review, the court has a discretion as to whether it will treat proceedings for a declaration or an injunction in this way when they are sought in the context of an action.[168]

2:2410 *"By or under a Statute"*

2:2411 *Ontario*

In Ontario, to be the subject of a declaration or an injunction on an application for judicial review, the impugned power must have been conferred "by or under a statute." For example, a decision certifying a proposed therapeutic abortion as an exception to an offence under the *Criminal Code* has been held not to be the exercise of a statutory power.[169] Similarly, the initiation of an investigation by a provincial government into sexual harassment charges against a senior public officer was held not to be carried out "by or under a statute" for the purposes of the *Judicial Review Procedure Act*.[170] And the same conclusion was reached where a regulation or formal policy did not exist respecting student discipline.[171] However, a power conferred by delegated legislation is a "statutory power," conferred "*under* a statute," as was the case, for example, where a superintendent of a correctional institution was acting pursuant to a Regulation.[172]

2:2412 *British Columbia*

In British Columbia, section 1 of the *Judicial Review Procedure Act* defines a "statutory power" as one that is conferred "by an enactment," a term that the *Interpretation Act*[173] defines as "an Act or regulation."

---

[168] Topic 2:2430, *post*.

[169] *Medhurst v. Medhurst* (1984), 45 O.R. (2d) 575 (Ont. H.C.J.).

[170] ***Masters v. Ontario*** (1993), 16 O.R. (3d) 439 (Ont. Div. Ct.), aff'd (1994), 18 O.R. (3d) 551 (Ont. Div. Ct.). **See also** *Soth v. Ontario (Speaker of the Legislative Assembly)* (1997), 32 O.R. (3d) 440 (Ont. Div. Ct.).

[171] *Dennison v. Algonquin College of Applied Arts & Technology* (1990), 38 O.A.C. 134 (Ont. H.C.J.); however, the court was found to have jurisdiction to review the decision on an application for judicial review because the relief requested was "in the nature of *certiorari*."

[172] *Hussey v. Ontario (Attorney General)* (1984), 46 O.R. (2d) 554 (Ont. Div. Ct.).

[173] *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 1.

However, the *Interpretation Act* defines "regulation" very broadly, so as to include rules, bylaws and, subject to some exceptions, any other instrument enacted in the exercise of power conferred under an Act. The *Judicial Review Procedure Act* has been held to apply even to powers exercised by provincial tribunals which derive from federal legislation, such as in the authority of a provincial official to apply for suspension of an individual's passport for maintenance arrears.[174] Nevertheless, despite the differences in approach in Ontario and British Columbia, the question of whether a power is "statutory" for the purpose of the *Judicial Review Procedure Act* is likely to be answered in the same way in both provinces.[175]

2:2420 *Exercise of a Statutory Power*

2:2421 *Generally*

A wide variety of administrative action has been held to have been taken in the exercise of a statutory power, including: the enactment of an order-in-council pursuant to a provision of the Ontario *Loan and*

---

[174] *G.B.I. v. British Columbia (Director of Maintenance Enforcement)* (2005), 47 B.C.L.R. (4th) 369 (BCSC).

[175] One possible exception is that in Ontario neither the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3) nor the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F defines an "Act" to be only a provincial enactment, as does the British Columbia *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 1 and the Ontario *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 3(1) [as am. 1994, c. 27, s. 56(1) to (44)] (App. Ont. 2). Accordingly, it may be that the Ontario Courts have jurisdiction under the *Judicial Review Procedure Act* to issue an injunction or declaration in respect of federal administrative action. **Compare** *Sabados v. Canadian Slovak League* (1982), 133 D.L.R. (3d) 152 (Ont. H.C.J.) (application for judicial review available against body incorporated under federal statute). In British Columbia, on the other hand, declarations or injunctions in respect of federal administrative action on the ground that either it or its enabling statute is unconstitutional must presumably be sought outside the *Judicial Review Procedure Act*: **e.g.** ***Canada (Attorney General) v. Law Society (British Columbia)***, [1982] 2 S.C.R. 307; *Law Society (British Columbia) v. Mangat* (1997), 149 D.L.R. (4th) 736 (BCSC), rev'd without reference to this point: (1998), 167 D.L.R. (4th) 723 (BCCA), aff'd 2001 SCC 67. Also, a minister in negotiating and consulting with respect to treaties over aboriginal land claims is not acting pursuant to a statutory power, so relief under the *Judicial Review Procedure Act* is not available: ***Cook v. Canada (Minister of Aboriginal Relations and Reconciliation)***, [2008] 7 W.W.R. 672 (BCSC). In any event, the Federal Court of Canada has virtually exclusive jurisdiction to review administrative action taken under a federal statute. Moreover, even where its jurisdiction is concurrent with that of the provincial superior courts, as it is in respect of constitutional challenges to federal administrative action, the courts will usually decline to exercise their jurisdiction in deference to the primary jurisdiction of the Federal Court. **See generally** topic 2:4725, *post*.

Trust Corporations Act;[176] a minister's refusal of a land-use permit;[177] cancellation of a proposal to establish an independent medical facility;[178] the refusal to issue marriage licences;[179] a minister's decision to delist a drug as interchangeable under the *Drug Interchangeability and Dispensing Fee Act*;[180] a General Manager's decision refusing the transfer of a licence to operate a liquor store;[181] the resumption of Crown lands pursuant to the British Columbia *Highway Act*;[182] the approval of a septic tank system by a local board of health;[183] a city's classification of a project for environmental assessment purposes;[184] the passage of a municipal bylaw[185] or resolution;[186] the enactment of regulations;[187] the delegation of power to enforce compliance with a Real Estate Council's

---

[176] *Seaway Trust Co. v. Ontario* (1983), 41 O.R. (2d) 501 (Ont. Div. Ct.), rev'd on other grounds (1983), 41 O.R. (2d) 532 (Ont. C.A.), leave to appeal to SCC ref'd (1983), 52 N.R. 235.

[177] *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 14 O.R. (2d) 49 (Ont. C.A.).

[178] *Ottawa-Carleton Dialysis Services v. Ontario (Minister of Health)* (1996), 41 Admin. L.R. (2d) 211 (Ont. Div. Ct.), leave to appeal to Ont. C.A. granted [1996] O.J. No. 4273.

[179] *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Ont. Div. Ct.), aff'd [2003] O.J. No. 2268 (Ont. C.A.).

[180] *Apotex Inc. v. Ontario (Lieutenant Governor in Council)* (2006), 213 O.A.C. 202 (Ont. Div. Ct.), rev'd on basis Regulation removing drug validly enacted (2007), 229 O.A.C. 11 (Ont. C.A.).

[181] *Northland Properties Corp. v. British Columbia (General Manager, Liquor Control and Lic. Branch)* (2011), 29 Admin. L.R. (5th) 337 (BCSC) at para. 22.

[182] *Moser v. R.* (1982), 31 B.C.L.R. 289 (BCSC).

[183] *Bailey v. Langley (Township) Local Board of Health* (1982), 32 B.C.L.R. 298 (BCSC).

[184] *William Ashley China Ltd. v. Toronto (City)* (2008), 39 C.E.L.R. (3d) 306 (Ont. Div. Ct.).

[185] *Mississauga Hydro Electric Commn. v. Mississauga (City)* (1975), 13 O.R. (2d) 511 (Ont. Div. Ct.); *Maurice Rollins Construction Ltd. v. South Fredericksburg (Township)* (1975), 11 O.R. (2d) 418 (Ont. H.C.J.); *Hall v. Maple Ridge (District)* (1992), 9 Admin. L.R. (2d) 178 (BCSC); *Serre v. Rayside-Balfour (Town)* (1975), 11 O.R. (2d) 779 (Ont. Div. Ct.); **see also** *Armstrong v. Langley (City)* (1992), 94 D.L.R. (4th) 21 (BCCA), assuming without deciding that a statutory power was exercised. **Compare** *Masiuk v. Carling* (1984), 2 O.A.C. 222 (Ont. Div. Ct.).

[186] *MacPump Developments Ltd. v. Sarnia (City)* (1994), 20 O.R. (3d) 755 (Ont. C.A.), add'l reasons (Jan. 19, 1995), Doc. CA C16439; **see also** ***Shell Canada Products Ltd. v. Vancouver (City)***, [1994] 1 S.C.R. 231; **compare** *Masiuk v. Carling* (1984), 2 O.A.C. 222 (Ont. Div. Ct.).

[187] *Canadian Memorial Services v. Ontario (Minister of Consumer & Commercial Relations)* (1992), 56 O.A.C. 344 (Ont. Div. Ct.); *O.P.S.E.U. v. Ontario (Attorney General)* (1995), 26 O.R. (3d) 740 (Ont. Div. Ct.).

Code of Ethics;[188] the appointment of hearing officers pursuant to the *Ontario Planning and Development Act*;[189] the appointment and report of a commission of inquiry;[190] a recommendation report and referral to a minister on environmental review;[191] an investigation by British Columbia's Ombudsman;[192] the holding of a hearing by the Land Commission;[193] the rebate of employer assessments by the Workers' Compensation Board;[194] the layoff of a teacher pursuant to a statute permitting reductions due to diminished operating funds;[195] the dismissal of a member of an administrative agency;[196] the decertification of a paramedic;[197] a university president's recommendation concerning the appointment of a professor;[198] a university senate decision to dismiss a student from a program;[199] transfer of a student to another school;[200] reconsideration of a decision under Ontario's *Hospital Labour Disputes*

---

[188] *Luzak v. Real Estate Council of Ontario* (2003) 67 O.R. (3d) 530 (Ont. Div. Ct.).

[189] *Chadwill Coal Co. v. Ontario (Treasurer)* (1976), 14 O.R. (2d) 393 (Ont. Div. Ct.).

[190] *U.T.U., Local 1778 v. British Columbia Rail Ltd.* (1990), 50 B.C.L.R. (2d) 329 (BCSC), rev'd without deciding merits (Nov. 28, 1990), Doc. CA 013145 (BCCA).

[191] *Taku River Tlingit First Nation v. Tulsequah Chief Mine* Project (2002), 211 D.L.R. (4th) 89 (BCCA), rev'd without reference to point 2004 SCC 74.

[192] *British Columbia (Workers' Compensation Board), Re* (1985), 62 B.C.L.R. 161 (BCSC); **see also** *Weldwood of Canada Ltd. v. British Columbia (Workers' Compensation Board)* (1998), 56 B.C.L.R. (3d) 297 (BCSC). **Compare** *R. v. Parliamentary Commissioner for Standards, Ex p. Al Fayed*, [1998] 1 All E.R. 93 (Eng. C.A.) (investigation by Parliamentary Commissioner not similar to that by Ombudsman; judicial review not available).

[193] *Gloucester Properties Ltd. v. R.* (1980), 110 D.L.R. (3d) 247 (BCSC).

[194] *B.C.F.L. v. British Columbia (Workers' Compensation Board)* (1988), 27 B.C.L.R. (2d) 175 (BCSC).

[195] *Teachers' Assn. (West Vancouver) v. West Vancouver School District No. 45* (1986), 6 B.C.L.R. (2d) 118 (BCSC).

[196] *Dewar v. Ontario* (1996), 30 O.R. (3d) 334 (Ont. Div. Ct.), aff'd (1998) 37 O.R. (3d) 170 (Ont. C.A.); *Hewat v. Ontario* (1997), 32 O.R. (3d) 622 (Ont. Div. Ct.), aff'd with variation (1998) 37 O.R. (3d) 161 (Ont. C.A.). However, the court did *not* declare that there was a right to reinstatement. **But see *Dunsmuir v. New Brunswick***, [2008] 1 S.C.R. 190 at paras. 81 and 114 (contract principles rather than public law principles apply, unless contrary intention clearly expressed).

[197] See *Scheerer v. Waldbillig* (2006), 265 D.L.R. (4th) 749 (Ont. Div. Ct.): interplay of two statutes.

[198] *York University Faculty Assn. v. York University* (1979), 27 O.R. (2d) 507 (Ont. Div. Ct.).

[199] *Ward v. University of Prince Edward Island* (1997), 3 Admin. L.R. (3d) 1 (PEISC).

[200] *Bonnah (Litigation guardian of) v. Ottawa-Carleton District School Board* (2002), 44 Admin. L.R. (3d) 25 (Ont. Sup. Ct. J.).

Arbitration Act;[201] the management of a prison;[202] an assessment for realty tax purposes;[203] the operation of a toll ferry;[204] recommendations by a committee under a federal-provincial commodity agreement;[205] and the assignment of demerit points by the Superintendent of Motor Vehicles for British Columbia, notwithstanding that the action was a clerical act.[206]

On the other hand, where an official refused to disclose information which he was under a duty not to disclose, the refusal was said not to be an exercise of a statutory power, on the ground that the refusal was mandated by statute and did not require even an administrative decision.[207] Similarly, a refusal by the Information and Privacy Commission to investigate a complaint was held to be a legislative matter not involving a statutory power.[208] Finally, a minister in negotiating and consulting with respect to treaties over aboriginal land claims is not acting pursuant to a statutory power, so relief under the *Judicial Review Procedure Act* is not available.[209]

2:2422 *Cabinet Decisions*

Cabinet decisions, when made pursuant to a statute, are an exercise of a statutory power and thus may be declared invalid on an application for judicial review.[210] Accordingly, courts have reviewed

---

[201] *538414 Ontario Ltd. v. London & District Service Workers Union, Local 220* (1987), 58 O.R. (2d) 361 (Ont. Div. Ct.).

[202] *Hussey v. Ontario (Attorney General)* (1984), 4 Admin. L.R. 147 (Ont. Div. Ct.).

[203] *RivTow Industries Ltd. v. British Columbia (Assessor of Capital-Saanich, Area 01)* (1989), 55 D.L.R. (4th) 447 (BCSC); *Home Depot Canada v. Toronto (City)* (1998), 37 O.R. (3d) 124 (Ont. Gen. Div.).

[204] *Wolfe Island (Township) v. Ontario (Minister of the Environment)* (1995), 23 O.R. (3d) 737 (Ont. C.A.).

[205] *Canadian Restaurant and Foodservices Assn. v. Canadian Dairy Commission* (2002), 164 O.A.C. 201 (Ont. Div. Ct.).

[206] *Hoffbeck v. Jackman* (1985), 67 B.C.L.R. 67 (BCSC).

[207] *Infant, Re* (1981), 32 B.C.L.R. 20 (BCSC).

[208] *Pelham v. Peel Regional Police Services*, 2015 ONSC 6558 (Ont. Div. Ct.).

[209] ***Cook v. Canada (Minister of Aboriginal Relations and Reconciliation)***, [2008] 7 W.W.R. 672 (BCSC).

[210] *Greenisle Environmental Inc. v. Prince Edward Island* (2005), 33 Admin. L.R. (4th) 91 (PEISC); *Jasper Park Chamber of Commerce v. Canada (Governor-General in Council)* (1983), 141 D.L.R. (3d) 54 (FCA); a decision made by an individual minister pursuant to a grant of statutory authority will, of course, be reviewable as an exercise of a statutory

Cabinet decisions revoking a hospital's approval pursuant to a provision of the *Public Hospitals Act*,[211] amending tobacco quotas,[212] listing drugs to qualify for certain benefits,[213] rescinding a decision of the Ontario Municipal Board,[214] and declaring a firearm to be a restricted weapon pursuant to the *Criminal Code*.[215] On the other hand, it has been held that the court cannot review Cabinet decisions made exclusively in the exercise of the Crown prerogative,[216] or decisions respecting the general expenditure of funds[217] under this head of its jurisdiction.

2:2423 *Private Bodies*

In keeping with the distinction made between "public" and "private" decision-making in relation to the prerogative writs,[218]

---

power: see e.g. *MacMillan Bloedel Ltd. v. British Columbia (Minister of Forests)* (1984), 51 B.C.L.R. 105 (BCCA), leave to appeal to SCC ref'd (1984), 4 Admin. L.R. 1(n). See also *Independent Contractors & Business Assn. (British Columbia) v. British Columbia* (1995), 6 B.C.L.R. (3d) 177 (BCSC).

[211] ***Doctors Hospital v. Ontario (Minister of Health)*** (1976), 12 O.R. (2d) 164 (Ont. Div. Ct.).

[212] *Prince Edward Island (Marketing Council) v. Honkoop* (1984), 150 A.P.R. 124 (PEITD), rev'd in part (1985), 168 A.P.R. 389 (PEICA); see also *Bedesky v. Farm Products Marketing Board (Ontario)* (1975), 10 O.R. (2d) 105 (Ont. C.A.), leave to appeal to SCC ref'd (1975), 10 O.R. (2d) 106(n).

[213] *Apotex v. Ontario (Minister of Health)* (1989), 71 O.R. (2d) 525 (Ont. Div. Ct.). See also *Apotex Inc. v. Ontario (Lieutenant Governor in Council)* (2006), 213 O.A.C. 202 (Ont. Div. Ct.), rev'd on basis Regulation removing drug validly enacted (2007), 229 O.A.C. 11 (Ont. C.A.); *Ontario (Minister of Health) v. Apotex Inc.* (2002), 60 O.R. (3d) 209 (Ont. C.A.); *Apotex Inc. v. Ontario (Attorney General)* (1984), 47 O.R. (2d) 176 (Ont. H.C.J.).

[214] *Davisville Investment Co. v. Toronto (City)* (1976), 76 D.L.R. (3d) 218 (Ont. Div. Ct.), aff'd (1977), 15 O.R. (2d) 553 (Ont. C.A.).

[215] *Williams v. Canada (Attorney-General)* (1983), 45 O.R. (2d) 291 (Ont. Div. Ct.).

[216] But that exception is somewhat dated: see discussion in ***Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)*** (1976), 14 O.R. (2d) 49 (Ont. C.A.); *Border Cities Press Club v. Ontario (Attorney General)*, [1955] 1 D.L.R. 404 (Ont. C.A.). Compare *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539.

[217] *Valley Rubber Resources Inc. v. British Columbia (Minister of Environment)* (2002), 219 D.L.R. (4th) 1 (BCCA); *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (1991), 2 O.R. (3d) 716 (Ont. Div. Ct.), leave to appeal to Ont. C.A. ref'd (1991), 4 Admin. L.R. (2d) 226; see also *H.E.U. v. Northern Health Authority* (2003), 2 Admin. L.R. (4th) 99 (BCSC); *Volansky v. British Columbia (Minister of Transportation)* (2002), 41 Admin. L.R. (3d) 300 (BCSC); *Metropolitan General Hospital v. Ontario Minister of Health* (1979), 25 O.R. (2d) 699 (Ont. H.C.J.).

[218] See topic 1:2250, *ante*.

decisions by private bodies generally do not involve the exercise of a statutory power, even though to some extent they may derive their legal authority from legislation, as, for example, where the bodies are incorporated,[219] or where a licence has been granted to a company.[220] Thus, it has been held that no statutory power was exercised in the suspension of a member of a golf club,[221] in a decision made by the Canadian Chiropractic Examining Board refusing to permit an individual to take a qualifying examination,[222] in an internal decision of a hospital board addressing budget problems,[223] in a refusal to issue a judge's badge to a non-resident member of the Canadian Kennel Club,[224]in an investigation by the Investment Industry Regulatory Organization of Canada,[225] or the suspension of a real estate board member.[226] And notwithstanding its "public aspect," a bylaw respecting membership in the Ontario Teachers' Federation was held to be "a normal housekeeping by-law...similar in nature to the by-laws of thousands of incorporated clubs and associations in Ontario not having share capital," and therefore not made in the exercise of a statutory power.[227] On the other hand, decisions by a church have been held to be reviewable on an application for judicial review as exercises of statutory

---

[219] Compare *Sabados v. Canadian Slovak League* (1982), 133 D.L.R. (3d) 152 (Ont. Div. Ct.) (decisions of club not reviewable in the Federal Court because of the private nature of the powers, but they were sufficiently public to be reviewable under the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224). **See also** *Parks (Guardian ad Litem of) v. B.C. School Sports* (1997), 145 D.L.R. (4th) 174 (BCSC).

[220] *Keewatin v. Ontario (Minister of Natural Resources)* (2003), 66 O.R. (3d) 370 (Ont. Div. Ct.). **See also** *Street v. B.C. School Sports* (2005), 35 Admin. L.R. (4th) 133 (BCSC) (suspension of basketball coach by private sports organization).

[221] *Iwasiw v. Essex Golf & Country Club* (1988), 64 O.R. (2d) 49 (Ont. H.C.J.).

[222] *Fawcett v. Canadian Chiropractic Examining Board* (2010), 103 O.R. (3d) 529 (Ont. Sup. Ct. J.) (not-for-profit, without-share capital group) at para. 51.

[223] ***Ontario Nurses' Assn. v. Rouge Valley Health System*** (2008), 302 D.L.R. (4th) 751 (Ont. Div. Ct.).

[224] *Kass v. Canada (Attorney General)* (1998), 155 F.T.R. 96 (FCTD).

[225] *Deeb v. Investment Industry Regulatory Organization of Canada*, 2012 ONSC 1014 (Ont. Div. Ct.) at para. 29; *Steinhoff v. Investment Regulatory Organization of Canada*, 2012 BCSC 1054.

[226] *Pestell v. Kitchener-Waterloo Real Estate Board Inc.* (1981), 34 O.R. (2d) 476 (Ont. Div. Ct.); **compare** *Seaside Real Estate Ltd. v. Halifax-Dartmouth Real Estate Board* (1964), 44 D.L.R. (2d) 248 (NSCA), where a board's decisions were subject to review by *certiorari; Luzak v. Real Estate Council of Ontario* (2003) 67 O.R. (3d) 530 (Ont. Div. Ct.).

[227] *Tomen v. O.P.S.T.F.* (1986), 55 O.R. (2d) 670 at p. 672 (Ont. Div. Ct.); **but see** *Forde v. O.S.S.T.F.* (1980), 115 D.L.R. (3d) 673 (Ont. Div. Ct.); **see also** topic 1:2255, *ante*.

power,[228] as have the decisions by two political parties to merge.[229]

2:2424 *Proposed or Purported Exercise of a Statutory Power*

Both the Ontario[230] and British Columbia[231] *Judicial Review Procedure Acts* provide for judicial review in relation to a "*proposed or purported* exercise of a statutory power." Thus, while it is unnecessary for a statutory power to be exercised before an application for judicial review can be made, the *mere existence* of such a power in a statute will not suffice. Rather, to give the court jurisdiction, the statutory power must either be purportedly exercised, or its exercise must be proposed. For example, an attack on the constitutionality of a statute alone, where there was no proposed or purported exercise of any power,[232] has been held not to come within the jurisdiction of the Court.[233] In the words of the Ontario Court of Appeal:

> ...it seems to us that for a 'proposed' exercise of a statutory power, there must be a matter pending before the body which has been given the power together with clear evidence of an intention on the part of the body to exercise the power. For a 'purported' exercise of a statutory power, there must be a professed or attempted exercise of the power, which for some reason falls short

---

[228] E.g. *McCaw v. United Church of Canada* (1988), 64 O.R. (2d) 513 (Ont. H.C.J.), varied (1991), 4 O.R. (3d) 481 (Ont. C.A.) (declaration issued); *Davis v. United Church of Canada* (1992), 8 O.R. (3d) 75 (Ont. Gen. Div.), add'l reasons [1992] O.J. No. 2686, although in that case the relief sought was in the nature of *certiorari* and the court assumed jurisdiction on the basis that the church decisions were made under a statute which gave them a sufficient "public character"; **see also** *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191 (Ont. Div. Ct.), aff'd (1987), 20 O.A.C. 381 (Ont. C.A.), where the court stated that the church had a sufficient public character to warrant it being subject to the processes of *certiorari*.

[229] *Ahenakew v. MacKay* (2003), 68 O.R. (3d) 277 (Ont. Sup. Ct. J.), aff'd (2004), 71 O.R. (3d) 130 (Ont. C.A.).

[230] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1) para. 2 (App. Ont. 3).

[231] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b) (App. BC. 4).

[232] However, where administrative action is challenged on the ground that it or the statute authorizing it is unconstitutional, a declaration may be granted on an application for judicial review: **see e.g.** *Klein v. Law Society of Upper Canada* (1985), 50 O.R. (2d) 118 (Ont. Div. Ct.).

[233] *S.E.I.U., Local 204 v. Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 225 (Ont. C.A.), leave to appeal to SCC ref'd (1985), 8 O.A.C. 320(n), foll'd *Keewatin v. Ontario (Minister of Natural Resources)* (2003), 66 O.R. (3d) 370 (Ont. Div. Ct.).

of constituting an actual exercise of the power.[234]

On the other hand, the publication by a minister of a notice of intention to use lands for a highway was sufficient to establish "a proposed exercise of a statutory power,"[235] as was a pending renewal of a licence[236] and a proposal to hold a hearing.[237]

Furthermore, where a municipal employer assigned fire dispatch duties to non-members, a purported exercise of a statutory power occurred.[238] Similarly, a purported exercise of a statutory power took place when the registrar of gaming control advised a supplier that its registration would be revoked pending a hearing;[239] when a school board laid off a teacher pursuant to a statute permitting layoffs due to reduced operating funds, but where the real reason was alleged incompetence on the part of the teacher;[240] and when the decision in question was made pursuant to an invalid Regulation.[241]

2:2425 *Refusal to Exercise*

A refusal to exercise a statutory power may be unlawful and, on an application for judicial review, a court may so declare, or it may grant a mandatory injunction requiring the body to discharge its legal duty. For example, a wrongful refusal to enter upon an adjudication has been found to come under this head of the courts' jurisdiction.[242] And in another case, a British Columbia court declared a fair wages policy applicable to government contractors to be unlawful, even though the policy was not made pursuant to a statutory power because, in the

---

[234] *S.E.I.U., Local 204 v. Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 225 at p. 233 (Ont. C.A.), leave to appeal to SCC ref'd (1985), 8 O.A.C. 320(n).

[235] *Beifuss v. British Columbia (Minister of Highways & Transportation)* (1981), 30 B.C.L.R. 265 (BCSC).

[236] *Islands Protection Society v. R.* (1979), 11 B.C.L.R. 372 (BCSC).

[237] *Gloucester Properties Ltd. v. R.* (1980), 110 D.L.R. (3d) 247 (BCSC).

[238] *Ordish v. London (City)* (1982), 35 O.R. (2d) 726 (Ont. C.A.).

[239] *Provan v. Ontario (Registrar of Gaming Control)* (1994), 20 O.R. (3d) 632 (Ont. Div. Ct.).

[240] *Teachers' Assn. (West Vancouver) v. West Vancouver School District No. 45* (1986), 6 B.C.L.R. (2d) 118 (BCSC).

[241] *Metropolitan Toronto (Municipality) Commissioners of Police v. Ontario (Municipal Employees' Retirement Board)* (1985), 53 O.R. (2d) 83 (Ont. Div. Ct.), rev'd (1989), 67 O.R. (2d) 448 (Ont. C.A.), leave to appeal to SCC ref'd (1989), 36 O.A.C. 216(n).

[242] *Zerr v. Zerr* (1978), 14 B.C.L.R. 333 (BCSC).

court's view, the issuance of the policy constituted a wrongful refusal by the Cabinet to exercise its statutory power to prescribe minimum wages.[243]

2:2430 *Transfer of an Action for a Declaration or Injunction*

While applications for *certiorari*, prohibition and *mandamus* in Ontario and British Columbia are automatically treated as applications for judicial review,[244] in both provinces the *Judicial Review Procedure Act* contains provisions whereby a judge *may*, not *must*, deal with an action or proceeding for a declaration or injunction under the Act, when these remedies are sought in respect of the exercise or refusal to exercise a statutory power. As to that, section 8 of the Ontario Act provides:[245]

> Where an action for a declaration or injunction, or both, whether with or without a claim for other relief, is brought and the exercise, refusal to exercise or proposed or purported exercise of a statutory power is an issue in the action, a judge of the Superior Court of Justice may on the application of any party to the action, if he or she considers it appropriate, direct that the action be treated and disposed of summarily, in so far as it relates to the exercise, refusal to exercise or proposed or purported exercise of such power, as if it were an application for judicial review and may order that the hearing on such issue be transferred to the Divisional Court or may grant leave for it to be disposed of in accordance with subsection 6(2).[246]

The burden of proving the grounds for transferring an action rests with the party making the application, and the transfer will be refused if

---

[243] *Independent Contractors & Business Assn. (British Columbia) v. British Columbia* (1995), 31 Admin. L.R. (2d) 95 (BCSC).

[244] Section 12(2) in the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (App. BC. 4), and s. 7 in the Ontario *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3); and see *Farm Credit Corp. v. Pipe* (1993), 16 O.R. (3d) 49 (Ont. C.A.), where the court held that relief in the nature of *mandamus* could only be obtained by following *JRPA* procedure. See also *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)* (1999), 12 Admin. L.R. (3d) 261 (BCSC), and ***Cook v. Canada (Minister of Aboriginal Relations and Reconciliation)***, [2008] 7 W.W.R. 672 (BCSC) (conversion not appropriate, since key parties lacking).

[245] The corresponding provision in the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 is s. 13 (App. BC. 4); it is identical to s. 8 of the Ontario *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3) in all material respects.

[246] See topic 5:3110, *post*, concerning the s. 6(2) expedited procedure.

such grounds are not made out.[247] Conversely, the existence of controverted facts, and the need for discovery, will often be a reason for avoiding an application for judicial review, which is a summary proceeding,[248] or for converting the proceeding into a trial,[249] or for ordering a trial of an issue.[250] Furthermore, where the Divisional Court has jurisdiction to grant only part of the relief sought, it may be more appropriate to transfer the matter to another forum.[251] On the other hand, the courts would appear to have no discretion under the *Judicial Review Procedure Act* to dismiss an application for judicial review in which the applicant is seeking a declaration or an injunction in respect of the exercise of a statutory power, on the ground that the proceeding would have been more appropriately instituted by way of a statement of claim.

2:3000 PRINCE EDWARD ISLAND'S *JUDICIAL REVIEW ACT*

2:3100 Generally

Like the *Judicial Review Procedure Acts* in British Columbia and Ontario, Prince Edward Island's *Judicial Review Act*[252] creates a single proceeding, called an application for judicial review, in which an applicant can seek any one or more of the forms of relief previously available, that is, a prerogative order or declaratory and injunctive

---

[247] E.g. *South-West Oxford (Township) v. Ontario (Attorney General)* (1983), 8 Admin. L.R. 30 (Ont. H.C.J.); *Loblaws Ltd. v. Gloucester* (1979), 25 O.R. (2d) 225 (Ont. Div. Ct.).

[248] Compare topic 2:4120, *post*, on the analogous position under the *Federal Courts Act*. And see topic 5:0200, *post*.

[249] E.g. *Timberwolf Log Trading Ltd. v. British Columbia*, 2013 BCSC 282 (order pursuant to R. 22-1(7)(d) converting petition to a trial and directing that a notice of claim be filed by the petitioner).

[250] *First Real Properties Ltd. v. Hamilton (City)* (2002), 59 O.R. (3d) 477 (Ont. Sup. Ct. J.) (action more appropriate); *Haagsman v. British Columbia (Minister of Forests)* (1998), 12 Admin. L.R. (3d) 103 (BCSC). See also *Karbalaeiali v. Canada (Deputy Solicitor General, Employment Standards Branch)* (2006), 42 Admin. L.R. (4th) 287 (BCSC) (notwithstanding controverted facts, judicial review preferable route), aff'd on other grounds [2008] 2 W.W.R. 226; *Keewatin v. Ontario (Minister of Natural Resources)* (2003), 66 O.R. (3d) 370 (Ont. Div. Ct.); *British Columbia (Minister of Forests) v. Westbank First Nation* (2000), 72 B.C.L.R. (3d) 250 (BCCA) (transfer to action, of petition under *Forest Practices Code* to stop work).

[251] *Seaway Trust Co. v. Ontario* (1983), 41 O.R. (2d) 532 (Ont. C.A.), leave to appeal to SCC ref'd (1983), 52 N.R. 235. See also *First Real Properties Ltd. v. Hamilton (City)* (2002), 59 O.R. (3d) 477 (Ont. Sup. Ct. J.); *Hussey v. Ontario (Attorney General)* (1984), 4 Admin. L.R. 147 (Ont. Div. Ct.).

[252] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3 (App. PEI. 1).

relief.[253] Moreover, in addition to introducing new jurisdictional bases, it also codifies the grounds of review[254] and the orders that a judge may make in disposing of an application,[255] and provides that a court may dismiss an application for judicial review on the ground that the applicant is not adversely affected by the administrative action being impugned.[256]

2:3200 The Application for Judicial Review

However, unlike the legislation in Ontario and British Columbia, the *Judicial Review Act* of Prince Edward Island imposes some significant limits on the jurisdiction of the court to grant relief, regardless of whether it is being sought under the prerogative order or declaration and injunction heads. The *Judicial Review Act* defines an application for judicial review as follows:

> 1. In this Act
>
> (b) 'application for judicial review' means an application to determine whether or not authority conferred on a tribunal by an enactment has been exercised in accordance with the enactment in respect to a decision of the tribunal in relation to 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 license.[257]

---

[253] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 2. **And see particularly** *Law Society of Prince Edward Island v. MacKinnon* (2001), 605 A.P.R. 310 (PEISC), where the court treated a proceeding as an application for judicial review on the basis that it was the preferable process given the relief claimed.

[254] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 4(1).

[255] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 3(3). In addition, a judge may issue any of these orders in respect of a report or recommendation where legislation requires a report or recommendations as conditions precedent to the making of a decision by a tribunal pursuant to an enactment: s. 4(3).

[256] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 5(b); presumably, however, this provision does not deprive the court from conferring "public interest" standing in its discretion: see topic 4:3500, *post*. Other aspects of the discretionary nature of the relief that may be granted on an application for judicial review are contained in s. 3(3) (orders that judge *may* make), s. 5 (applications made out of time), and s. 6(1) (defects of form and technical irregularities).

[257] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 1(b) (App. PEI. 1). On the meaning of the words "legal rights, powers, privileges, immunities, duties or liabilities," see topics 2:2332, 2:2333, *ante*.

And section 1 defines a tribunal to mean:

> (h) 'tribunal,' means a person or group of persons upon whom an enactment confers authority to make a decision, whether styled a board or commission or by any other title, but does not include
>
> (i) the Provincial Court of Prince Edward Island or a judge thereof,[258]
>
> (ii) the Supreme Court of Prince Edward Island or a judge thereof, or
>
> (iii) the Court of Appeal of Prince Edward Island or a judge thereof, or
>
> (iv) the Lieutenant Governor in Council when not making a decision pursuant to authority conferred by an enactment.[259]

Thus, for example, since an incorporated bargaining agent was not a tribunal within the meaning of the *Act*, its decision to withdraw a grievance was not subject to judicial review.[260]

2:3300 The Prerogative Order Basis of Jurisdiction

Section 2 of the *Judicial Review Act*[261] provides:

> 2. The purpose of this Act is to substitute an application for judicial review for the following proceedings:
>
> (a) proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari...

As with the legislation in Ontario and British Columbia, the *Judicial Review Act* does not technically abolish the three prerogative

---

[258] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 1(h). **Contrast** the Ontario and British Columbia statutes on this point: **see** topic 2:2320, *ante*; **and see** *R. v. Gaudette Farms Inc.* (1993), 331 A.P.R. 346 (PEITD).

[259] E.g. *Prince Edward Island (Department of Health and Wellness) v. C.U.P.E., Local 805* (2011), 304 Nfld. & P.E.I.R. 178 (PEISC) (Classification Appeal Board is tribunal for purposes of Act) at para. 14. **Compare** topic 2:2422, *ante*.

[260] *Connelly v. PEITF*, 2014 PECA 6.

[261] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 2(a).

orders included in this section,[262] although section 2(a) may be read as requiring a court to treat proceedings seeking one of the three specified prerogative orders as an application for judicial review. However, since the Act defines an application for judicial review as a proceeding "to determine whether or not authority conferred on a tribunal *by an enactment*"[263] has been lawfully exercised, an application for *certiorari*, prohibition or *mandamus* will have to be made if the administrative action being challenged cannot be so described. Thus, an application for judicial review would not seem to be available to challenge administrative action taken pursuant to a prerogative power of the Crown,[264] or other non-statutory public decision-making that is within the scope of these remedies at common law,[265] or where it is sought to prohibit a tribunal from proceeding in excess of its jurisdiction.[266]

Moreover, even if the statutory or common law remedy for quashing an award made in a consensual arbitration proceeding were regarded as "an order in the nature of *certiorari*,"[267] and thus included in section 2(a), the limited definition of "an application for judicial review" would seem to preclude the review of these proceedings under the *Judicial Review Act*, since consensual arbitrators derive their powers largely from contract, rather than statute. Furthermore, since the *Interpretation Act*[268] provides that "an enactment" includes "an Act,"[269]

---

[262] *National Farmers Union v. Prince Edward Island (Potato Marketing Council)* (1989), 231 A.P.R. 64 (PEITD; **and see** *C.J.A., Local 1388 v. Prince Edward Island (Labour Relations Board)* (1990), 255 A.P.R. 40 (PEITD), aff'd (1990), 266 A.P.R. 326 (PEICA); *Big John Holdings Ltd. v. Prince Edward Island (Island Regulatory & Appeals Commn.)* (1993), 348 A.P.R. 297 (PEITD). It does, however, abolish *quo warranto*: *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 11(1), (2) (App. PEI. 1). **And see further** *Ayangma v. Prince Edward Island* (1998), 29 C.P.C. (4th) 125 (PEISC); *Ward v. University of Prince Edward Island* (1997), 3 Admin. L.R. (3d) 1 (PEISC).

[263] The phrase "by an enactment" has the same meaning as in British Columbia: see topic 2:2412, *ante*. **See discussion in** *Georgetown (Town) v. Eastern School District* (2009), 97 Admin. L.R. (4th) 110 (PEISC) (school board polity not "enactment" for purposes of *Judicial Review Act*; application dismissed).

[264] *Canada (Attorney General) v. Prince Edward Island (Legislative Assembly)* (2003), 46 Admin. L.R. (3d) 171 (PEISC) (Parliamentary privilege).

[265] See topic 1:2250, *ante*; **and see *Masters v. Ontario*** (1993), 16 O.R. (3d) 439 (Ont. Div. Ct.), aff'd (1994), 18 O.R. (3d) 551 (Ont. Div. Ct.).

[266] This is because the definition of "application for judicial review" assumes that any authority conferred on the tribunal "*has been* exercised."

[267] See topic 2:2230, *ante*.

[268] *Interpretation Act*, R.S.P.E.I. 1988, c. I-8.

[269] *Interpretation Act*, R.S.P.E.I. 1988, c. I-8, s. 1(c).

which in turn is defined to mean "an Act of the Legislature,"[270] an application for judicial review cannot be made in respect of administrative action taken pursuant to an Act of the Parliament of Canada.

2:3400 Declarations and Injunctions

Section 2 of the *Judicial Review Act* contains the other head of the court's jurisdiction in Prince Edward Island. It states that the purpose of the Act is to substitute an application for judicial review for

> (b) proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.[271]

The words "in relation to the exercise, refusal to exercise or proposed or purported exercise" are identical to those in the statutes of Ontario and British Columbia, and the caselaw interpreting this language in those jurisdictions should be relevant to the interpretation of this provision.[272] However, the definition of "an application for judicial review"[273] seems to contemplate that this proceeding is only available when the "authority conferred on a tribunal *has been* exercised." Indeed, an application for judicial review of the notification by a liquor commission of an intention to hold a hearing concerning an alleged violation of the statute was dismissed as being premature for this reason.[274]

2:4000 *FEDERAL COURTS ACT*

2:4100 Introduction

Until the enactment of the *Federal Court Act*[275] in 1970, judicial

---

[270] *Interpretation Act*, R.S.P.E.I. 1988, c. I-8, s. 1(a).

[271] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 2(b) (App. PEI. 1).

[272] See topic 2:2420, *ante*.

[273] Topic 2:3200, *ante*.

[274] *K.J.G.W. Holdings Inc. v. Prince Edward Island (Liquor Control Commn.)* (1995), 127 Nfld. & P.E.I.R. 84 (PEICA).

[275] *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.) (now *Federal Courts Act*, R.S.C. 1985, c. F-7, as am. S.C. 2002, c. 8) (App. Fed. 3). **And see particularly discussion in**

review of federal administrative action was conducted by the provincial superior courts as part of their inherent jurisdiction.[276]

However, with the growth of federal regulatory regimes and the creation of more independent administrative tribunals to implement them, the disadvantages of leaving their supervision to the ten provincial courts became more obvious. These included the likelihood of conflicting decisions which could only be resolved at the level of the Supreme Court of Canada, the institution of multiple proceedings against an agency, and a perceived lack of familiarity with federal legislation by judges who encountered it only occasionally.[277] Those factors, together with the view that a federal court would be better able to bring a national perspective to the interpretation and application of the federal legislation, resulted in the dissolution of the Exchequer Court of Canada and the creation of the Federal Court of Canada by the *Federal Court Act*, a statute enacted pursuant to section 101 of the *Constitution Act, 1867*.[278]

2:4110 *The Establishment of the Federal Courts of Canada*

The most important aspect of the Federal Courts jurisdiction is its authority to review federal boards, commissions and other tribunals. And for the most part, this jurisdiction is exclusive of that of the superior courts in the provinces,[279] by virtue of section 18 of the *Federal Courts*

Felipa v. Canada (Minister of Citizenship and Immigration) (2011), 340 D.L.R. (4th) 227 (FCA) (persons over 75 could not be appointed to act as Federal Court judges), rev'g (2010), 3 Admin. L.R. (5th) 77 (FC).

[276] ***Three Rivers Boatman Ltd. v. Canada (Labour Relations Board)***, [1969] S.C.R. 607, where it was also held that provincial legislation could not remove the superior courts' judicial review jurisdiction over federal administrative action. See also *R. v. DesRosiers* (1970), 13 D.L.R. (3d) 274 (Ont. H.C.J.).

[277] ***Strickland v. Canada (Attorney General)***, 2015 SCC 37 at para. 17.

[278] See generally P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough, Ont.: Thomson Reuters Canada Ltd., looseleaf).

[279] ***Strickland v. Canada (Attorney General)***, 2015 SCC 37 at para. 18. And see e.g. *S. Suite Property Management Inc. v. Canada Revenue Agency*, 2013 ONSC 5249 (Ont. S.C.J.) (interlocutory injunction against CRA within exclusive jurisdiction of the Federal Court); *Donovan v. Canada (Attorney General)* (2007), 67 Admin. L.R. (4th) 239 (Nfld. & Lab. S.C.) (claim for damages for cancellation of fishing permit struck; judicial review to be sought in Federal Court, as condition precedent to action in damages), foll'd *Waterman v. Canada (Department of Fisheries and Oceans)* (2007), 67 Admin. L.R. (4th) 257 (Nfld. & Lab. S.C.); *J.H. v. D.A.* (2008), 290 D.L.R. (4th) 732 (Ont. Sup. Ct. J.) (*Immigration and Refugee Protection Act* trumped provincial child custody proceedings) aff'd 2009 ONCA 17; *Denison Mines Ltd. v. Canada (Attorney General)*, [1973] 1 O.R. 797 (Ont. H.C.J.); but see

CHAPTER 3

DISCRETIONARY BARS TO JUDICIAL REVIEW

3:1000 INTRODUCTION

3:1100 Generally

The exercise of the courts' supervisory jurisdiction is discretionary. That is, even where a litigant has established a ground on which the courts may intervene in the administrative process, relief will not necessarily be granted: the court may decline to provide a remedy for reasons other than the merits of the application for judicial review. [1]

The discretionary nature of the courts' judicial review jurisdiction is a result of the fact that prerogative remedies were issued in the name of the Crown, albeit on the application of a person aggrieved.[2] Accordingly, they are sometimes expressed as being "extraordinary."[3] Moreover, when the declaration and injunction came to be used as public law remedies, their discretionary character was carried over from their origins in equity.[4]

Nevertheless, apart from its historical roots, the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed

---

[1] ***Strickland v. Canada (Attorney General)***, 2015 SCC 37 at para. 37. See further The Honourable John M. Evans, *View From the Top: Administrative Law in the Supreme Court of Canada*, 2014-2015, at pp. 2015VT- 9-10.

[2] On the historical origins of the prerogative writs, see generally H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review*, 6th ed. (London: Sweet and Maxwell, 2007), c. 15. And as to the discretionary nature of the prerogative orders in the contemporary law of judicial review, see ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561. While the writ of *habeas corpus* is commonly described as available as of right, it too may be refused in the exercise of the courts' discretion on the ground that relief should have been sought in another court: ***Reza v. Canada***, [1994] 2 S.C.R. 394. However, the scope of the courts' discretion to refuse *habeas corpus* is narrower than that applicable to the prerogative orders of *certiorari*, prohibition and *mandamus*: see R.J. Sharpe, *The Law of Habeas Corpus*, 2d ed. (Oxford: Clarendon Press, 1989) at pp. 59-63 for the pre-*Reza* view that, unlike the other prerogative remedies, *habeas corpus* is not a discretionary remedy.

[3] That is, such remedies would not ordinarily issue where there was another remedy available: *Cheyenne Realty Ltd. v. Thompson*, [1975] 1 S.C.R. 87.

[4] See generally topic 1:6000, *ante*; and as to their discretionary character as public law remedies, see e.g. *Terrasses Zarolega Inc. v. Quebec (Olympic Installations Board)*, [1981] 1 S.C.R. 94; *Municipal Contracting Ltd. v. Nova Scotia (Minister of Finance)* (1991), 299 A.P.R. 45 (NSTD), rev'd on other grounds (1992), 309 A.P.R. 174 (NSCA).

exclusively to vindicating the rights of individuals.[5] The public interest in good government, including the principle that it should be conducted according to law, has been an equally important factor in the development of the law of judicial review.

The discretionary nature of both the prerogative orders and the equitable remedies has been retained in those jurisdictions where statutory reforms to the remedial aspects of administrative law have been enacted. For example, British Columbia's *Judicial Review Procedure Act*[6] specifically provides that the court retains the same discretion to refuse relief as it had prior to the passage of the Act, subject to the *proviso* that relief should not be denied on the ground that other relief ought to have been sought.[7] The Ontario *Judicial Review Procedure Act* has identical provisions.[8] And while neither Prince Edward Island's *Judicial Review Act*[9] nor the *Federal Courts Act*[10] contains an equivalent general provision retaining the discretion associated with the prerogative orders and equitable remedies,[11] there is no doubt that these courts enjoy the same breadth of remedial discretion as they do elsewhere in Canada,[12] since their jurisdiction to grant relief is expressed in permissive terms.[13]

---

[5] ***Strickland v. Canada (Attorney General)***, 2015 SCC 37 at para. 48.

[6] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 8 (App. BC. 4); see e.g. *Warnock v. Garrigan* (1978), 8 B.C.L.R. 26 (BCCA).

[7] For the common law principle that this exception abolishes, see topics 1:1000, *ante*; 3:2135, *post*.

[8] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(5), (6) (App. Ont. 3); see e.g. *Becker Milk Co. v. Ontario (Ministry of Labour)* (1973), 41 D.L.R. (3d) 503 (Ont. Div. Ct.).

[9] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3 (App. PEI. 1).

[10] *Federal Courts Act*, R.S.C. 1985, c. F-7, as am. S.C. 2002, c. 8 (App. Fed. 3).

[11] On the other hand, both provide for the discretionary refusal of relief in certain circumstances: see *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 5 [as am. 1990, c. 26, s. 3] (delay and applicant not adversely affected), and s. 6 (defect in form or technical irregularity); and *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(5) [en. 1990, c. 8, s. 5, as am. S.C. 2002, c. 8] (defect in form or technical irregularity).

[12] Indeed, one of the leading cases expanding judicial discretion to refuse relief for failure to exhaust an administrative remedy, ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3, emanated from the Federal Court.

[13] The *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 3(3) provides: "Subject to this Act, a judge, on an application for judicial review, *may* by order ....", and the *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(3) [en. 1990, c. 8, s. 5, as am. S.C. 2002, c. 8] states that, "On an application for judicial review, the Trial Division [now Federal Court] *may* ...." [emphasis added].

3:1200 Discretionary Bars: An Overview

All of the discretionary bars are grounded in the notion that, even though a public body may have acted unlawfully, the public interest does not always require judicial intervention. That is, other factors can override the general public interest that governmental decision-making accord with appropriate legal norms.[14]

3:1210 *Exhaustion of Specific Administrative or other Remedies*

Judicial review applicants are normally expected to have exhausted any form of redress specifically provided by the legislature before they can be granted any of the "extraordinary" forms of relief available through the courts' supervisory jurisdiction.[15] For example, a court may conclude that a statutory right of review or appeal to an administrative body has been created because either the expertise or other institutional characteristics of that body equip it to provide a better and cheaper solution than the courts. Or where the right of appeal is to the courts, this more specific statutory remedy may be regarded as intended to supplant the relief available through the exercise of the courts' general supervisory jurisdiction.[16] A similar conclusion may also be reached with respect to the courts' original jurisdiction to grant declarations of right or injunctions, where the legislation creating new legal rights or imposing liabilities also establishes a statutory body to adjudicate any disputed claims arising thereunder.[17]

3:1220 *The Issue Must Exist and be Justiciable*

The issue in respect of which relief is requested must be one that a court can address in a way that is consistent with the nature of the

---

[14] *2122157 Ontario Inc. v. Tarion Warranty Corp.*, 2016 ONSC 851(Ont. Div. Ct.) at para. 11. Moreover, this balance is struck by the court, not the Executive, since the discretionary bars also apply where relief is sought by the Attorney General: ***P.P.G. Industries Canada Ltd. v. Canada (Attorney General)***, [1976] 2 S.C.R. 739 at p. 749.

[15] See more particularly topic 3:2000, *post*.

[16] E.g. *A v. Edmonton Police Service*, 2015 ABQB 697 at para. 19 (provision for appeal to Court of Appeal implicitly precluded judicial review by courts of general jurisdiction).

[17] E.g. *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.), add'l reasons (1995), 25 O.R. (3d) 702 (Ont. Gen. Div.); see also topics 1:7330, 1:8300, *ante*.

litigation process and the institutional character of the judiciary.[18] Thus, since litigation is a technique for deciding concrete issues and resolving live disputes, relief may be refused because the issue is either unripe or moot. Similarly, courts will not grant relief if it is ineffective to remedy the applicant's complaint. In addition, the issue must be justiciable. That is, it must be one that is appropriate for decision by the judicial branch of government.

3:1230 *Timeliness*

Relief may also be refused by virtue of the timing of the applicant's request, on the ground of either prematurity[19] or delay.[20] Underlying these discretionary bars are such public interest considerations as: the efficient use of judicial resources; the avoidance of a multiplicity of proceedings; and the minimization of disruption to public administration and third parties.

3:1240 *Waiver, Misconduct and Triviality*

Courts may also refuse relief on the residual ground that the costs of judicial intervention in public administration outweigh any potential injustice to the aggrieved individual because of the applicant's waiver or misconduct, for example, or because the legal error identified by the applicant in the decision-making process was too trivial to justify judicial intervention.[21]

3:1250 *Identity of the Decision-Maker and the Nature of the Decision*

In addition to the specific discretionary bars discussed in this chapter, there is a more general judicial reluctance to intervene in certain situations. For example, courts seem generally loath to interfere with decisions made by universities on matters such as student

---

[18] See more particularly topic 3:3000, *post*.

[19] See topic 3:4000, *post*; a lack of ripeness may also be considered a form of prematurity.

[20] See topic 3:5000, *post*.

[21] See topics 3:6000 (waiver), 3:7000 (other disqualifying conduct), 3:8000 (technical and non-material errors), 3:9000 (balance of convenience), *post*.

discipline, academic assessment, tenure and conditions of employment.[22] In many such cases, courts' decisions are based on the content of the duty of procedural fairness appropriate in that context, the consequences of a breach of the duty, and the availability of an effective alternative remedy.[23]

Similarly, a policy of judicial restraint is also apparent in many cases concerning prison inmates, although the *Charter* may exert pressure in the other direction.[24] Again, while this reluctance may be attributed to specific issues such as the grounds or standard of review applicable, there is little doubt that the courts' perception that penitentiaries are inherently dangerous and difficult to manage operates at a more general level on applicants' prospects of success in judicial review proceedings.

In addition, there are other categories of decisions with which courts rarely interfere: decisions involving the allocation of public funds and other decisions of a broad policy nature,[25] and decisions with a strong commercial element, such as the award of government contracts.[26] Here, too, specific doctrines may be used to explain non-intervention, such as the non-justiciablity of the decision.[27] But again, the discretionary nature of the courts' judicial review jurisdiction would seem to underlie these particular explanations.

3:1300 The Exercise of Discretion

While a reviewing court *may* exercise its discretion on a motion to quash made by the respondent at the outset of the proceeding,[28] more

---

[22] E.g. *Dawson v. University of Ottawa* (1994), 72 O.A.C. 232 (Ont. Div. Ct.), aff'd (1995), Doc. CA C20980 (Ont. C.A.); *Wade v. Strangway* (1996), 132 D.L.R. (4th) 406 (BCCA); but see *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535 (Ont. C.A.); *Khan v. University of Toronto* (1995), 130 D.L.R. (4th) 570 (Ont. Div. Ct.). See also topics 1:2256, 2:2344, *ante*; 3:2250, *post*.

[23] See generally topic 3:2000, *post*, and especially topic 3:2300, *post*.

[24] See topic 7:4424, *post*.

[25] E.g. *Simon v. Metropolitan Toronto (Municipality)* (1993), 61 O.A.C. 389 (Ont. Div. Ct.); see also topic 15:2121, *post*.

[26] See topic 7:2322, *post*; and see topic 1:2258, *ante*.

[27] E.g. topics 1:7310, *ante*; 3:3400, *post*.

[28] E.g. *Olmstead v. Canada* (1990), 34 F.T.R. 89 (FCTD), where declaratory relief was sought by way of action in the Federal Court, and a motion to strike (the equivalent of a motion to quash) was dismissed, leaving the exercise of discretion to the trial judge. See topic 6:4100, *post*, on the motion to quash generally.

often it will want to consider the issue of discretion together with all other issues raised in the application for judicial review.[29] Furthermore, even though in most cases the application for judicial review will not involve the hearing of witnesses, an appellate court will be reluctant to interfere with the exercise of discretion by a judge of first instance, unless the appellant establishes that the judge took into account irrelevant factors or failed to give "sufficient weight to all relevant considerations."[30]

3:2000 ADEQUATE ALTERNATIVE REMEDIES

3:2100 Overview

An applicant's failure to pursue a statutory remedy[31] will usually bar relief in judicial review proceedings[32] if the other remedy is considered to be an adequate alternative to judicial review.[33] And in that regard, two main categories of alternative remedy can be identified: other administrative remedies, and other judicial proceedings. Furthermore, the courts have recognized various sub-categories within these two broad groups. For example, alternative administrative remedies include reconsideration by the original decision-maker, an appeal to an independent administrative tribunal, or a petition to Cabinet. Similarly, the alternative legal remedies include a right of appeal to a court, some other form of statutory judicial remedy, or an application for judicial review to the Federal Court.[34] Of course, any discretion to consider the adequacy of an alternative remedy can be

---

[29] E.g. ***Conception Bay South (Town) v. Newfoundland (Public Utilities Board)*** (1991), 78 D.L.R. (4th) 170 (Nfld. C.A.).

[30] ***Reza v. Canada***, [1994] 2 S.C.R. 394 at p. 404; **see also** ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3; ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3. **See generally** D.J.M. Brown, *Civil Appeals* (Toronto: Carswell, looseleaf) at topic 15:2000.

[31] This circumstance may also arise where a new issue is raised on judicial review that could have been raised at the tribunal level: **e.g.** *Canwood International Inc. v. Bork*, 2012 BCSC 578 at paras. 164-9. **And see further** topic 5:2120, *post*.

[32] *Twinn v. Sawridge First Nation*, 2016 FC 358 at para. 11 (although relief may be denied, application for judicial review is not prohibited).

[33] In some situations, another statutory remedy may be found to be *exclusive* of a judicial remedy, and thus outside the courts' jurisdiction: **e.g.** *Rasouli (Litigation Guardian of) v. Sunnybrook Health Sciences Centre*, 2013 SCC 53 (procedure for obtaining consent in relation to a person on continuing life support ousts access to civil courts).

[34] See topics 2:4520, 2:4625, *ante*.

removed by statute.[35]

Moreover, at one time, courts tended to view administrative decisions made in breach of the rules of natural justice or in excess of jurisdiction as null and void, which they would therefore quash without an assessment of any alternative administrative remedy.[36] Today, however, the courts seek to arrive at a result that produces a desirable balance among the competing policy considerations.[37]

Thus, in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?[38] And as indicated, "adequacy" is determined by reference to considerations such as ensuring justice according to law for the individual applicant, the economic use of judicial resources,[39] the integrity of the administrative scheme, and the comparative costs and delays associated with the statutory remedy and judicial review proceeding, respectively.

3:2110 Redetermination

Many administrative tribunals have an express statutory power to reopen a decision and decide it again.[40] This power may be dependent upon new evidence having come to light or upon changed circumstances, or it may be exercisable without restriction.[41] Indeed,

---

[35] ***Pringle v. Fraser***, [1972] S.C.R. 821 (immigration appeal procedure exclusive); *Olmstead v. Canada* (1990), 34 F.T.R. 89 (FCTD); **see also** *Ontario (Ombudsman) v. Ontario (Health Disciplines Board)* (1979), 26 O.R. (2d) 105 (Ont. C.A.), where such a provision precluded review by an Ombudsman until all proceedings and appeals were exhausted.

[36] See e.g. *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Abel Skiver Farm Corp. v. Ste-Foy (Town)*, [1983] 1 S.C.R. 403.

[37] See especially ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3 at p. 24. In the earlier leading case in this area, ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561, the majority adopted a similar approach while also feeling the need to characterize the breach as rendering the decision merely "voidable"; **see also** *Walker v. Board of Registration of Embalmers and Funeral Directors* (1995), 126 D.L.R. (4th) 549 (NSCA).

[38] ***Strickland v. Canada (Attorney General)***, 2015 SCC 37 at para. 42.

[39] E.g. ***Strickland v. Canada (Attorney General)***, 2015 SCC 37 at paras. 53-4.

[40] In Ontario, for example, tribunals to which the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 applies, may reopen their decisions in accordance with any rules of procedure that they have made under the *Act*: s. 21.2 [en. 1994, c. 27, s. 56(36)] (App. Ont. 2); **see also** topic 12:6400, *post*.

[41] In British Columbia, there seem to be two views as to whether an initial decision is even reviewable once a reconsideration decision has been rendered. In ***United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy (Allied Industrial and Service Workers International Union, Local 2009) v. Auyeung***, 2011 BCSC 220, aff'd 2011 BCCA 527, the Court of Appeal held that where the Labour Relations Board refuses

even where the enabling statute does not expressly so provide, a court may impute an implied power to this effect, exercisable especially, but not exclusively, where the original decision is vitiated by an error that renders it liable to be set aside on judicial review.[42] Thus, while not an absolute bar,[43] relief may be denied as a matter of discretion if the applicant has not first sought reconsideration from the agency in question, when it is reasonable to have done so.[44]

Of course, if there is good reason to doubt that a tribunal would agree to reopen, it would be unfair for a court to dismiss the application and to require the applicant to recommence the proceeding. And a similar result may often seem appropriate where the tribunal has no

---

leave to reconsider an original decision, judicial review should be taken only of the decision refusing leave, although the Court of Appeal said that the review could be informed by the original decision; **foll'd** *Pistell v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2012 BCSC 463 at para. 32. In *BC Ferry Services Inc. and BCFMWU (Exclusions/Inclusions), Re*, 2012 BCSC 663, aff'd 2013 BCCA 497, and *Mazerolle v. British Columbia (Labour Relations Board)*, 2012 BCSC 1506. However, subsequently the Court has accepted that both the denial of reconsideration *and* the original decision may be reviewed. **See also** *Global Agriculture Trans-Loading Inc. v. Lobo*, 2016 BCSC 1556 at para. 48 (reconsideration decision is the one subject to review); *Pioneer Distributors Ltd. v. Orr*, 2015 BCSC 461 at para. 56 (reconsideration decision is one to be reviewed); *USW, Local 2009 v. Ledcor Resources & Transportation Limited Partnership*, 2015 BCSC 622 at para. 50; *Martin v. Barnett*, 2015 BCSC 426 at paras. 10*ff*; *Yellow Cab Co. v. British Columbia (Passenger Transportation Board)*, 2014 BCCA 329 (where denial of leave for reconsideration did not address merits, original decision could be judicially reviewed); *Fraser Health Authority v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCSC 524 at para. 9 (although different standards of review apply, reconsideration decision requires review of initial decision), aff'd 2014 BCCA 499, rev'd on merits 2016 SCC 25; *Stehlik v. British Columbia (Ministry of Public Safety)*, 2013 BCSC 801 at para. 79, aff'd 2013 BCCA 388; *Decision No. WCAT-2004-04388-AD*, 2012 BCSC 831 at para. 56, rev'd on merits 2013 BCCA 391.

[42] ***Chandler v. Assn. of Architects (Alberta)***, [1989] 2 S.C.R. 848 is the leading case; **see also** topic 12:6320, *post*.

[43] ***Ellis-Don Ltd. v. Ontario (Labour Relations Board)***, 2001 SCC 4; **see also** *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 (reconsideration not required where no change of circumstances); *Eastern Provincial Airways Ltd. v. Canada (Labour Relations Board)* (1983), 2 D.L.R. (4th) 597 (FCA); *C.U.P.E., Local 1545 (Cape Breton (County) Municipal Office Employees) v. Nova Scotia (Labour Relations Board)* (1996), 40 Admin. L.R. (2d) 232 (NSTD). **See further** topic 12:6422, *post*.

[44] E.g. *I.A.B.S.O.R.I.W., Local 97 v. British Columbia (Labour Relations Board)* (2011), 23 Admin. L.R. (5th) 210 (BCSC); *I.B.E.W., Local 1739 v. I.B.E.W.* (2007), 86 O.R. (3d) 508 (Ont. Div. Ct.) (reasons); *Sedlezky v. Jeffrey*, [2005] O.J. No. 1523 (Ont. Div. Ct.); *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (BCCA); *T.W.U. v. Canada (Canadian Radio-television & Telecommunications Commn.)*, [1995] 2 S.C.R. 781; *Arumugam v. Canada (Minister of Employment & Immigration)* (1985), 11 Admin. L.R. 228 (FCTD), aff'd (1986), 23 Admin. L.R. 1 (FCA); **see also** *United Brotherhood of Carpenters, Local 1325 v. Permasteel Construction Ltd.* (2000), 278 A.R. 1 (Alta. Q.B.) (fact that reconsideration sought no bar to judicial review); *Lowe v. Manitoba (Labour Board)* (1992), 6 Admin. L.R. (2d) 221 (Man. C.A.) (statute permitted judicial review only if the applicant had first sought reconsideration).

express statutory power to reopen. On the other hand, if the remedy sought is to quash and remit, it would seem to be reasonable to require a request to reconsider as a condition precedent to judicial review, at least where the statute contains an express power to reconsider,[45] and there is no reason to believe that such a request would almost certainly be futile.[46] Of course, reconsideration by the same body will not be an adequate remedy if the rehearing could not resolve the issue in question, or where there is an allegation of a reasonable apprehension of bias.[47]

3:2120 *Appeals*

The existence of a right of appeal to an administrative tribunal[48] or to a court[49] may constitute an adequate alternative remedy to judicial review, even where there has been a breach of the duty of fairness[50] or a substantive jurisdictional error.[51] Of course, where the right of appeal is limited, it will only permit judicial review of those issues that are not appealable.[52]

However, in some jurisdictions the discretion to deny judicial review in favour of a statutory appeal has been modified by statute. Specifically, the *Judicial Review Procedure Act* of Ontario provides that judicial review applications may be brought "despite any right of appeal"[53] to either another administrative agency[54] or a court,[55]

---

[45] E.g. *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1994), 16 O.R. (3d) 698 (Ont. Div. Ct.), leave to appeal to Ont. C.A. ref'd [1994] O.L.R.B. Rep. 801, leave to appeal to SCC ref'd (1995), 184 N.R. 320(n) where, in *obiter*, the court noted that in an earlier case a request for reconsideration had been made and acted upon prior to bringing the application for judicial review.

[46] E.g. *Buenaventura v. Telecommunications Workers Union*, 2012 FCA 69 at para. 40 (Board unlikely to reconsider its refusal to extend time).

[47] E.g. *Penton v. Métis Nation of Alberta Assn.*, [1995] 8 W.W.R. 39 (Alta. Q.B.).

[48] See more particularly topic 3:2300, *post*.

[49] See more particularly topic 3:2200, *post*.

[50] ***Harelkin v. University of Regina***, [1979] 2 S.C.R 561.

[51] ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3, where a 6-3 majority subscribed to this proposition.

[52] *Habtenkiel v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 180 at para. 35; *Seshaw v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 181 at para. 19; **and see e.g.** *St Albert Housing Society v. St Albert (City)*, 2014 ABQB 556 (where appeal limited to questions of law, the appeal procedure is not an adequate remedy in relation to questions of mixed law and fact), foll'd *St. Albert Housing Society v. St. Albert (City)*, 2016 ABQB 203; *Edmonton (City) v. Edmonton (Composite Assessment Review Board)*, 2012 ABQB 154 at para. 62. **Compare** *A v. Edmonton Police Service*, 2015 ABQB 697 at para. 19 (provision for appeal to Court of Appeal implicitly precluded judicial review by courts of general jurisdiction).

although it has also been said that proceeding with an application for judicial review should only occur in exceptional circumstances.[56] British Columbia's *Judicial Review Procedure Act* merely refers to the court's discretion to refuse to grant relief "on any ground."[57] And Prince Edward Island's *Judicial Review Act* provides that, although the authority of the tribunal under review could have been the subject of an appeal, relief on an application for judicial review may be granted if the applicant files a written waiver of the right to appeal.[58] Finally, it should be noted that Quebec's *Code of Civil Procedure* provides that where a decision is "susceptible of appeal," evocation is not available unless a lack or excess of jurisdiction is alleged.[59]

On the other hand, the *Federal Courts Act*[60] takes away any discretion to proceed with judicial review where certain appeal rights exist. Specifically, section 18.5 precludes the Federal Court from granting any form of relief under sections 18.1 or 28 in respect of a decision or order of a federal board, commission or other tribunal, where Parliament has expressly provided a right of appeal from that decision or order to the Federal Court, or "to the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board .... to the extent that it may be so appealed, ... except in accordance with that Act."[61] Moreover, the

---

53 *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1) (App. Ont. 3).

54 E.g. *Mississauga (Municipality) v. Ontario (Director, Environmental Protection Act)* (1978), 8 C.P.C. 292 (Ont. H.C.J.) (appeal to Environmental Appeal Board).

55 E.g. *Pronto Cabs Ltd. v. Metropolitan Toronto Licensing Commn.* (1982), 39 O.R. (2d) 488 (Ont. Div. Ct.) (appeal to Divisional Court).

56 *Mississauga (Municipality) v. Ontario (Director, Environmental Protection Act)* (1978), 8 C.P.C. 292 (Ont. H.C.J.); *Deenen v. Assn. of Landscape Architects (Ontario)* (1986), 15 O.A.C. 117 (Ont. Div. Ct.), leave to appeal to Ont. C.A. ref'd (1986), 17 O.A.C. 80(n); **see also** *Woodglen & Co. v. North York (City)* (1983), 42 O.R. (2d) 385 (Ont. Div. Ct.); *Rae v. Rae* (1983), 44 O.R. (2d) 493 (Ont. H.C.J.), where it was said that the section did not displace the historic principle that where an appeal is provided, judicial review should be foregone. **Compare** *V.S.R. Investments Ltd. v. Laczko* (1983), 41 O.R. (2d) 62 (Ont. Div. Ct.) (appeal by stated case did not preclude judicial review application alleging bias); *Hayles v. Sproule* (1980), 29 O.R. (2d) 500 (Ont. H.C.J.).

57 *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 8(1) (App. BC. 4).

58 *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 4(2) (App. PEI. 1); **see also** *Martin v. Prince Edward Island (Workers' Compensation Board)* (2000), 586 A.P.R. 277 (PEISC). **But see** *Eric D. McLaine Construction Ltd. v. Southport (Community)* (1990), 257 A.P.R. 158 (PEITD), where the court stated that filing a waiver of appeal pursuant to the statute did not displace the courts discretion to decline to hear a matter where an appeal is provided.

59 *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 846 (App. Que. 4).

60 *Federal Courts Act*, R.S.C. 1985, c. F-7, as am. S.C. 2002, c. 8 (App. Fed. 3).

61 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.5 [en. 1990, c. 8, s. 5, as am. S.C. 2002, c. 8] (formerly s. 29), which also applies to the Federal Court of Appeal's otherwise exclusive

words "appeal as such" have been broadly construed so as to exclude the Court's jurisdiction under s. 18.1 in respect of orders or decisions that may be determined *de novo* in a proceeding designated as a "reference," not an appeal."[62] However, where Parliament has created some other right of appeal, its existence may be taken into account by the Federal Court and the Court of Appeal as part of their general remedial discretion exercisable on an application for judicial review.[63] Unless otherwise specifically provided by statute, appeals are heard in the Federal Court, although the Rules may transfer jurisdiction to the Court of Appeal to determine certain classes of appeal.[64]

3:2130 *Other Judicial Proceedings*

3:2131 *Generally*

Where the alternative to judicial review is another judicial proceeding, usually there is little reason to compel resort to it[65] unless

---

jurisdiction under s. 28(1) by virtue of s. 28(2) [re-en. 1990, c. 8, s. 8]; e.g. ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3; **see also** *Rusnak v. Canada (Minister of National Revenue)* (2011), 423 N.R. 282 (FCA); *Canada (Citizenship and Immigration) v. Takla* (2010), 359 F.T.R. 248 (FC) (appeals under *Citizenship Act*) at para. 19; *Canada (Citizenship and Immigration) v. Zegarac* (2009), 356 F.T.R. 297 (FC) (appeals under *Citizenship Act* per s. 21 of the *Federal Courts Act*); *Jockey Canada Co. v. Canada (Minister of Public Safety and Emergency Preparedness)* (2010), 10 Admin. L.R. (5th) 300 (FC) (*Customs Act*); *Danone Canada Inc. v. Canada (Attorney General)*, 2009 FC 44; *1099065 Ontario Inc. v. Canada (Minister of Public Safety and Emergency Preparedness)* (2006), 301 F.T.R. 291 (FC) (appeal under *Customs* Act), aff'd 2008 FCA 47; **and see** *Rich Colour Prints Ltd. v. Deputy Minister of National Revenue (Customs & Excise)*, [1984] 2 F.C. 246 (FCA), where it was confirmed that if an appeal right is limited, there can be judicial review of matters which cannot be appealed; and *Consumers' Gas Co. v. Canada (National Energy Board)* (1990), 43 Admin. L.R. 102 (FCTD), in which an interlocutory order was held not to trigger s. 29 (now s. 18.5), **as well as** *Salibian v. Canada (Minister of Employment & Immigration)* (1990), 73 D.L.R. (4th) 551 (FCA), where provisions in the *Immigration Act*, R.S.C. 1985, c. I-2 having the effect of limiting review were strictly construed. **Compare** *Bloxom v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1701 (FCTD) (court dealt with application on merits while acknowledging no right to judicial review).

[62] ***Fast v. Canada (Minister of Citizenship and Immigration)***, [2000] F.C.J. No. 1116 (FCTD), aff'd (2001), 41 Admin. L.R. (3d) 200 (FCA); **see also** the cases cited therein; foll'd *Abbott Laboratories, Ltd. v. Canada (Minister of National Revenue)* (2004), 12 Admin. L.R. (4th) 20 (FC).

[63] E.g. ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3.

[64] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 24 [as am. S.C. 2002, c. 8] (App. Fed. 3).

[65] *McCarthy v. Calgary Roman Catholic Separate School District No. 1*, [1980] 4 W.W.R. 738 (Alta. Q.B.), add'l reasons [1980] 5 W.W.R. 524 (Alta. Q.B.); ***Thomas C. Assaly Corp. v. R.*** (1990), 44 Admin. L.R. 89 (FCTD); *Gerrard v. Sackville (Town)* (1992), 4 Admin. L.R. (2d) 238 (NBCA); *Nixon v. Newfoundland* (1990), 260 A.P.R. 271 (Nfld. S.C.), aff'd (1992), 94 D.L.R. (4th) 464 (Nfld. C.A.), leave to appeal to SCC ref'd (1993), 152 N.R. 240(n).

the other type of proceeding or the remedies available pursuant to it are more appropriate.[66] In that regard, a consideration of the various factors relating to the exercise of the discretion to refuse a judicial review application will be required.[67] Of course, courts also seek to avoid duplication of proceedings that are already extant,[68] apart from the question of whether proceedings ought to take place in the Federal Court rather than in the provincial courts,[69] or vice versa.[70]

3:2132 *Civil Trials*

Judicial review has been refused when a civil trial was more appropriate because *viva voce* evidence was required.[71] Similarly,

---

[66] E.g. *Price v. Canada (Attorney General)* (2004), 247 F.T.R. 15 (FC) (action necessary to obtain declaration that legislative provisions constitutionally invalid); *Keewatin v. Ontario (Minister of Natural Resources)* (2003), 66 O.R. (3d) 370 (Ont. Div. Ct.) (for complex factual issues, civil action more appropriate); *Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School Board* (2002), 205 N.S.R. (2d) 88 (NSSC) (civil action more appropriate where determination of *Charter* issue would involve extensive factual evidence), rev'd in part on other grounds 2004 NSCA 82; *Seaway Trust Co. v. Ontario* (1983), 41 O.R. (2d) 532 (Ont. C.A.), leave to appeal to SCC ref'd (1983), 37 C.P.C. 8(n).

[67] ***Strickland v. Canada (Attorney General)***, 2015 SCC 37 at para. 42. **See further**, The Honourable John M. Evans, *View From the Top: Administrative Law in the Supreme Court of Canada*, 20142015 at pp. 2015VT-10*ff*.

[68] E.g. *MacDonald v. Law Society (Manitoba)* (1975), 54 D.L.R. (3d) 372 (Man. Q.B.); **see** also *Samuel Varco Ltd. v. R.* (1978), 87 D.L.R. (3d) 522 (FCTD), where a collateral attack was brought challenging the validity of Regulations that would be raised in outstanding criminal proceedings; and *International Assn. of Longshoremen, Local 375 v. Assn. of Maritime Employers* (1974), 52 D.L.R. (3d) 293 (FCTD), where an injunction to enforce an arbitration award was not entertained on the ground that by filing the award, other enforcement proceedings had been undertaken.

[69] E.g. *Neira (Guardian ad litem of) v. Canada (Secretary of State)* (1994), 98 B.C.L.R. (2d) 344 (BCCA). **See generally** topic 2:4520, *ante*.

[70] ***Strickland v. Canada (Attorney General)***, 2015 SCC 37 (Federal Court's refusal to grant declaration as to validity of *Divorce Act* guidelines a valid exercise of discretion).

[71] *Indigo Books & Music Inc. v. C. & J. Clark International Ltd.* (2010), 16 Admin. L.R. (5th) 21 (FC) (either action or proceeding for expungement of trade-mark more appropriate, due to complex factual issues); *Alberta Commercial Fishermen's Assn. v. Opportunity (Municipal District No. 17)* (2001), 289 A.R. 47 (Alta. Q.B.);
Toronto (City) v. 1291547 Ontario Inc. (2000), 49 O.R. (3d) 709 (Ont. Sup. Ct. J.); *Bank of Montreal v. Canada (Minister of Agriculture)* (1999), 241 N.R. 198 (FCA); *Brewery, Malt & Soft Drink Workers, Local 304 v. B.F.C.S.D.* (1985), 11 O.A.C. 66 (Ont. Div. Ct.). **Compare** *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2016 BCSC 1802 (conversion to action refused where no facts in dispute and petition appropriate); *Canada Post Corp. v. G3 Worldwide (Canada) Inc.* (2007), 282 D.L.R. (4th) 244 (Ont. C.A.) (application more appropriate, since no material facts in dispute); *Karbalaeiali v. Canada (Deputy Solicitor General, Employment Standards Branch)* (2006), 42 Admin. L.R. (4th) 287 (BCSC) (notwithstanding controverted facts, judicial review preferable route), aff'd on other grounds (2007), 67 Admin. L.R. (4th) 149 (BCCA); *Parks (Guardian ad Litem of) v. B.C. School Sports* (1997), 145 D.L.R. (4th) 174 (BCSC);

where the remedies sought include damages, judicial review relief has been refused on the ground that the more appropriate remedy was an action for damages.[72]

3:2133 *Criminal Proceedings*

Where the same issue can be raised in criminal proceedings,[73] particularly summary conviction proceedings,[74] courts may decline to hear an application for judicial review. However, an injunction may be granted in respect of conduct that interferes with the plaintiff's property rights, even though such conduct may also amount to an offence under the *Criminal Code*.[75]

Neskonlith Band v. Canada (Attorney General) (1997), 138 F.T.R. 81 (FCTD); *Seaway Trust Co. v. Ontario* (1983), 41 O.R. (2d) 501 (Ont. Div. Ct.), rev'd (1983), 41 O.R. (2d) 532 (Ont. C.A.), leave to appeal to SCC ref'd (1983), 52 N.R. 235; **and see particularly** *Taku River Tlingit First Nation v Tulsequah Chief Mine Project* (1999), 38 C.P.C. (4th) 64 (BCCA): severance of part of petition for reference to trial list upheld; in circumstances, complex aboriginal issues not appropriate on judicial review, **as well as** *Chen v. Canada (Minister of Citizenship and Immigration)* (2004), 21 Admin. L.R. (4th) 55 (FC); *Keewatin v. Ontario (Minister of Natural Resources)* (2003), 66 O.R. (3d) 370 (Ont. Div. Ct.) (for complex factual issues, civil action more appropriate); *New Brunswick Aboriginal Peoples Council v. New Brunswick (Min. of Natural Resources & Energy)* (2001), 611 A.P.R. 204 (NBQB). **See also** topic 6:5540, *post*.

[72] *Sussex Cheese & Butter (1974) Ltd. v. New Brunswick (Milk Marketing Board)* (1977), 18 N.B.R. (2d) 686 (NBQB); **see also *TeleZone Inc. v. Canada (Attorney General)*** (2008), 86 Admin. L.R. (4th) 163 (Ont. C.A.), aff'd 2010 SCC 62 and companion cases *Manuge v. Canada*, [2010] 3 S.C.R. 672 (SCC); *Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food)*, [2010] 3 S.C.R. 639 (SCC); *Canada (Attorney General) v. McArthur* (2010), 327 D.L.R. (4th) 562 (SCC) and *Canadian Food Inspection Agency v. P.I.P.S.C.* (2010), 327 D.L.R. (4th) 588 (SCC); ***Canada v. Grenier***, [2006] 2 F.C.R. 287 (FCA), cited in *Canship Ltd. v. Newfoundland and Labrador (Minister of Works, Services and Transportation)* (2005), 735 A.P.R. 21 (Nfld. & Lab. S.C.) (remedy in damages for breach of contract preferable to *certiorari*). **And see** *Stewarts of Dartmouth Ltd. v. Dartmouth (City)* (1981), 128 D.L.R. (3d) 547 (NSTD), where a court consolidated *mandamus* proceedings with an action because the action did not provide complete relief, **as well as discussion** in *Kimoto v. Canada (Attorney General)* (2011), 25 Admin. L.R. (5th) 248 (FC), aff'd 2011 FCA 291; *Wang v. British Columbia Medical Assn.*, 2010 BCCA 43, rev'g 2008 BCSC 1559. **Compare** *Prentice c. Gendarmerie royale du Canada*, [2006] 3 F.C.R. 135 (FCA) (action by RCMP constable was disguised claim for damages for accident occurring in course of employment; several other federal tribunals more appropriate venues); *Renaud v. Nova Scotia (Attorney General)* (2005), 15 C.P.C. (6th) 290 (NSSC); *Klymchuk v. Cowan* (1964), 47 W.W.R. 467 (Man. Q.B.), where a declaration of damages was proceeded with to avoid a multiplicity of proceedings. **See also** topic 5:2300, *post*.

[73] E.g. *R. v. Multitech Warehouse Direct (Ont.) Inc.* (1989), 35 O.A.C. 349 (Ont. C.A.), leave to appeal to SCC ref'd (1990), 108 N.R. 240(n).

[74] E.g. *Canadian Mine Enterprises Ltd. v. New Brunswick (Occupational Health & Safety Commn.)* (1983), 4 Admin. L.R. 299 (NBQB). **See also** *Samuel Varco Ltd. v. R.* (1978), 87 D.L.R. (3d) 522 (FCTD). As to collateral attack generally, **see** topic 5.0300, *post*.

[75] *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048.

3:2134 *Special Statutory Procedures*

In most Canadian jurisdictions, specialized legislation has been enacted providing for a civil proceeding to challenge a person's legal authority to occupy a position, such as where an individual's right to public office is contested.[76] Accordingly, where an application for relief is made by way of *quo warranto*, the courts have generally deferred to the specialized statutory remedy.[77] As well, special procedures often exist for quashing bylaws,[78] which procedures are sometimes invoked as a reason for declining to proceed with an application for judicial review or for declaratory relief. However, the more prevalent view today is that either procedure is appropriate for challenging municipal bylaws.[79] Similarly, specialized legislation commonly exists respecting

---

[76] Many *Elections Acts* or *Municipal Acts* also provide for such relief: see British Columbia: *Elections Act*, R.S.B.C. 1996, c. 106; Alberta: *Local Authorities Election Act*, S.A. 1983, c. L-27.5, cited in *Cunningham v. Peavine Metis Settlement* (1999), 256 A.R. 351 (Alta. Q.B.); Manitoba: *Local Authorities Elections Act*, cited in *Sexton v. Holden* (2001), 153 Man. R. (2d) 248 (Man. C.A.) and *Stuartburn (Rural Municipality) v. Kiansky* (2001), 155 Man. R. (2d) 35 (Man. Q.B.); Newfoundland: *Municipalities Act*, R.S.N. 1990, c. M-23; Northwest Territories: *Elections and Plebiscites Act*, S.N.W.T. 2006, c. 15; Nova Scotia: *Elections Act*, S.N.S. 2011, c. 5 and *Municipal Elections Act*, R.S.N.S. 1989, c. 300; Ontario: *Election Act*, R.S.O. 1990, c. E.6 and *Municipal Elections Act*, R.S.O. 1990, c. M.53, cited in *Burton v. Oakville (Town)* (2004), 69 O.R. (3d) 771 (Ont. Sup. Ct. J.); *Audziss v. Santa* (2003), 223 D.L.R. (4th) 257 (Ont. C.A.) (Act was complete code to challenging right of councillor to hold office; private information under *Provincial Offences Act* seeking *certiorari*, prohibition and declaration thus barred); Prince Edward Island: *Controverted Elections (Provincial) Act*, R.S.P.E.I. 1988, c. C-22 and *Election Act*, S.P.E.I. 1988, c. E-1.1; Quebec: *Election Act*, S.Q. 2011, c. E-3.3; Saskatchewan: *Controverted Elections Act*, R.S.S. 1978, c. C-32 and *Controverted Municipal Elections Act*, R.S.S. 1978, c. C-33; Yukon: *Municipal Act*, R.S.Y. 1988, c. 119; federal: *Canada Elections Act*, R.S.C. 1985, c. E-2; **e.g.** *Gerrard v. Hilstrom*, [1998] 2 W.W.R. 404 (Man. Q.B.). **See also** *Knox v. Conservative Party of Canada* (2007), 286 D.L.R. (4th) 129 (Alta. C.A.), where the Alberta Court of Appeal held that the provincial *Arbitration Act* was the proper procedure to challenge the nomination process for a political party, because it involved a private consensual tribunal. In some jurisdictions writs of *quo warranto* and informations in the nature of *quo warranto* have been abolished, and have been replaced with orders that may be granted on an application for judicial review to restrain the person from acting and to declare the office vacant: **see e.g.** *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 18 (App. BC. 1); *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 11 (App. PEI. 1).

[77] *Stevens, Re* (1969), 2 N.S.R. 406 (NSTD); *Pfeiffer v. Northwest Territories (Commissioner)* (1977), 75 D.L.R. (3d) 407 (NWTSC). **See also** *Friesen v. Hammell* (1997), 4 Admin. L.R. (3d) 115 (BCSC), aff'd [1999] 5 W.W.R. 345 (BCCA) (statutory procedure instead of declaration). As to relief by way of *quo warranto*, **see** topic 1:4000, *ante*.

[78] E.g. *Municipal Act*, R.S.O. 1990, c. M.45, ss. 13 [as am. 1996, c. 32, s. 3] and 138.

[79] E.g. ***Homex Realty & Development Co. v. Wyoming (Village)***, [1980] 2 S.C.R. 1011; ***Equity Waste Management of Canada v. Halton Hills (Town)*** (1997), 35 O.R. (3d) 321 (Ont. C.A.); *Landreville v. Boucherville (Town)*, [1978] 2 S.C.R. 801; *Canadian National Railway v. Fraser-Fort George (Regional District)* (1994), 24 M.P.L.R. (2d) 252 (BCSC), aff'd (October 24, 1996), Doc. Vancouver CA019756 (BCCA); **see also** *Gateway Charters Ltd. (c.o.b. Sky Shuttle) v. Edmonton (City)*, 2012 ABCA 93 at para. 18 (judicial

adoption proceedings,[80] and to challenge commercial arbitration decisions.[81] As well, pursuant to the *PIPEDA*[82] a *de novo* hearing by the Federal Court is provided for and that procedure has been held to bar an application for judicial review.[83] And the *Federal Courts Act* specifically excludes judicial review where resort can be had to the Tax Court of Canada.[84]

Of course, if the special statutory procedure does not enable the applicant to raise an issue included in the application for judicial review, it will not be an adequate remedy, and the application will not be barred.[85]

3:2135 *Other Prerogative Remedies*

On occasion, a court may decline to proceed with an application for a particular prerogative remedy, on the ground that another is more appropriate.[86] For example, *quo warranto* has been refused where the applicant ought to have sought relief by way of *mandamus* or an injunction.[87] Similarly, the Ontario Court of Appeal has refused to grant relief in the nature of prohibition and *certiorari* in connection with extradition proceedings, on the ground that *habeas corpus* was

---

review treated as if it were statutory appeal); *Goodtrack v. Waverley (Regional Municipality, No. 44)*, 2012 SKQB 413 at para. 24 (the right to question the validity of a municipal bylaw by way of *certiorari*, as well as by way of a statutory application, is accepted practice in Saskatchewan); *Air Canada v. Dorval (City)*, [1985] 1 S.C.R. 861; *Wiswell v. Winnipeg (City)*, [1965] S.C.R 512. **Contrast discussion** in *Country Pork Ltd. v. Ashfield (Township)* (2002), 60 O.R. (3d) 529 (Ont. C.A.) (only in rare circumstances is there concurrent jurisdiction).

[80] E.g. *C.P.B. v. Winnipeg Child and Family Services (Southwest Area)* (2000), 148 Man. R. (2d) 139 (Man. C.A.).

[81] E.g. *Sharecare Homes Inc. v. Cormier* (2010), 321 D.L.R. (4th) 485 (NSSC) at para. 18. **See also** *Adams v. Canada (Attorney General)* (2011), 22 Admin. L.R. (5th) 351 (Ont. Div. Ct.) (*Arbitration Act* governed, since private contract was involved), suppl. reasons [2011] O.J. No. 3403, reconsideration denied 2011 ONSC 7592; *Universal Settlements International Inc. v. Duscio* (2011), 23 Admin. L.R. (5th) 331 (Ont. Div. Ct.).

[82] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

[83] *Kniss v. Canada (Privacy Commissioner)*, 2013 FC 31 (judicial review application dismissed notwithstanding applicant out of time to resort to statutory procedure). **See also** *Oleinik v. Canada (Privacy Commissioner)*, 2013 FC 44 (*Privacy Act* procedure).

[84] ***JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue***, 2013 FCA 250 (s. 18.5 provides this exception where appeal lies to Tax Court of Canada).

[85] *Huyck v. Musqueam Indian Band*, [2000] F.C.J. No. 582 (FCTD).

[86] Of course, the jeopardy in seeking the wrong remedy was a prime motivation for the legislative reform in B.C., Ontario, and Prince Edward Island. **See** topic 1:1000, *ante*.

[87] *Bruce v. Reynett*, [1979] 4 W.W.R. 408 (FCTD).

the more appropriate remedy.[88] In another case, the court concluded that *mandamus* was preferable to an application for *habeas corpus* with *certiorari*-in-aid, in the circumstances.[89]

3:2200 Appeals to the Courts

3:2210 *Generally*

The statutory provision of a right of appeal to the courts from an administrative decision *prima facie* indicates a legislative intention to exclude the courts' exercise of their supervisory jurisdiction.[90] Indeed, while provision for an appeal does not necessarily preclude the exercise

(Continued on page 3 - 17)

---

[88] *Global Communications Ltd. v. Canada (Attorney General)* (1984), 2 O.A.C. 21 (Ont. C.A.). **See also** *Mahjoub (Re)* (2010), 354 F.T.R. 185 (FC) (security certificate detainees could challenge conditions through judicial review application or *habeas corpus*, instead of motion for declaration about unconstitutionality of statute) at para. 54.

[89] *Latham v. Canada* (2004), 246 D.L.R. (4th) 457 (Sask. C.A.).

[90] E.g. *BP Canada Energy Co. v. Alberta Energy and Utilities Board* (2003), 27 Alta. L.R. (4th) 123 (Alta. Q.B.); *Chad Investments Ltd. v. Longson, Tammets & Denton Real Estate Ltd.*, [1971] 5 W.W.R. 89 (Alta. C.A.); **see also** *Foster v. Alberta (Transportation and Safety Board)* (2006), 68 Alta. L.R. (4th) 160 (Alta. C.A.) (trial judge lacked jurisdiction). **And see** *Fraser v. Victoria City Police* (1990), 48 B.C.L.R. (2d) 99 (BCCA), where it was held that the fact that tribunal orders could be filed in court for enforcement did not give rise to a right of appeal, absent statutory authority.

of discretion, some courts have stated that the existence of an appeal right in effect deprives them of jurisdiction.[91] The primary reason for this general rule is that a statutory appeal to the courts represents a legislative judgment that it is better for the court's consideration of a matter to be based on the full administrative record and, where leave to appeal is required, a judgment that the courts should perform a gate-keeping function.[92]

In any event, where appeal rights exist,[93] including an appeal by way of stated case,[94] the courts have usually declined to grant a remedy pursuant to an application for judicial review,[95] notwithstanding that the time for appeal may have expired[96] or that leave to appeal had been

---

[91] E.g. *Maritime-Ont. Freight Lines Ltd. v. E.J. Bourque Transport Ltd.* (1987), 205 A.P.R. 94 (NBCA); *Matheson v. Prince Edward Island (Director of Child Welfare)* (1977), 29 A.P.R. 451 (PEICA); *Pronto Cabs Ltd. v. Metropolitan Toronto Licensing Commn.* (1982), 39 O.R. (2d) 488 (Ont. Div. Ct.); **see also** *Manitoba Provincial Municipal Assessor v. Manitoba (Municipal Board)* (1982), 18 Man. R. (2d) 46 (Man. Q.B.).

[92] *Municipal Property Assessment Corp. v. Snab Holdings Ltd.*, 2013 ONSC 2388 (Ont. Div. Ct.) at para. 4. **See also** *1056626 Ontario Inc. v. Municipal Property Assessment Corp.*, 2015 ONSC 7967 (Ont. Div. Ct.) (failure to exercise statutory appeal procedure).

[93] *McArthur v. Ontario (Attorney General)*, 2012 ONSC 5773 at para. 63 (Minister of Justice to decide whether individual seeking leave to appeal to the Supreme Court is required to exhaust a right of appeal, which s. 696.1 of the *Criminal Code* makes a condition to the exercise of the mercy power) aff'd 2013 ONCA 668.

[94] *Cheyenne Realty Ltd. v. Thompson*, [1975] 1 S.C.R. 87; **see also** *London (City) v. Young* (2006), 64 Admin. L.R. (4th) 149 (Ont. Sup. Ct. J.) (appeal to Ontario Court of Justice proper route, not application for *mandamus* to Superior Court of Justice), aff'd 2008 ONCA 429; *R. v. Palacios* (1984), 1 O.A.C. 356 (Ont. C.A.). **But see** *V.S.R. Investments Ltd. v. Laczko* (1983), 41 O.R. (2d) 62 (Ont. Div. Ct.).

[95] *Independent Power Producers' Society of Alberta v. Independent System Operator*, 2016 ABQB 133 at paras. 36-8; *Oleynik v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2012 NLCA 13 at para. 8; *Precision Drilling Corp. v. Calgary (City)* (2011), 339 D.L.R. (4th) 179 (FC) (no "special circumstances" warranting judicial review), citing *Merchant v. Law Society of Alberta*, 2008 ABCA 363; *KCP Innovative Services Inc. v. Alberta (Securities Commission)* (2009), 90 Admin. L.R. (4th) 177 (Alta. C.A.) (appeal under *Securities Act* should have been taken); *Milner Power Inc. v. Alberta (Energy and Utilities Board)* (2006), 50 Admin. L.R. (4th) 264 (Alta. Q.B.), aff'd (2007), 65 Admin. L.R. (4th) 296 (Alta. C.A.); *Kaburda v. College of Dental Surgeons (British Columbia)* (2000), 19 Admin. L.R. (3d) 297 (BCSC); ***Rozander v. Alberta (Energy Resources Conservation Board)*** (1978), 13 A.R. 461 (Alta. C.A.), leave to appeal to SCC ref'd (1979), 14 A.R. 540; *Hatt v. Hebb* (1977), 20 A.P.R. 346 (NSCA). As to appeals pursuant to the various *Summary Conviction Acts*, **see e.g.** *Warnock v. Garrigan* (1978), 8 B.C.L.R. 26 (BCCA); *Khanna v. Québec (Procureur Général)* (1984), 10 Admin. L.R. 210 (Que. C.A.); *R. v. Dnieper*, [1970] 2 O.R. 32 (Ont. H.C.J.), aff'd (1970), 9 D.L.R. (3d) 668(n) (Ont. C.A.).

[96] E.g. *Sequeira v. Ontario (Minister of Revenue)*, 2012 ONSC 3575 (Ont. Div. Ct.) (to permit judicial review would circumvent limitation period); *Blau v. Board of Examiners in Psychology (Nova Scotia)* (1991), 111 N.S.R. (2d) 187 (NSTD); *Walker v. Board of Registration of Embalmers & Funeral* Directors (1995), 126 D.L.R. (4th) 549 (NSCA);

denied.[97] Furthermore, when an applicant institutes proceedings by way of both an appeal and an application for judicial review, the latter will normally be struck out.[98] *A fortiori*, when an applicant has unsuccessfully exercised a right of appeal, a subsequent application for a prerogative order or analogous relief will be dismissed if the ground of review relied on could have been raised on the appeal.[99]

The necessity of obtaining leave to appeal aside,[100] the general rule

---

Salvation Army Grace Hospital v. Newfoundland (1995), 33 Admin. L.R. (2d) 61 (Nfld. S.C.); *Canada (Human Rights Commn.) v. Jones*, [1982] 1 F.C. 738 (FCTD); *Big John Holdings Ltd v. Prince Edward Island (Island Regulatory & Appeals Commn.)* (1993), 348 A.P.R. 297 (PEITD) (missed time-limit did not constitute "special circumstances"). But see *Alpenridge Wood Products Ltd. v. B.C.* (1992), 5 Admin. L.R. (2d) 183 (BCSC); and *Newfoundland (Attorney General) v. Newfoundland Colonization & Mining Co.* (1983), 130 A.P.R. 150 (Nfld. C.A.), where it was held that even though the time for appeal had passed, it was a matter of discretion whether to entertain judicial review proceedings; and see *Milstein v. College of Pharmacy (Ontario) (No. 1)* (1976), 13 O.R. (2d) 699 (Ont. Div. Ct.), where the court refused to extend a time for appeal but subsequently entertained an application for judicial review in the same matter: *Milstein v. College of Pharmacy (Ontario) (No. 2)* (1976), 13 O.R. (2d) 700 (Ont. Div. Ct.), aff'd in this respect (1978), 87 D.L.R. (3d) 392 at p. 395 (Ont. C.A.). See also *Leslie v. Nova Scotia (Attorney General)* (1978), 40 A.P.R. 185 (NSCA), where it was held that, given the retroactive nature of the legislation, an action for a declaration was not precluded by failure to follow statutory appeal procedures; and *Conception Bay South (Town) v. Newfoundland (Public Utilities Board)* (1991), 6 Admin. L.R. (2d) 287 (Nfld. S.C.), where the applicant did not have notice until the appeal period had expired.

[97] ***Rozander v. Alberta (Energy Resources Conservation Board)*** (1978), 13 A.R. 461 (Alta. C.A.), leave to appeal to SCC ref'd (1979), 14 A.R. 540.

[98] *Reddall v. College of Nurses (Ontario)* (1981), 33 O.R. (2d) 129 (Ont. Div. Ct.), rev'd in part on other grounds (1983), 1 Admin. L.R. 278 (Ont. C.A.); see also *Quigley v. Torbay (Town)* (2009), 286 Nfld. & P.E.I.R. 294 (Nfld. & Lab. S.C.) (no notice of discontinuance of action had been filed; judicial review application dismissed), var'd 2010 NLCA 3; *Radil Bros. Fishing Co. v. Canada (Department of Fisheries and Oceans, Pacific Region)* (2000), 29 Admin. L.R. (3d) 159 (FCTD), rev'd in part (2001), 207 D.L.R. (4th) 82 (FCA); *Kaburda v. College of Dental Surgeons (British Columbia)* (2000), 19 Admin. L.R. (3d) 297 (BCSC); *Edworthy v. Saskatchewan (Water Appeal Board)* (1992), 9 Admin. L.R. (2d) 263 (Sask. Q.B.). Compare *Huyck v. Musqueam Indian Band*, [2000] F.C.J. No. 582 (FCTD), aff'd 2001 FCA 150; *V.S.R. Investments Ltd. v. Laczko* (1983), 41 O.R. (2d) 62 (Ont. Div. Ct.) (appeal by way of stated case stayed pending judicial review application alleging bias).

[99] *Reich v. College of Physicians & Surgeons (Alberta) (No. 1)* (1984), 8 D.L.R. (4th) 691 (Alta. Q.B.).

[100] E.g. ***Delmas v. Vancouver Stock Exchange*** (1995), 34 Admin. L.R. (2d) 313 (BCCA); ***Rozander v. Alberta (Energy Resources Conservation Board)*** (1978), 13 A.R. 461 (Alta. C.A.), leave to appeal to SCC ref'd (1979), 14 A.R. 540, where the Alberta Court of Appeal held that having to seek leave to appeal generally did not give rise to "special circumstances" which would permit judicial review proceedings to be entertained; *Westboine Park Housing Co-op Ltd. v. Wapemoose* (2011), 262 Man. R. (2d) 159 (Man. C.A.) (leave to appeal refused since was not question of law, and judicial review should have been sought); *Willow Park Housing Co-op v. Walker* (2010), 262 Man. R. (2d) 18 (Man. C.A.) (leave refused since no question of law or jurisdiction raised); *Prince Edward Island*

does not apply if there are doubts about the availability of the appeal.[101] For example, where the right of appeal is limited to questions of law, and the application for judicial review impugns a question of fact or one of mixed fact and law, the right of appeal should not be seen as a bar.[102] Nor does it apply where the applicant is not a party to the administrative proceedings and has no right of appeal,[103] nor where the issues would not be dealt with on appeal.[104]

3:2220 *Inadequate Record on Appeal*

Despite an applicant's right to appeal, relief *may* be available on judicial review where the administrative record on which the appeal

---

(Workers' Compensation Board) v. Cormier (2010), 298 Nfld. & P.E.I.R. 328 (PEICA) (test is whether arguable issue raised) at para. 26, foll'd *Prince Edward Island (Workers' Compensation Board) v. Mullen* (2010), 298 Nfld. & P.E.I.R. 324 (PEICA); **compare** *Davian Construction Ltd. v. McGinty* (1984), 29 Man. R. (2d) 310 (Man. Q.B.), where judicial review was entertained because the leave to be obtained was from the Supreme Court of Canada in connection with a decision of the County Court. **See also *Conception Bay South (Town) v. Newfoundland (Public Utilities Board)*** (1991), 78 D.L.R. (4th) 170 (Nfld. C.A.), where the Court of Appeal indicated that to consider only the appeal with leave provision was an error in principle by the trial judge who declined to proceed with the *certiorari* application.

[101] *Crush v. Canadian Natural Resources Ltd.*, 2012 SKQB 206 at para. 22; *Huyck v. Musqueam Indian Band*, [2000] F.C.J. No. 582 (FCTD), aff'd 2001 FCA 150; *Burgess Transfer & Storage Ltd. v. Nova Scotia (Public Utilities Board of Commissioners)* (1976), 35 A.P.R. 430 (NSTD); **see also** *Beaver Lumber Co. v. Ottawa (City)* (1976), 12 O.R. (2d) 314 (Ont. Div. Ct.); *v. British Columbia (Superintendent of Motor Vehicles)* (1977), 5 B.C.L.R. 206 (BCSC). And for judicial approval of the exceptions to the general rule contained in this paragraph, see *Showtime Networks Inc. v. WIC Premium Television Ltd.* (2000), 5 C.P.R. (4th) 297 (FCTD) at p. 303.

[102] *Tompkins v. Alberta (Appeals Commission for Workers' Compensation)*, 2012 ABQB 418.

[103] *Arthur v. Canada (Attorney General)* (1999), 254 N.R. 136 (FCA); *Mullin v. New Brunswick (Farm Products Appeal Tribunal)* (1989), 256 A.P.R. 210 (NBQB); *Canadian Industries Ltd. v. Edmonton (Development Appeal Board)* (1969), 9 D.L.R. (3d) 727 (Alta. C.A.). **See particularly discussion** in *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario* (2002), 215 D.L.R. (4th) 550 (FCA) and cases cited therein (whether decision of Registrar of Trade-marks should be challenged through judicial review or appeal).

[104] *Solicitor, Re* (1967), 64 D.L.R. (2d) 140 (Alta. C.A.); *Forbes & Sloat Ltd. v. New Brunswick (Minister of the Environment)* (1977), 30 A.P.R. 541 (NBQB); **see also** *Martin v. Prince Edward Island (Workers' Compensation Board)* (2000), 586 A.P.R. 277 (PEISC). **Compare** *Huyck v. Musqueam Indian Band*, [2000] F.C.J. No. 582 (FCTD) (since application of rule against bias involves questions of fact and law, a power to refer a matter to a court on a question of law alone was not an adequate remedy).

would be based is not adequate.[105] For example, this may be so where the tribunal is alleged to have committed a breach of the duty of procedural fairness, or where the relevant facts would not otherwise be part of the appeal record.[106]

3:2230 *Expedition and Costs*

A right of appeal from a tribunal's final decision may not be sufficient to prevent a court from intervening prior to the completion of the administrative process. Thus, preliminary or interlocutory rulings made at an early stage may be the subject of an application for judicial review,[107] where the expense to the parties and delay that would result in requiring completion outweigh the usual benefits of avoiding a multiplicity of proceedings,[108] and of providing the court with a reasoned decision from the specialist tribunal.[109]

3:2240 *Constitutional and Jurisdictional Issues*

At one time, some courts were of the view that rights of appeal were not an adequate alternative remedy when disputes arose over constitutional law[110] or the jurisdiction of the tribunal, prior to the completion of the administrative proceedings.[111] Today, however, these decisions must be read in light of more recent developments. In particular, the Supreme Court of Canada has regularly emphasized the important contribution that a reasoned decision makes to the task of the

---

[105] *Solicitor, Re* (1967), 64 D.L.R. (2d) 140 (Alta. C.A.); and see topic 6:5000, *post*, where the limits on this possibility are set out.

[106] E.g. *Bromley v. Assn. of Professional Engineers, Geologists & Geophysicists (Alberta)* (1989), 56 D.L.R. (4th) 325 (Alta. Q.B.); *Fooks v. Assn. of Architects (Alberta)*, [1982] 6 W.W.R. 40 (Alta. Q.B.). See also topic 6:5300, *post*.

[107] E.g. *Homelite v. Canada (Import Tribunal)* (1987), 26 Admin. L.R. 126 (FCTD); see also *Roosma v. Ford Motor Co. of Canada* (1988), 66 O.R. (2d) 18 (Ont. Div. Ct.); *Reiman v. Penkala* (1985), 45 Sask. R. 89 (Sask. Q.B.).

[108] E.g. *Carter v. Oxford Square Investments* (1988), 32 O.A.C. 328 (Ont. C.A.) (appeal provisions of *Residential Tenancies Act*, R.S.O. 1980, c. 452 should be complied with to avoid fragmentation and protraction of proceedings).

[109] E.g. *Hayles v. Sproule* (1980), 29 O.R. 500 (Ont. H.C.J.); *Gage v. Ontario (Attorney General)* (1992), 55 O.A.C. 47 (Ont. Div. Ct.).

[110] E.g. *R. v. Clarke* (1982), 104 A.P.R. 87 (Nfld. S.C.), aff'd (1983), 147 D.L.R. (3d) 763 (Nfld. C.A.).

[111] E.g. *Newfoundland (Attorney General) v. Newfoundland Colonization & Mining Co.* (1983), 130 A.P.R. 150 (Nfld. C.A.).

court on judicial review, even where the question concerns the application of the Constitution.[112] Accordingly, the cost and inconvenience of completing the administrative proceedings and appeal must be weighed against the usual benefits of avoiding a multiplicity of proceedings and of having a reasoned decision from the specialist tribunal.[113]

3:2250 *Procedural Fairness*

Notwithstanding a statutory right of appeal, cost and convenience considerations favouring judicial review early in the process are more easily established where the allegation is one of procedural error which cannot be corrected either by the administrative process or on appeal without requiring the matter to be reheard.[114] For example, immediate review was held to be warranted where a direction was made at the start of a hearing to exclude a factor that the statute required the decision-maker to consider in reaching a decision.[115] Similarly, where a police officer was entitled to "notice forthwith" of a disciplinary matter, and the police force delayed in complying, the court quashed the proceeding notwithstanding the existence of an appeal, rather than requiring the officer to proceed until the tribunal had completed the hearing and made a decision.[116] And the same conclusion was reached where the

---

[112] See topic 13:4000, *post*.

[113] E.g. ***Québec (Sa Majesté du Chef) v. Ontario Securities Commn.*** (1992), 10 O.R. (3d) 577 (Ont. C.A.), leave to appeal to SCC ref'd (1993), 101 D.L.R. (4th) viii; see also *Forster v. Saskatchewan Teachers' Federation* (1991), 92 Sask. R. 29 (Sask. Q.B.). And see topic 3:2230, *ante*.

[114] But see *dicta* in *BP Canada Energy Co. v. Alberta Energy and Utilities Board* (2003), 27 Alta. L.R. (4th) 123 (Alta. Q.B.): "Since denial of natural justice is itself a significant jurisdictional error, I disagree with the reasoning that assertions of a breach of natural justice–regardless of how solid the assertions are–may constitute special circumstances to oust appeal in favour of judicial review. Once having determined that an appeal is an adequate remedy, the central test of special circumstances is whether the record under review will disclose the nature of alleged jurisdictional breaches" at para. 40. See also *Litchfield v. College of Physicians and Surgeons (Alberta)* (2005), 42 Admin. L.R. (4th) 165 (Alta. Q.B.) in this regard.

[115] *Industrial Gas Users Assn. v. Canada (National Energy Board)* (1990), 33 F.T.R. 217 (FCTD); see also topic 3:4000, *post*.

[116] *Gage v. Ontario (Attorney General)* (1992), 55 O.A.C. 47 (Ont. Div. Ct.); see also *McIntosh v. College of Physicians and Surgeons (Ontario)* (1998), 169 D.L.R. (4th) 524 (Ont. Div. Ct.) (four and one-half year delay in giving notice); *Conception Bay South (Town) v. Newfoundland (Public Utilities Board)* (1991), 6 Admin. L.R. (2d) 287 (Nfld. S.C.) (lack of adequate notice to all affected persons). And see topic 3:5000, *post*.

application for judicial review contained allegations of bias,[117] a contention that the appointment of the decision-maker was unauthorized,[118] and where a municipal council was alleged to have passed a bylaw in bad faith.[119]

3:2300 Administrative Appeals

3:2310 *Generally*

Applicants for judicial review may also have *administrative* redress available to them.[120] And in two pivotal judgments,[121] the Supreme Court of Canada has developed an analytical framework for identifying and weighing the sometimes competing considerations that must be taken into account in deciding whether an applicant must exhaust the prescribed administrative remedy before obtaining relief in judicial review proceedings.

In the first of these, *Harelkin v. University of Regina*,[122] the issue was whether the applicant, a university student, should have pursued a second right of appeal to the university senate committee before seeking judicial review, after his appeal to the first level had been dismissed without a hearing in contravention of both the statute and the duty of fairness. In holding that the applicant should have exhausted the internal appeal process, Beetz J. for the majority said:

> In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the senate committee, its powers and

---

[117] E.g. *Fooks v. Assn. of Architects (Alberta)* (1982), 21 Alta. L.R. (2d) 306 (Alta. Q.B.); *V.S.R. Investments Ltd. v. Laczko* (1983), 41 O.R. (2d) 62 (Ont. Div. Ct.).

[118] *Reiman v. Penkala* (1985), 45 Sask. R. 89 (Sask. Q.B.).

[119] *Ottawa (City) v. Boyd Builders Ltd.*, [1965] S.C.R. 408 (motion to quash bylaw or appeal to Ontario Municipal Board not adequate).

[120] E.g. ***Pringle v. Fraser***, [1972] S.C.R. 821, in which the Supreme Court viewed the *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, as establishing a "code for the administration of immigration matters."

[121] ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561; and ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3.

[122] ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561.

> the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.[123]

Subsequently, in *Canadian Pacific Ltd. v. Matsqui Indian Band*[124], which involved a challenge to the jurisdiction of a first-level administrative decision-maker to decide a matter, the Supreme Court elaborated on the operative factors as follows:

> ... a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant.[125]

Accordingly, like statutory appeals to a court, the general rule now is that rights of appeal to an administrative tribunal or other administrative remedies should be exhausted before resorting to judicial review proceedings,[126] unless there is concurrent or overlapping jurisdiction,[127] or the cost and inconvenience of so doing outweigh the benefits, or there are other "exceptional circumstances".[128]

---

[123] ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561 at p. 588.

[124] ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3. Here, the trial judge's discretion was held to have been wrongly exercised because he failed to take a relevant factor into consideration, namely the fact that the composition of the appeal tribunals raised a reasonable apprehension of bias.

[125] ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3 at p. 31. The divisions of opinion on the Court produced a most unusual result; while there was a 6-3 majority in favour of the proposition advanced by the appellant, namely that a reviewing court had a discretion not to quash an administrative decision for a non-procedural jurisdictional error, and a 4-2 majority for the appellant's second contention, namely that the right of appeal was adequate, taken together, the two minority opinions succeeded in dismissing the appeal 5-4!

[126] ***Vaughan v. Canada***, 2005 SCC 11. **See also** *Budlakoti v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 139 at para. 56, referring to ***C.B. Powell Ltd. c. Canada (Agence des services frontaliers)***, 2010 FCA 61 at para. 30.

[127] *Englander v. TELUS Communications Inc.*, [2005] 2 F.C.R. 572 (FCA) at para. 79.

[128] *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1002 at para. 51, referring to ***C.B. Powell Ltd. c. Canada (Agence des services frontaliers)***, 2010

3:2311 *Exhaustion Required*

In the result, a wide range of administrative appeals and other procedures has been held capable of providing adequate alternatives to judicial review, including: appeal procedures in a university available to students prior to their expulsion,[129] appearances before a Parliamentary Committee,[130] grievance review proceedings within the Armed Forces,[131] Part III of the *R.C.M.P. Act*,[132] appeals within the prison system,[133] tax assessment appeal tribunals,[134] crop

---

FCA 61 at paras. 31-3. **See also** *Budlakoti v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 139 at para. 60.

[129] ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561. **See also** *Wong v. University of Saskatchewan* (2006), 287 Sask. R. 4 (Sask. Q.B.); *Pearlman v. University of Saskatchewan* (2004), 248 Sask. R. 35 (Sask. Q.B.); *Warraich v. University of Manitoba* (2003), 226 D.L.R. (4th) 714 (Man. C.A.) (dispute over academic matters to be dealt with under internal scheme); *Pearlman v. University of Saskatchewan*, [2002] 8 W.W.R. 451 (Sask. C.A.) (appeal committee respecting unsatisfactory evaluation of medical resident); *Blasser v. Royal Institute for the Advancement of Learning* (1985), 16 Admin. L.R. 298 (Que. C.A.), leave to appeal to SCC ref'd (19, 67 N.R. 399(n). As to tenure and promotion decisions within universities, **see e.g.** ***Paine v. University of Toronto*** (1981), 34 O.R. (2d) 770 (Ont. C.A.), leave to appeal to SCC ref'd (1982), 42 N.R. 270; ***Vinogradov v. University of Calgary*** (1987), 77 A.R. 227 (Alta. C.A.). **Compare** *Freeman-Maloy v. York University* (2004), 189 O.A.C. 22 (Ont. Div. Ct.) (alternate remedy not adequate); *Pearlman v. College of Medicine of the University of Saskatchewan* (2006), 273 D.L.R. (4th) 414 (Sask. C.A.) (Visitor to exercise discretion).

[130] *Treaty Seven First Nations v. Canada (Attorney General)* (2003), 230 F.T.R. 53 (FCTD).

[131] *Bast v. Canada (Attorney General)* (1998), 156 F.T.R. 99 (FCTD); ***Anderson v. Canada (Minister of National Defence)*** (1996), 205 N.R. 350 (FCA). **Compare** *Forsyth v. Canada (Attorney General)*, [2003] 1 F.C. 96 (FCTD); *Loiselle v. Canada (Attorney General)* (1998), 161 F.T.R. 232 (FCTD); *Hawco v. Canada (Attorney General)* (1998), 150 F.T.R. 106 (FCTD); *McClennan v. Canada (Minister of National Defence)* (1998), 150 F.T.R. 96 (FCTD). **See also** *L. (J.) v. Canada (Attorney General)* (1999), 175 D.L.R. (4th) 559 (BCSC) (civil action not barred by existence of internal grievance procedure: former member of Armed Forces not eligible); *McLean v. Canada* (1999), 164 F.T.R. 208 (FCTD) (grievance procedure to be pursued instead of action for wrongful dismissal).

[132] *Holdenried v. Canada (Attorney General)*, 2012 FC 707 at para. 19 (Part III provides effective redress other than in cases concerning harassment), ref'g to *Marshall v. Attorney General of Canada*, 2008 SKQB 113 at para 11; *Canada (Attorney General) v. Smith*, 2007 NBCA 58 at para. 3; *Merrifield v. Canada (Attorney General)*, 2009 ONCA 127 at para. 10. **See also** *Boogaard v. Canada (Attorney General)*, 2013 FC 267 (although delay hampered effectiveness of remedy pursuant to grievance procedure, judicial review application dismissed); *Black v. Canada (Attorney General)*, 2012 FC 1306 (jurisdictional issue should first be determined by Commissioner), aff'd 2013 FCA 201.

[133] *Johnny v. Canada (Parole Board)*, 2013 BCSC 911 (*habeas corpus* declined); *R. v. Graham* (2011), 275 O.A.C. 200 (Ont. C.A.) (trial judge correct in declining *habeas corpus* application); *Ewert v. Canada (Attorney General)* (2009), 355 F.T.R. 170 (FC) (grievance procedure under *Corrections and Conditional Release Act*) at paras. 31*ff*; *Olah v. Canada (Attorney General)* (2006), 301 F.T.R. 274 (FC); *Gambini v. Canada (Attorney General)* (2005), 272 F.T.R. 312 (FC); *Bordage v. Archambault Institution* (2000), 204 F.T.R. 133

insurance appeal boards,[135] agricultural marketing tribunals,[136] insurance tribunals,[137] an appeal to a financial services tribunal,[138] pension appeal boards,[139] a Band Employees Benefits Program,[140] an appeal pursuant to the *Indian Act*,[141] appeals to planning boards,[142]appeals to municipal grants boards,[143] appeals of student

---

(FCTD) (prison transfer); *Giesbrecht v. Canada* (1998), 10 Admin. L.R. (3d) 246 (FCTD); *Fortin v. Donnacona Institution* (1997), 153 F.T.R. 84 (FCTD); **see also** *Fabrikant v. Canada (Correcional Service)*, 2012 FC 1496, aff'd 2013 FCA 211; ***Reda v. Canada (Attorney General)***, 2012 FC 79 (where failure to exhaust remedies was raised by the application judge, merits were addressed); *Bonamy v. Canada (Attorney General)* (2010), 8 Admin. L.R. (5th) 221 (FC) at paras. 52-60; *Armaly v. Parole Service* (2000), 261 A.R. 394 (Alta. C.A.), aff'g [2000] A.J. No. 254 (Alta. Q.B.); *Fortin v. Donnaconna Insitution* (2000), 258 N.R. 85 (FCA) (application dismissed as moot). **But see** *R. v. Latham* (2010), 346 Sask. R. 175 (Sask. C.A.) (new evidence and incorrect testimony led to conclusion that *habeas corpus* should have been granted) at para. 44; *Doran v. Canada (Correctional Services)* (1996), 108 F.T.R. 93 (FCTD) (Regulations stayed grievance procedure on application for judicial review); *Marachelian v. Canada (Attorney General)*, [2000] F.C.J. No. 1128 (FCTD). **Compare also** *dicta* in ***May v. Ferndale Institution*** (2005), 261 D.L.R. (4th) 541 (SCC) (grievance procedure under *Corrections and Conditional Release Act* not necessarily adequate alternative remedy to *habeas corpus* application).

[131] *Toth Equity Ltd. v. Ottawa (City)* (2011), 283 O.A.C. 33 (Ont. C.A.) at para. 41; *Kelly Western Services Ltd. v. Manitoba (Municipal Board)* (2000), 149 Man. R. (2d) 141 (Man. Q.B.); ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3; however, as noted the divisions of opinion among the members of the Court resulted in a finding that, on the facts of this case, the right of appeal did not bar relief. **See also** *Consumers' Assn. of Canada (Manitoba) Inc. v. Manitoba (Public Utilities Board)* (2006), 212 Man. R. (2d) 109 (Man. C.A.); *Winnipeg (City) Assessor v. Hudson's Bay Co. Properties Ltd.* (1998), 132 Man. R. (2d) 53 (Man. Q.B.); *Sobey's Stores Ltd., Re* (1971), 2 Nfld. & P.E.I.R. 185 (Nfld. S.C.) (assessment court of review); *Municipal Contracting Ltd. v. Nova Scotia (Minister of Finance)* (1992), 309 A.P.R. 174 (NSCA) (tax appeal board). **Compare** *Municipal Property Assessment Corp. v. Montevallo Developments Ltd.* (2008), 305 D.L.R. (4th) 618 (Ont. Div. Ct.) at para. 16.

[135] *Rollo Bay Holdings Ltd. v. Prince Edward Island Agricultural Corp.* (1994), 382 A.P.R. 262 (PEITD).

[136] *Saskatchewan (Minister of Agriculture, Food and Rural Revitalization) v. Canada (A.G.)* (2006), 289 F.T.R. 237 (FC).

[137] *Allstate Insurance Co. of Canada v. Brown* (1998), 40 O.R. (3d) 610 (Ont. Div. Ct.).

[138] *Worldtransact Financial Ltd. v. British Columbia (Financial Institutions Commission)*, 2009 BCSC 283 at para. 27.

[139] *Decker v. Canada (Attorney General)* (2008), 326 F.T.R. 13 (FC) (where new facts arise); *Lazar v. Canada (Attorney General)* (1999), 168 F.T.R. 11 (FCTD), aff'd (2001), 271 N.R. 10 (FCA). **See also** *Burns v. Ontario (Pension Board)* (1999), 125 O.A.C. 364 (Ont. Sup. Ct. J.) (further appeals to Financial Services Commission directed).

[140] *Sagkeeng First Nation v. Canada (Attorney General)*, 2015 FC 1113.

[141] *Leaf v. Canada (Governor General)* (1987), 15 F.T.R. 268 (FCTD). **Compare** *Diabo v. Whitesand First Nation*, 2009 FC 1250, aff'd 2010 FCA 96.

[142] *Starstroke Developments Inc. v. Durham (Regional Municipality)* (1998), 113 O.A.C. 57 (Ont. Div. Ct.); *Canadian National Railway v. Toronto (City)* (1992), 6 Admin. L.R. (2d) 32 (Ont. Div. Ct.); *Slatter v. Edmonton (City)* (1981), 32 A.R. 336 (Alta. Q.B.); **see also** *Najjar v. Brombow Developments Ltd.*, 2015 ONCA 383 (statutory right to recission or

transfer decisions under the *Education Act*,[144] appeals to the Mining and Lands Commissioner,[145] resort to a labour relations board[146] or other comprehensive schemes for resolving workplace disputes,[147] resort to arbitration,[148] use of internal union procedures for resolving disputes,[149] appeal provisions of First Nation election regulations,[150] workers' compensation tribunal proceedings,[151] recourse to criminal

---

variation to be resorted to); *Country Pork Ltd. v. Ashfield (Township)* (2002), 60 O.R. (3d) 529 (Ont. C.A.); *Gaudaur v. Etobicoke (City)* (1997), 35 O.R. (3d) 551 (Ont. Div. Ct.) (fact no appeal taken to Ontario Municipal Board triggered exercise of discretion not to grant judicial review); *Starr v. Puslinch (Township)* (1978), 20 O.R. (2d) 313 (Ont. C.A.). **Compare** *Polla v. Toronto (City) Chief Building Official* (2000), 6 C.L.R. (3d) 305 (Ont. Sup. Ct. J.).

[143] *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (Ont. C.A.).

[144] *Bonnah (Litigation guardian of) v. Ottawa-Carleton District School Board* (2002), 44 Admin. L.R. (3d) 25 (Ont. Sup. Ct. J.).

[145] *Leo Alarie v. Ontario (Minister of Natural Resources)* (2000), 136 O.A.C. 81 (Ont. C.A.): trial judge erred in transferring proceeding to superior court; judicial review or statutory appeal preferable.

[146] *Boyko v. Canadian Pacific Railway*, [2011] 5 W.W.R. 521 (Man. Q.B.) (duty of fair representation complaint; exclusive jurisdiction of labour board); *Saskatoon Board of Police Commissioners v. Saskatoon Police Assn.* (2011), 371 Sask. R. 130 (Sask. C.A.); *Stark v. Vancouver School District No. 39* (2005), 35 Admin. L.R. (4th) 114 (BCSC), foll'd ***Northstar Lumber, Div. of West Fraser Mills Ltd. v. U.S.W.A., Local 1-424*** (2009), 308 D.L.R. (4th) 22 (BCCA) (in British Columbia, labour arbitration decisions must be challenged before labour relations board; judicial review not directly available) at para. 39; *Universal Workers' Union, L.I.U., Local 183 v. L.I.U.* (2004), 70 O.R. (3d) 435 (Ont. Sup. Ct. J.) (notwithstanding concurrent jurisdiction, labour board preferable forum to determine whether lawyer in conflict-of-interest position); *Maritime-Ontario Freight Lines Ltd. v. Teamsters Local 938* (2001), 278 N.R. 142 (FCA) (alternate proceeding before labour relations board preferable to judicial review).

[147] See *Maritime Employers Assn. v. Canada (Human Resources and Social Development)*, 2008 FC 1393 (*Canada Labour Code* safety appeals officer) at para. 21; *Adams v. Cusack* (2006), 264 D.L.R. (4th) 692 (NSCA) and cases cited therein.

[148] E.g. *Dolan v. Ontario (Civilian Commission on Police Services)* (2011), 277 O.A.C. 109 (Ont. Div. Ct.) at paras. 65-9; *Wong v. Hawryluk* (2011), 266 Man. R. (2d) 190 (Man. Q.B.) (notwithstanding defamation and other tortious claims, resort to arbitration mandated); *Adams v. Canada (Attorney General)* (2011), 22 Admin. L.R. (5th) 351 (Ont. Div. Ct.) (*Arbitration Act* governed, since power taken from private contract), suppl. reasons [2011] O.J. No. 3403, reconsideration denied 2011 ONSC 7592; *Bron v. Canada (Attorney General)* (2010), 99 O.R. (3d) 749 (Ont. C.A.) (notwithstanding whistleblower aspect to complaint, grievance procedure to be followed); *McLean v. Miramichi (City)* (2010), 364 N.B.R. (2d) 392 (NBQB) at para. 23, rev'd on basis *Police Act* proceedings should have been followed for "frustration of contract" termination 2011 NBCA 80; **see also** *McMillan v. McMillan*, 2016 BCCA 441 (scope of arbitration to be first decided by arbitrator); **and see** topics 1:7330, *ante*, and 3:2360, *post*. **But see** *Thomas v. Canada (Attorney General)*, 2013 FC 292 at paras. 37-8 (grievance procedure inadequate as it would not give remedy of a new investigation); *Waboose v. Anishinabek Police Service* (2007), 59 C.C.E.L. (3d) 81 (Ont. Sup. Ct. J.) (collective agreement came into force two years after dismissal and trade union had not elected to invoke arbitration process); *Sweeney v. Canada (National Film Board)*, 2008 ONCA 87 (jurisdiction issue raised after too late to grieve).

injuries review boards,[152] an appeal to a Water Appeal Board,[153] an appeal to the Highway Traffic Board,[154] reconsideration of judges' remuneration decisions,[155] resort to Judicial Council procedures,[156] police disciplinary procedures,[157] appeals of parole board decisions,[158]

---

[149] *Berry v. Pulley*, 2002 SCC 40; *Pileggi v. C.U.P.W.* (2005), 13 C.P.C. (6th) 373 (Ont. Sup. Ct. J.); *Boyko v. Canadian Pacific Railway*, [2011] 5 W.W.R. 521 (Man. Q.B.).

[150] *Horseman v. Twinn*, 2015 FCA 122.

[151] *Johnson v. British Columbia (Workers' Compensation Board)* (2011), 22 Admin. L.R. (5th) 91 (BCCA); *Woods v. British Columbia (Workers' Compensation Board)* 2009 BCSC 1402 at paras. 40*ff*; *Galger v. Saskatchewan (Workers' Compensation Board)* (2005), 271 Sask. R. 178 (Sask. Q.B.); *Danners v. Namanishen Contracting Ltd.* (2000), 1 C.C.E.L. (3d) 228 (Sask. Q.B.); *Haberstock v. Alberta (Workers' Compensation Board)* (1998), 222 A.R. 38 (Alta. Q.B.); *Caron v. Beaupré* (1985), 17 Admin. L.R. 31 (Que. C.A.). **See** *Martinson v. Alberta (Workers' Compensation Appeals Commission)* (2005), 43 C.C.E.L. (3d) 187 (Alta. Q.B.) (appeal to appeal tribunal cured jurisdictional defect before lower tribunal); *Pinder v. Northwest Territories and Nunavut (Workers' Compensation Board)* (2001), 34 Admin. L.R. (3d) 76 (NWTSC), aff'd [2002] 11 W.W.R. 404 (N.W.T.C.A.) (in circumstances, appeal to appeals tribunal not appropriate). **Compare** *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)* (2011), 26 Admin. L.R. (5th) 228 (BCSC) (no failure to exhaust internal review processes) at paras. 80*ff*, var'd 2012 BCCA 174; *Jones v. British Columbia (Workers' Compensation Board)* (2003), 20 B.C.L.R. (4th) 74 (BCCA) (trial judge wrong in concluding petitioner had not exhausted internal remedies); *Saskatchewan (Workers' Compensation Board) v. Saskatchewan (Human Rights Commission, Board of Inquiry)* (1999), 174 D.L.R. (4th) 391 (Sask. C.A.).

[152] *W. (J.) v. Alberta (Victims of Crime Financial Benefits Program)*, 2013 ABQB 212.

[153] *Bayne (Rural Municipality No. 371) v. Saskatchewan Water Corp.* (1990), 46 Admin. L.R. 23 (Sask. C.A.).

[154] *Ferber Trucking Ltd. v. Saskatchewan Government Insurance* (1998), 166 Sask. R. 65 (Sask. Q.B.). **See also** *Juneja v. Alberta (Registrar of Motor Vehicle Services)* (2008), 299 D.L.R. (4th) 646 (Alta. Q.B.) (Transportation Safety Board).

[155] *Ontario Conference of Judges v. Ontario (Chair, Management Board)* (2004), 71 O.R. (3d) 528 (Ont. Div. Ct.).

[156] *Gonzalez v. British Columbia (Attorney General)* (2009), 95 B.C.L.R. (4th) 185 (BCSC) at para. 54.

[157] *Wasylyshen v. Edmonton Police Service*, 2012 ABQB 406; *Izzett v. Toronto (City) Police Services* (2010), 262 O.A.C. 182 (Ont. Div. Ct.); *Toronto Police Assn. v. Toronto Police Services Board* (2007), 287 D.L.R. (4th) 557 (Ont. C.A.); *Prentice v. Canada*, [2006] 3 F.C.R. 135 (FCA) (R.C.M.P.); *Delta (City) Police Department v. British Columbia (Police Complaint Commissioner)* (2001), 92 B.C.L.R. (3d) 370 (BCSC); *McManus v. Calgary (City) Police Service* (1998), 228 A.R. 160 (Alta. C.A.); *Romanuck v. Penkala* (1984), 35 Sask. R. 216 (Sask. Q.B.), aff'd (1987), 56 Sask. R. 27. (Sask. C.A.).; **See also** *McLean v. Miramichi (City)* (2011), 377 N.B.R. (2d) 245 (NBCA) ("frustration of contract" allegation to be heard under *Police Act* procedures). **Compare** *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)* (2007), 65 Admin. L.R. (4th) 111 (FC) (whether Parliamentary privilege precluded R.C.M.P. investigation); *Smith v. Canada (Attorney General)* (2007), 282 D.L.R. (4th) 193 (NBCA) (where serious workplace harassment and bad faith alleged, no obligation to pursue administrative scheme); *Secord v. Saint John (City) Board of Police Commissioners* (2006), 43 Admin. L.R. (4th) 218 (NBQB) (issue one of jurisdiction, so appeal process not adequate); *Heighton v. Kingsbury* (2003), 680 A.P.R. 277 (NSCA) (uncertainty as to which procedure to follow militated in favour of judicial review); *Phillips v. Harrison* (2000), 196 D.L.R. (4th) 69 (Man. C.A.);*Gage v. Ontario (Attorney General)* reflex, (1992), 90 D.L.R. (4th)

proceedings under freedom-of-information legislation,[159] appeals from denial of hospital privileges,[160] proceedings under the *Mental Health Act*,[161] appeals from the imposition of professional discipline,[162] appeals to rent review tribunals,[163] proceedings under the *Co-operative Corporations Act*,[164] appeals provided under the *Official*

---

537 (Ont. Div. Ct.) (lack of notice impaired administrative process. **See also** *Edmonton Police Assn. v. Edmonton (City)* (2007), 58 C.C.E.L. (3d) 175 (Alta. C.A.); *Robertson v. Wasylyshen* (2003), 8 Admin. L.R. (4th) 215 (Alta. C.A.).

158 ***Khela v. Mission Institution***, 2014 SCC 24 at para. 55 referring to *Peiroo v. Canada (Minister of Employment & Immigration)* (1989), 69 O.R. (2d) 253. See also *Gallant v. Springhill Institution*, 2014 NSSC 122 (comprehensive procedure applied so discretion exercised to decline jurisdiction); *Wilson v. Canada (Attorney General)* (2011), 25 Admin. L.R. (5th) 328 (NSSC) (appeal from National Parole Board Appeal Division to be judicially reviewed in federal court, not *habeas corpus* with *certiorari*-in-aid in provincial court), aff'd 2013 NSCA 49; *McDougall v. Canada (Attorney General)* (2011), 386 F.T.R. 8 (FC); *Mymryk v. Canada (Attorney General)* (2007), 308 F.T.R. 5 (FC); *R. v. Billiouras*, [2000] O.J. No. 2212 (Ont. C.A.), aff'g (2000), 135 O.A.C. 292 (Ont. Sup. Ct. J.).

159 *Saxer v. College of Opticians of British Columbia* (2002), 49 Admin. L.R. (3d) 82 (BCSC); *CTV Television v. Ontario Superior Court of Justice (Toronto Region) (Registrar)* (2001), 52 O.R. (3d) 549 (Ont. Sup. Ct. J.). **See also** *Detorakis v. Canada (Attorney General)* (2010), 358 F.T.R. 266 (FC) (federal Office of the Information Commissioner).

160 E.g. *Haber v. Wellesley Hospital* (1988), 24 O.A.C. 239 (Ont. C.A.), leave to appeal to SCC ref'd (1988), 46 D.L.R. (4th) vi(n); *Jow v. Regina General Hospital* (1979), 100 D.L.R. (3d) 98 (Sask. C.A.); **compare** *Zahab v. Salvation Army Grace General Hospital-Ottawa* (1991), 3 Admin. L.R. (2d) 307 (Ont. Gen. Div.), amended (1991), 3 Admin. L.R. (2d) 323, leave to appeal to Ont. CA granted (Doc. No. A72/91); **see also** *Bahinipaty v. College of Physicians & Surgeons (Saskatchewan)* (1985), 44 Sask. R. 111 (Sask. C.A.) (direct payment of medical fees).

161 *Capano v. Centre for Addiction and Mental Health* (2010), 4 Admin. L.R. (5th) 147 (Ont. Sup. Ct. J.), appeal quashed as moot 2011 ONSC 5585.

162 E.g. *Landry v. Law Society of Upper Canada* (2011), 106 O.R. (3d) 728 (Ont. Div. Ct.) at paras. 37*ff*; *Kawula v. Institute of Chartered Accountants of Saskatchewan* (2010), 348 Sask. R. 213 (Sask. Q.B.), aff'd 2011 SKCA 80; *Merchant v. Law Society of Alberta* (2008), 440 A.R. 377 (Alta. C.A.); *Litchfield v. College of Physicians and Surgeons (Alberta)* (2005), 42 Admin. L.R. (4th) 165 (Alta. Q.B.); *Harrison v. Law Society (Alberta)* (2005), 36 Admin. L.R. (4th) 313 (Alta. C.A.); *Goodyear v. Queen Elizabeth II Health Sciences Centre* (2004), 725 A.P.R. 99 (NSSC) (hospital Internal Disciplinary Board); *Society of Management Accountants of Sask. v. Ostoforoff* (2005), 264 Sask. R. 316 (Sask. Q.B.); *Violette v. New Brunswick Dental Society* (2003), 685 A.P.R. 213 (NBQB), aff'd 2004 NBCA 1; *Cimolai v. Children's and Women's Health Centre of British Columbia* (2002), 16 C.C.E.L. (3d) 232 (BCSSC) (hospital appeal board); *Violette v. New Brunswick Dental Society* (2000), 607 A.P.R. 217 (NBQB); *Kaburda v. College of Dental Surgeons (British Columbia)* (2000), 19 Admin. L.R. (3d) 297 (BCSC); ***Howe v. Institute of Chartered Accountants (Ontario)*** (1994), 19 O.R. (3d) 483 (Ont. C.A.), leave to appeal to SCC ref'd (1995), 27 Admin. L.R. (2d) 118(n). **Compare** *Luzak v. Real Estate Council of Ontario* (2003) 67 O.R. (3d) 530 (Ont. Div. Ct.) (petitioner launched appeal but did not appear at it because of bias concerns; court refused to strike out application for judicial review on basis alternative remedy not pursued).

163 E.g. *Francois v. Joseph* (1980), 73 A.P.R. 155 (NSTD); **see also** *563386 B.C. Ltd. v. Barrett* (2009), 309 D.L.R. (4th) 450 (BCCA) (tenants' occupancy; commencing action was abuse of process).

Languages Act,[165] appeals to a referee under the *Canada Labour Code*[166] or *Employment Standards Act*,[167] appeals from decisions of a chief forester,[168] proceedings under the *Forest Act*,[169] proceedings under animal protection legislation,[170] proceedings before the Canadian Radio-television and Telecommunications Commission,[171] appeals to the Canadian International Trade Tribunal,[172] customs and tax appeal procedures,[173] proceedings before the Social Security Tribunal,[174] proceedings in the Tax Court of Canada,[175] appeals to

---

[164] *Becker v. City Park Co-operative Apartments Inc.* (2004), 193 O.A.C. 52 (Ont. Div. Ct.).

[165] *Bakayoko v. Bell Nexxia* (2004), 262 F.T.R. 192 (FC); *Caraquet (Town) v. New Brunswick (Minister of Health and Wellness)* (2005), 282 N.B.R. (2d) 112 (NBCA), rev'g 280 N.B.R. (2d) 146 (NBQB) (remedies under Act not exclusive; trial judge erred in dismissing action/application).

[166] *Bissett v. Canada (Minister of Labour)*, [1995] 3 F.C. 762 (FCTD). **Compare** *Acton Transport Ltd. v. Canada (Minister of Labour)* (2001), 211 F.T.R. 188 (FCTD).

[167] *Susan Shoe Industries Ltd. v. Ricciardi* (1994), 18 O.R. (3d) 660 (Ont. C.A.). **And see discussion in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44. Compare** *Carillon Decorative Products Inc. v. Ontario (Employment Standards Officer)* (2004), 71 O.R. (3d) 500 (Ont. Div. Ct.) (indigent petitioner could not afford to seek mandatory review by labour relations board; judicial review granted).

[168] *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 66 (BCSC).

[169] *International Forest Products Ltd. v. British Columbia* (2004), 15 Admin. L.R. (4th) 222 (BCSC). **See also** *Timberwolf Log Trading Ltd. v. British Columbia (Comm'r apptd Pursuant to s. 142.11 Forest Act)* (2011), 331 D.L.R. (4th) 405 (BCCA).

[170] *Reece v. Edmonton (City)* (2010), 324 D.L.R. (4th) 172 (Alta. Q.B.), aff'd 2011 ABCA 238.

[171] *Shaw Cablesystems (SMB) Ltd. v. MTS Communications Inc.* (2006), 265 D.L.R. (4th) 730 (Man. C.A.). **See also** *MTS Allstream Inv. v. TELUS Communications Co.*, 2010 ABCA 372, rev'g [2009] 9 W.W.R. 354 (Alta. Q.B.) (C.R.T.C. had exclusive jurisdiction over dispute).

[172] *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2009 FC 528 (rejection notification is negative decision that can be appealed to C.I.T.T.), rev'd on grounds application was premature 2010 FCA 61; *Danone Canada Inc. v. Canada (Attorney General)*, 2009 FC 44; *Agustawestland Int. Ltd. v. Canada (Minister of Public Works and Government Services)* (2004), 263 F.T.R. 54 (FC) (court did not have sufficient facts).

[173] E.g. *Abbott Laboratories, Ltd. v. Canada (Minister of National Revenue)* (2004), 12 Admin. L.R. (4th) 20 (FC), foll'd *1099065 Ontario Inc. v. Canada (Minister of Public Safety and Emergency Preparedness)* (2006), 301 F.T.R. 291 (FC), aff'd 2008 FCA 47; *Cambridge Leasing Ltd. v. Canada (Minister of National Revenue)* (2003), 230 F.T.R. 222 (FCTD) (Notice of Objection should be filed under *Excise Tax Act*); *Neles Controls Ltd. v. Canada* (2002), 288 N.R. 26 (FCA); *Municipal Contracting Ltd. v. Nova Scotia (Minister of Finance)* (1992), 309 A.P.R. 174 (NSCA); **see also** *GRK Fasteners v. Canada (Attorney General)* (2011), 384 F.T.R. 251 (FC) (appeals under *Special Import Measures* Act); *Optical Recording Co. v. Canada* (1990), 116 N.R. 200 (FCA).

[174] *Noel v. Canada (Attorney General)*, 2015 FC 1375 (stay of judicial review application).

[175] *Canada v. Addison & Leyen Ltd.* (2007), 284 D.L.R. (4th) 385 (SCC); *Morris v. Canada (Minister of National Revenue)*, 2009 FCA 373 at para. 13; *Walker v. Canada* (2005), 344 N.R. 169 (FCA); *GLP NT Corp. v. Canada (Attorney General)* (2003), 65 O.R. (3d) 840 (Ont.

Bankruptcy Court,[176] appeals to securities regulators,[177] infringement proceedings under patent legislation,[178] immigration appeals,[179] issuing an authority to proceed under the *Extradition Act*,[180] and human rights proceedings.[181]

3:2312 *Exhaustion Not Required*

However, the principle of exhaustion of administrative remedies does not apply to bar relief in judicial review proceedings where a decision is final, and as a practical matter, there are no further administrative procedures to exhaust,[182] where there are doubts that

---

Sup. Ct. J.): while provincial superior court had jurisdiction, it should defer to Tax Court of Canada in the circumstances.

[176] *Fantasy Construction Ltd. (Re)* (2007), 35 C.B.R. (5th) 86 (Alta. Q.B.).

[177] E.g. ***Delmas v. Vancouver Stock Exchange*** (1994), 27 Admin. L.R. (2d) 294 (BCSC), aff'd (1995), 34 Admin. L.R. (2d) 313 (BCCA); *First City Financial Corp. v. Genstar Corp.* (1981), 33 O.R. (2d) 631 (Ont. H.C.J.).

[178] *Genpharm Inc. v. Canada (Minister of Health)* (2003), 30 C.P.R. (4th) 67 (FC); *Eli Lilly and Co. v. Apotex Inc.* (2000), 9 C.P.R. (4th) 439 (FCA); **and see** *Syntex (U.S.A.) L.L.C. v. Canada (Minister of Health)* (2001), 15 C.P.R. (4th) 312 (FCTD).(Regulations provide complete code; applicant cannot bring *certiorari* or prohibition proceeding to circumvent missed time-limits).

[179] E.g. *Landaeta v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 219, refg to *Somodi v. Canada (Minister of Citizenship and Immigration)* (2009), 311 D.L.R. (4th) 335 (FCA); *Vaziri v. Canada (Minister of Citizenship and Immigration)* (2006), 52 Admin. L.R. (4th) 118 (FC) (Temporary Residence Visa adequate alternative remedy in sponsorship case), appeal dismissed for mootness (2007), 364 N.R. 195 (FCA); *Adviento v. Canada (Minister of Citizenship and Immigration)* (2003), 9 Admin. L.R. (4th) 314 (FC); **see also** *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)* (2006), 263 D.L.R. (4th) 51 (FCA) (trial judge failed to consider alternative remedy open to applicant; also, consequences of danger opinion misapprehended). **Compare** *Phung v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 585 at paras. 26-30 (appeal to I.A.D. would be ineffective).

[180] *Froom v. Canada (Minister of Justice)*, [2002] 4 F.C. 345 (FCTD), foll'd *Coffey v. Canada (Minister of Justice)*, 2005 FC 554. **See also** *Thailand v. Saxena*, 2009 BCCA 223 (*habeas corpus* not available due to existence of complete code under *Extradition Act*) at para. 8; *Coffey v. Canada (Minister of Justice)* (2005), 273 F.T.R. 92 (FC). However, it now appears that a Minister of Justice, in issuing an Authority to Proceed under the *Extradition Act*, is exercising a statutory power; judicial review available in Federal Court, although it will rarely be successful: *Froom v. Canada (Minister of Justice)*, [2004] 2 F.C.R. 154 (FC), aff'd (2004), 245 D.L.R. (4th) 577 (FCA) (judge should have declined to hear application).

[181] E.g. *Trudel v. Service New Brunswick*, 2016 NBQB 208 at para. 35; *Native Council of Nova Scotia v. Canada (Attorney General)* (2011), 383 F.T.R. 64 (FC) at para. 68; *Beattie v. Acadia University* (1976), 72 D.L.R. (3d) 718 (NSCA); **see also** *Meiklem v. Bot Québec Ltée* (1992), 5 Admin. L.R. (2d) 177 (Ont. Gen. Div.) (stay of action pending human rights commission proceedings). **But see** *McIntire v. University of Manitoba* (1980), 113 D.L.R. (3d) 112 (Man. Q.B.).

[182] E.g. *550551 Ontario Ltd. v. Framingham* (1991), 4 O.R. (3d) 571 (Ont. Div. Ct.) (administrative procedure conditional upon payment of 3.8 million dollars so exhaustion

the alternative procedure is duplicative or effective,[183] where there are doubts about the existence of an appeal from the administrative action in question,[184] or if the statutory appeal route is abolished by legislation.[185] Similarly, where one of two alternative administrative procedures has been elected, exhaustion of the other is not required.[186] Nor is an applicant required to choose the means of challenge favoured by the administrative tribunal, where a statute presents two sets of procedures for challenging a decision.[187] Nor will a court regard a right of appeal to a tribunal that is not independent of one of the parties as an adequate alternative remedy.[188] Of course, the institution of an administrative appeal may be viewed as evidence of the parties' agreement to continue to pursue that remedy before seeking judicial review.[189]

---

not required). **See also** *Kadiri v. Southlake Regional Health Centre*, 2015 ONCA 847 (no decision made that would be subject to administrative procedure).

[183] *Patriarcki v. Canada (Attorney General)* (2011), 104 O.R. (3d) 749 (Ont. Sup. Ct. J.); *L.I.U. (Local 1208) v. Transport and Allied Workers, Local 855* (2011), 312 Nfld. & P.E.I.R. 66 (Nfld. & Lab. S.C.) at para. 47; *Diabo v. Whitesand First Nation*, 2009 FC 1250 at para. 30, aff'd 2010 FCA 96; *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham* [1994], 3 F.C. 449 (FCTD). **See also** *Jones v. British Columbia (Workers' Compensation Board)* (2003), 20 B.C.L.R. (4th) 74 (BCCA); *Saskatchewan (Workers' Compensation Board) v. Saskatchewan (Board of Inquiry)* (1998), 163 D.L.R. (4th) 336 (Sask. Q.B.); *Hutton v. Canada (Chief of Defence Staff)*, [1998] 1 F.C. 219 (FCTD) (complaint to minister ineffective).

[184] E.g. *Northeast Bottle Depot Ltd. v. Alberta (Beverage Container Management Board)* (2000), 269 A.R. 248 (Alta. Q.B.) (appeal process not available to applicants); *Laba v. Dental Assn. (Manitoba)* (1989), 61 Man. R. (2d) 24 (Man. Q.B.) (not clear registration refused which was the basis for appeal procedure); *Carpenter v. Vancouver (City) Commissioners of Police*, [1987] 2 W.W.R. 97 (BCCA), leave to appeal to SCC ref'd (1987), 12 B.C.L.R. (2d) xxxvi (no appeal available where dismissal decision made by Chief Constable); **see also** *R. v. McCartie*, 2013 BCPC 150 at para. 12 (judicial review might be available where there is a stay of administrative appeals); *Pulice v. Canada (National Parole Board)* (1990), 44 Admin. L.R. 236 (FCA) (appeal right was a matter of policy and not provided "by law").

[185] *Clancey v. Clarke Transport Canada Inc.* (1998), 160 D.L.R. (4th) 621 (Nfld. C.A.).

[186] E.g. *Brandon (City) v. Manitoba (Police Commn.)* (1987), 25 Admin. L.R. 142 (Man. Q.B.). **See also** *Hutton v. Canada (Chief of Defence Staff)*, [1998] 1 F.C. 219 (FCTD); *Saskatchewan (Workers' Compensation Board) v. Saskatchewan (Board of Inquiry)* (1998), 163 D.L.R. (4th) 336 (Sask. Q.B.).

[187] *Glynos v. Canada* (1992), 96 D.L.R. (4th) 95 (FCA). **See also** *Westin Hotel Co. v. Municipal Property Assessment Corp.* (2003), 173 O.A.C. 191 (Ont. Div. Ct.) (adjournment granted concerning leave to appeal application pending completion of review by tribunal).

[188] ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3; **see also** *Desrivières v. Manitoba*, [2003] 1 W.W.R. 262 (Man. C.A.); *Bissett v. Canada (Minister of Labour)*, [1995] 3 F.C. 762 (FCTD). **See further** topic 11:4100, *post*.

[189] E.g. *Fleischhacker v. Saskatchewan (Minister of Environment)* (1985), 40 Sask. R. 283 (Sask. Q.B.); **see also** *Johns-Manville Canada Inc. v. Newfoundland (Minister of Mines & Energy)* (1985), 150 A.P.R. 338 (Nfld. C. A.); **and see** *U.F.C.W., Local 1252 v. Allen* (1988), 235 A.P.R. 142 (Nfld. S.C.) (statement of claim for same relief struck out because administrative remedy being pursued).

Moreover, as with a missed time-limit for appeal to the courts,[190] a missed time-limit in connection with an otherwise adequate administrative remedy will not generally render the remedy inadequate.[191] However, since it is a matter within the discretion of the court, where there is a satisfactory reason for the failure to comply and if the applicant did not deliberately attempt to circumvent the administrative remedy, the court may decide to entertain the judicial review proceedings.[192]

3:2320 *Inadequacy of Appeals to the Cabinet or a Minister*

Appeals to the Governor-in-Council and the Lieutenant-Governor-in-Council are a familiar, if controversial, feature of Canadian administrative law. However, since many Cabinet appeals are decided on the basis of broad political, economic and social considerations, applicants are not normally required to pursue them before seeking relief in judicial review proceedings. For example, an application for judicial review alleging a breach of the duty of fairness by a vehicle licensing commission was not barred, for the following reasons:

> If the petitioners appealed directly to the Lieutenant Governor in Council without their submissions and evidence first being considered by the commission, [[*sic*] on a rehearing after the first decision had been quashed] the petitioners would be deprived of the benefit of the investigation and the decision making expertise of the commission and forced to rely upon three busy cabinet ministers. The ministers in turn would not have the benefit of the commission having brought its expertise to bear upon the petitioners' representations as they will not have been before the commission.[193]

---

[190] See topic 3:2210, *ante*.

[191] *Gillan v. Mount St. Vincent University* (2006), 42 C.C.L.T. (3d) 65 (NSSC), aff'd (2008), 294 D.L.R. (4th) 53 (NSCA); *Syntex (U.S.A.) L.L.C. v. Canada (Minister of Health)* (2001), 15 C.P.R. (4th) 312 (FCTD); *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (BCCA); *Lazar v. Canada (Attorney General)* (1999), 168 F.T.R. 11 (FCTD), aff'd (2001), 271 N.R. 10 (FCA). **Compare** *Brass v. Key Band First Nation* (2007), 314 F.T.R. 15 (FC) (extremely short time-limits led to conclusion judicial review preferable), aff'd 2008 FCA 163.

[192] E.g. in connection with a missed time-limit for appeal to the courts, **see** *Alpenridge Wood Products Ltd. v. B.C.* (1992), 5 Admin. L.R. (2d) 183 (BCSC); *Conception Bay South (Town) v. Newfoundland (Public Utilities Board)* (1991), 6 Admin. L.R. (2d) 287 (Nfld. S.C.). **And see** topic 3:2210, *ante*.

Nor is a party who has appealed to the Cabinet precluded from seeking judicial review of the decision from which the appeal is made.[194] Similarly, appeals to a minister have also been held not to be an adequate alternative to judicial review. For example, where a minister had complete discretion over the appointment of an appeal board[195] or over the disposition of an appeal,[196] judicial review proceedings were not precluded. And the same result was reached where the issue in dispute was one of *ultra vires*.[197]

3:2330 *Relevance of the Decision-Maker's Expertise*

In determining the adequacy of a statutory right of appeal to an administrative tribunal, reviewing courts may consider the expertise and composition of the decision-maker, and its relevance to deciding the issues in dispute.[198] But, in the absence of evidence of the decision-maker's expertise, a court is left with three options: it may assume that the alternative remedy is adequate since there is no evidence to the contrary;[199] second, it may conclude that in the absence of evidence, the respondent has not established that the alternative remedy is

---

[193] *Richmond Cabs Ltd. v. British Columbia (Motor Carrier Commn.)* (1992), 11 Admin. L.R. (2d) 183 at p. 205 (BCSC).

[194] *Islands Protection Society v. British Columbia (Environmental Appeal Board)* (1988), 25 B.C.L.R. (2d) 307 (BCSC); **but see** *Carter v. British Columbia (Environmental Appeal Board)* (1986), 25 B.C.L.R. (2d) 318 (BCSC), which Lysyk J. (*Islands Protection Society*) decided not to follow.

[195] *Mackey v. Saskatchewan (Medical Care Insurance Commn.)* (1988), 32 Admin. L.R. 279 (Sask. Q.B.).

[196] *DeWolf v. Halifax* (1979), 67 A.P.R. 259 (NSTD).

[197] *Air Canada v. Turner* (1984), 57 B.C.L.R. 322 (BCSC).

[198] E.g. *Ermineskin Cree Nation v. Canada* (2001), 37 Admin. L.R. (3d) 88 (Alta. Q.B.) (court in better position than human rights tribunal to determine constitutional issue); *Imperial Oil Ltd. v. British Columbia (Waste Management Act, Regional Waste Manager)* (1998), 4 Admin. L.R. (3d) 182 (BCSC); *Edith Lake Service Ltd. v. Edmonton (City)* (1981), 34 A.R. 390 (Alta. C.A.), leave to appeal to SCC ref'd (1982), 42 N.R. 358; **see also** *Boeing Canada Operations Ltd. v. Winnipeg (City) Assessor*, 2016 MBQB 175 at para. 33 (courts better placed than Municipal Board to decide fairness issue); *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Ont. Gen. Div.); *First City Financial Corp. v. Genstar Corp.* (1981), 33 O.R. (2d) 631 (Ont. H.C.J.); *Canadian National Railway v. Toronto (City)* (1992), 91 D.L.R. (4th) 255 (Ont. Div. Ct.); *Byers Transport Ltd. v. Kosanovich* (1995), 126 D.L.R. (4th) 679 (FCA); *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.); **compare** *Eric D. McLaine Construction Ltd. v. Southport (Community)* (1990), 257 A.P.R. 158 (PEITD) (appeal tribunal composed of lay persons; judicial review preferred).

[199] E.g. *Trumbley v. Saskatchewan Amateur Hockey Assn.* (1986), 49 Sask. R. 296 at p. 300 (Sask. C.A.), cited in *Coombes v. National Phoenix 1984 Firearms Information and Communications Assn.* (2009), 488 A.R. 127 (Alta. Q.B.) at para. 26.

adequate;[200] or third, it may simply assess the adequacy of the appeal process on the basis of its own experience and common sense.[201]

3:2340 *Inadequate Scope of the Administrative Remedy*

The general rule that administrative remedies must be exhausted before a court will grant relief does not apply where the *scope* of the alternative remedy does not embrace the issue raised in the application for judicial review, or where it otherwise does not permit the granting of practical relief.[202] Conversely, the fact that a statutory body is able fully to address the issues and grant effective relief will lead the court to defer to the prescribed administrative process.[203] Indeed, the fact that the powers of the appeal body to

---

[200] E.g. *Mackey v. Saskatchewan (Medical Care Insurance Commn.)* (1988), 32 Admin. L.R. 279 (Sask. Q.B.), where a failure to explain the nature of the appeal process led the court to conclude that judicial review was appropriate.

[201] E.g. *Harelkin v. University of Regina*, [1979] 2 S.C.R 561; *R. v. Comsa* (2000), 282 A.R. 108 (Alta. Q.B.).

[202] E.g. *Phung v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 585 at paras. 26-30 (appeal to I.A.D. would be ineffective); *Diabo v. Whitesand First Nation* (2009), 358 F.T.R. 149 (FC) at para. 30, aff'd 2010 FCA 96; *Coombes v. National Phoenix 1984 Firearms Information and Communications Assn.* (2009), 488 A.R. 127 (Alta. Q.B.) at para. 28; *Halliburton Group Canada Inc. v. Alberta*, 2009 ABQB 420 at para. 41; *Kelly v. Ontario* (2008), 91 O.R. (3d) 100 (Ont. Sup. Ct. J.) (Superior Court alone had jurisdiction over issue of constitutionality of Procedural Code; motion to strike out application dismissed); *Rakowski v. Malagerio* (2007), 84 O.R. (3d) 696 (Ont. Sup. Ct. J.) (resort to Governance Review Committee would not resolve dispute); *Smith v. Canada (Attorney General)* (2007), 282 D.L.R. (4th) 193 (NBCA) (no neutral third-party adjudication available); *Bruno v. Canada (Attorney General)* (2006), 268 D.L.R. (4th) 98 (FC) (RCMP had wrongly concluded another grievance could not be launched, so court took jurisdiction over dispute); *Sydney Precision Machining Ltd. v. Cape Breton (Regional Municipality)* (2003), 692 A.P.R. 129 (NSSC); *Bristol-Myers Squibb Co. v. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 138 (FCA) (patent Regulations did not permit applicant to quash invalid notice of compliance; general judicial review jurisdiction under s. 18.1 of *Federal Courts Act* permitted relief), rev'd on other grounds (2005), 253 D.L.R. (4th) 1 (SCC); *Desrivières v. Manitoba*, [2003] 1 W.W.R. 262 (Man. C.A.); *Arch Transco Ltd. v. Regina (City)* (2002), 227 Sask. R. 139 (Sask. C.A.) (applicant remained under jeopardy even if statutory appeal route followed); *Phillips v. Harrison* (2000), 196 D.L.R. (4th) 69 (Man. C.A.); *Reilly v. Alberta (Provincial Court, Chief Judge)* (1999), 33 C.P.C. (4th) 24 (Alta. Q.B.), aff'd (2000), 266 A.R. 296 (Alta. C.A.); *T. Eaton Co. v. Saskatchewan (Attorney General)* (1991), 91 Sask. R. 81 (Sask. Q.B.), aff'd (1993), 108 D.L.R. (4th) 406 (Sask. C.A.), where the alternate remedy was held inadequate because the *vires* of an order-in-council and various Regulations could not be challenged through it. See also *L.I.U. (Local 1208) v. Transport and Allied Workers, Local 855*(2011), 312 Nfld. & P.E.I.R. 66 (Nfld. & Lab. S.C.) at para. 47; *Giesbrecht v. McNeilly* (2007), 45 C.C.L.T. (3d) 104 (Man. Q.B.) (not clear access to effective remedy would be denied), aff'd 2008 MBCA 22; *913719 Ontario Ltd. v. North York (City)* (1998), 41 O.R. (3d) 298 (Ont. Div. Ct.).

[203] *Johnson v. British Columbia (Workers' Compensation Board)* (2011), 22 Admin. L.R. (5th) 91 (BCCA); *A.(K.) v. Ottawa (City)* (2006), 80 O.R. (3d) 161 (Ont. C.A.) (potential difference in quantum of damages did not amount to remedial gap sufficient to warrant court's intervention); *Severance v. Oliver* (2007), 54 C.C.E.L. (3d) 161 (PEICA) (arbitration

resolve the matter exceed those of a court on judicial review is a common reason for requiring the statutory remedy to be exhausted.[204] *A fortiori,* if it is of the view that the administrative procedure is well-suited to the issues to be decided, a court is likely to refuse immediate relief.[205]

3:2350 *Convenience and Costs*

Where the established administrative scheme is efficient, expeditious and the least expensive route available to the parties, courts will generally decline to grant relief in judicial review proceedings.[206] Moreover, the court will not normally depart from this general principle even if the judicial review proceeding might be faster,[207] or because of an agency backlog,[208] unless the delay in resorting to it would be prejudicial to the applicant.[209]

---

process could provide adequate relief), leave to appeal to SCC ref'd [2007] S.C.C.A. No. 74; *Neles Controls Ltd. v. Canada* (2002), 288 N.R. 26 (FCA) (equitable relief is precluded by comprehensive statutory scheme); *Jadwani v. Canada (Attorney General)* (2001), 52 O.R. (3d) 660 (Ont. C.A.); **see also** *Adams v. Cusack* (2006), 264 D.L.R. (4th) 692 (NSCA) at para. 18: "Deference may be due to a comprehensive dispute resolution scheme even if it does not address every conceivable complaint or provide access to third-party neutral adjudication"; *Delta (City) Police Department v. British Columbia (Police Complaint Commissioner)* (2001), 92 B.C.L.R. (3d) 370 (BCSC); *Ortiz v. Patrk* (1998), 26 C.P.C. (4th) 56 (Ont. Gen. Div.) (arbitrator could award damages).

[204] E.g. *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 66 (BCSC).

[205] E.g. *Keewatin Tribal Council v. Thompson (City)* (1988), 56 Man. R. (2d) 206 (Man. Q.B.), where the issues were factual and the administrative procedure contemplated *viva voce* testimony. **See also** ***Cockeram v. College of Physicians and Surgeons of New Brunswick***, 2014 NBQB 227 at paras. 90*ff.* (complaints committee can provide effective remedy); *Arumugam v. Canada (Minister of Employment & Immigration)* (1986), 23 Admin. L.R. 1 (FCA); *British Columbia v. Tozer* (1998), 60 B.C.L.R. (3d) 160 (BCSC).

[206] E.g. ***Vinogradov v. University of Calgary*** (1987), 77 A.R. 227 (Alta. C.A.); **see also** *Blank v. Canada (Minister of the Environment)*, 2015 FC 1251 at para. 29 (Privacy Commissioner); *Lambton Kent District School Board v. Ontario (Workplace Safety and Insurance Board)*, 2013 ONSC 839 (Ont. Div. Ct.) at para. 30 (preferable that Privacy Commission first decide whether access to workers' records should be permitted); *Arumugam v. Canada (Minister of Employment & Immigration)* (1986), 23 Admin. L.R. 1 (FCA); *Shykitka v. Regina (City) Police Service* (1989), 79 Sask. R. 311 (Sask. Q.B.), aff'd (1990), 83 Sask. R. 70 (Sask. C.A.). **Compare** *Lightfoot v. Gerecke* (1983), 27 Sask. R. 305 (Sask. Q.B.).

[207] *Condo v. Canada (Attorney General)* (2003), 301 N.R. 355 (FCA); *Edith Lake Service Ltd. v. Edmonton (City)* (1981), 34 A.R. 390 (Alta. C.A.), leave to appeal to SCC ref'd (1982), 42 N.R. 358. **See also** *Violette v. New Brunswick Dental Society* (2003), 685 A.P.R. 213 (NBQB), aff'd 2004 NBCA 1. **Compare** *York Region Board of Education v. Markham (Town)* (1992), 60 O.A.C. 212 (Ont. Div. Ct.) (judicial review preferable route in circumstances); *Acton Transport Ltd. v. Canada (Minister of Labour)* (2001), 211 F.T.R. 188 (FCTD); *Fraser v. Kent Institution* (1998), 167 D.L.R. (4th) 457 (BCCA).

On the other hand, where the issue in question is likely to require a judicial determination at some point, considerations of cost and the practicality of permitting immediate judicial review may outweigh the benefits normally associated with the general rule. For example, in one case relief was granted even though the applicant had not first appealed to the Nova Scotia Municipal Board, because the Board had earlier ruled

(Continued on page 3 - 37)

---

[208] E.g. *Horbas v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 359 (FCTD); *Russell v. Canada (Minister of Employment & Immigration)* (1986), 21 Admin. L.R. 99 (FCTD); **contrast** *Sahota v. Canada (Minister of Employment & Immigration)* (1985), 21 Admin. L.R. 95 (FCTD).

[209] *Municipal Property Assessment Corp. v. Montevallo Developments Ltd.* (2008), 305 D.L.R. (4th) 618 (Ont. Div. Ct.) at para. 16; *Caruana v. Canada (Attorney General)* (2006), 303 F.T.R. 246 (FC) (grievance process excessively slow); *Sherman v. Canada (Customs and Revenue Agency)* (2005), 269 F.T.R. 294 (FC) (applicant should not be forced to relitigate issues in another forum); ***Misra v. College of Physicians & Surgeons (Saskatchewan)*** (1988), 36 Admin. L.R. 298 (Sask. C.A.), leave to appeal to SCC granted (1989), 79 Sask. R. 80(n); **see also** *Pinder v. Northwest Territories and Nunavut (Workers' Compensation Board)* (2001), 34 Admin. L.R. (3d) 76 (NWTSC), aff'd [2002] 11 W.W.R. 404 (N.W.T.C.A.) and *Zahab v. Salvation Army Grace General Hospital - Ottawa* (1991), 3 Admin. L.R. (2d) 307 (Ont. Gen. Div.), amended (1991), 3 Admin. L.R. (2d) 307 at p. 323, leave to appeal to Ont. C.A. granted (September 3, 1991), Doc. No. A 72/91, where the court ordered reinstatement on terms pending completion of the administrative review.

that it had no jurisdiction over the issue in contention.[210]

3:2360 *Jurisdictional Errors and Other Errors of Law*

In some cases, an allegation that an administrative decision was not within the jurisdiction of a decision-maker has led the court to grant relief in judicial review proceedings, even though the applicant had not exhausted its statutory administrative remedies.[211] Indeed, some courts have reached a similar conclusion where the question was simply one "of law."[212] And while many of these cases predate the Supreme Court of Canada's decision in *Harelkin*,[213] in others *Harelkin* has been distinguished on the ground that it does not apply where there is a complete lack of jurisdiction, as opposed to a breach of the duty of fairness.[214] As a result of *Matsqui*, however, it is now clear that the

---

[210] *Walsh v. Bedford (Town)* (1990), 251 A.P.R. 377 (NSTD); **compare** *Canadian Logistics Systems v. I.B. of T.C.W. & H. of A., Local 351* (1984), 22 B.C.L.R. (2d) 313 (BCSC); *Canada (Department of National Defence) v. Ontario (Workers' Compensation Board)* (1992), 8 Admin. L.R. (2d) 122 (Ont. Div. Ct.), where the court stated that nevertheless it would benefit from the record and reasons of the Board.

[211] E.g. *Manitoba v. Russell Inns Ltd.* (2011), 334 D.L.R. (4th) 212 (Man. Q.B.) at para. 25, aff'd on this point 2013 MBCA 46 at paras. 24-7; *Freeman-Maloy v. York University* (2004), 189 O.A.C. 22 (Ont. Div. Ct.); **see also** *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)* (2007), 65 Admin. L.R. (4th) 111 (FC) (whether Parliamentary privilege precluded R.C.M.P. investigation); *Heighton v. Kingsbury* (2003), 680 A.P.R. 277 (NSCA) (earlier decision made without jurisdiction, so alternative remedies under collective agreement or *Police Act* not adequate; *certiorari* and prohibition granted); *Pinder v. Northwest Territories and Nunavut (Workers' Compensation Board)* (2001), 34 Admin. L.R. (3d) 76 (NWTSC), aff'd [2002] 11 W.W.R. 404 (N.W.T.C.A.); *Wood v. Wetaskiwin (County No. 10)* (2001), 290 A.R. 37 (Alta. Q.B.) (allegations of bias and breach of duty of fairness are jurisdictional errors), aff'd (2003), 2 Admin. L.R.(4th) 265 (Alta. C.A.); *Northern Mountain Helicopter Inc. v. British Columbia (Workers' Compensation Board)*, [1999] 8 W.W.R. 674 (BCSC) and cases cited therein, aff'd 2000 BCCA 395; *Billinkoff v. Winnipeg School Division No. 1* (1999), 170 D.L.R. (4th) 50 (Man. C.A.) (issue not within jurisdiction of arbitration board, and judicial review more convenient than concurrent arbitration and human rights proceedings); **compare** *Martinson v. Alberta (Workers' Compensation Appeals Commission)* (2005), 43 C.C.E.L. (3d) 187 (Alta. Q.B.); *Myers v. Law Society of Newfoundland* (1998), 509 A.P.R. 150 (Nfld. C.A.), aff'g (1997), 471 A.P.R. 184 (Nfld. S.C.).

[212] *Eric D. McLaine Construction Ltd. v. Southport (Community)* (1990), 257 A.P.R. 158 (PEITD); *Sahota v. Canada (Minister of Employment & Immigration)* (1985), 21 Admin. L.R. 95 (FCTD); **compare** ***Pringle v. Fraser***, [1972] S.C.R. 821. **See also** *Ferber Trucking Ltd. v. Saskatchewan Government Insurance* (1998), 166 Sask. R. 65 (Sask. Q.B.).

[213] ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561.

[214] E.g. *Reiman v. Penkala* (1985), 45 Sask. R. 89 (Sask. Q.B.); *Goertz v. College of Physicians & Surgeons (Saskatchewan)* (1989), 76 Sask. R. 64 (Sask. C.A.); *Perfection Foods Ltd. v. P.E.I. (Labour Relations Board)* (1985), 168 A.P.R. 326 (PEITD); **see also** Dickson J., dissenting in ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561.

courts' discretion to refuse relief where there is an adequate alternative remedy extends in principle to cases where the applicant challenges the decision-maker's jurisdiction on either procedural or substantive grounds.[215]

That is not to say, however, that courts will automatically decline to proceed with judicial review proceedings. Rather, as in all other cases, the overall circumstances may lead the court to proceed with judicial review in the exercise of its discretion. For example, an appeal to a tribunal that is not sufficiently independent of either the first instance decision-maker or a party will not be regarded as an adequate administrative remedy.[216] Similarly, where the administrative process cannot deal with the jurisdictional error, it may be appropriate to hear and determine the application for judicial review.[217] And where the applicant would suffer substantial prejudice if required to await the outcome of the administrative process and the court is fully apprised of the facts upon which the jurisdictional error is founded, immediate intervention in the form of judicial review may well be warranted.[218] It has also been held that an internal grievance procedure could not credibly adjudicate an allegation that the department had permitted a decision to be dictated by another agency.[219]

Of course, where the legislation compels exclusive resort to one administrative procedure, and the party has pursued the wrong avenue altogether, the court will intervene.[220]

---

[215] ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3; ***Delmas v. Vancouver Stock Exchange*** (1995), 34 Admin. L.R. (2d) 313 (BCCA); see also *Heighton v. Kingsbury* (2003), 680 A.P.R. 277 (NSCA); *Myers v. Law Society of Newfoundland* (1998), 509 A.P.R. 150 (Nfld. C.A.), aff'g (1997), 471 A.P.R. 184 (Nfld. S.C.); *Hasan v. 260 Wellesley Residence Ltd.* (1995), 24 O.R. (3d) 335 (Ont. Div. Ct.).

[216] ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3. See also *Brass v. Key Band First Nation* (2007), 314 F.T.R. 15 (FC) (various conflicting interests of minister made judicial review preferable route to challenge Band election), aff'd 1008 FCA 163; *Imperial Oil Ltd. (Re)* (2002), 41 Admin. L.R. (3d) 49 (Yuk. Terr. S.C.).

[217] *Aylward v. McMaster University* (1991), 47 Admin. L.R. 198 (Ont. Div. Ct.) (university senate could not provide jurisdictional relief); *T. Eaton Co. v. Saskatchewan (Attorney General)* (1991), 91 Sask. R. 81 (Sask. Q.B.), aff'd (1993), 108 D.L.R. (4th) 406 (Sask. C.A.) (challenge to *vires* of Regulations). See also *Marachelian v. Canada (Attorney General)*, [2000] F.C.J. No. 1128 (FCTD) (decision-maker could not *credibly* deal with issue).

[218] E.g. *Gage v. Ontario (Attorney General)* (1992), 55 O.A.C. 47 (Ont. Div. Ct.). See also topic 3:2250, *ante*.

[219] *Marachelian v. Canada (Attorney General)*, [2000] F.C.J. No. 1128 (FCTD).

[220] E.g. *J.D. Irving Ltd. v. Hughes* (2010), 318 D.L.R. (4th) 408 (NBCA) (workers' compensation commission alone had jurisdiction to rule on claim); *MacNeil v. Nova Scotia*

(Attorney General) (2010), 290 N.S.R. (2d) 144 (NSSC) (constructive dismissal claim governed by collective agreement); *Johal v. Canada (Revenue Agency)*, 2009 FCA 276 (employees had no recourse under alternate system because they lacked "preferred status") at para. 6; *Saskatoon Board of Police Commissioners v. Saskatoon Police Assn.*, 2009 SKQB 291 (*Police Act* disciplinary proceedings, not labour relations board, proper forum), rev'd on basis labour relations board should have made ruling on jurisdiction before *certiorari* sought (2011), 371 Sask. R. 130 (Sask. C.A.); *Andrews v. Air Canada* (2008), 88 O.R. (3d) 561 (Ont. C.A.) (Supreme Court had no jurisdiction over subject matter of action; collective agreement applied); *Myrtezaj v. Cintas Canada Ltd.* (2008), 90 O.R. (3d) 384 (Ont. C.A.) (constructive dismissal complaint must be heard by labour relations board); *Gillan v. Mount Saint Vincent University* (2008), 294 D.L.R. (4th) 53 (NSCA); *Allen v. Alberta*, 2003 SCC 13 (severance pay dispute to be dealt with under collective agreement); *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40 (dispute within exclusive jurisdiction of Social Affairs Commission), apld *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)* (2007), 57 C.C.E.L. (3d) 189 (Alta. C.A.); *Edmonton Police Assn. v. Edmonton (City)* (2007), 58 C.C.E.L. (3d) 175 (Alta. C.A.) (*Police Act* governed dispute in circumstances, not arbitration procedure); *Ferreira v. Richmond (City)* (2007), 46 C.C.E.L. (4th) 69 (BCCA) (notwithstanding that whistleblowing not referred to in collective agreement, such disputes arbitrable); *Toronto Police Assn. v. Toronto Police Services Board* (2007), 287 D.L.R. (4th) 557 (Ont. C.A.) (dispute was one of police discipline that fell within jurisdiction of *Police Services Act*); *Symington v. Halifax (Regional Municipality)* (2007), 285 D.L.R. (4th) 76 (NSCA) (all disputed matters arbitrable under collective agreement except for malicious prosecution claim); *Dupéré v. Canada (House of Commons)* (2007), 282 D.L.R. (4th) 317 (FCA) (discrimination complaint should be filed under *Parliamentary Employment and Staff Relations Act*, not under *Canadian Human Rights Act*); *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39 (human rights tribunal had exclusive jurisdiction over dispute); *Canada (House of Commons) v. Vaid* (2005), 252 D.L.R. (4th) 529 (SCC) (grievance procedure under federal public service legislation to be followed instead of human rights complaint); *Bisaillon v. Concordia University*, 2006 SCC 19 (dispute about pension plan management to be processed through grievance machinery, not class action suit); *Isadore Garon Ltée v. Syndicat du Bois Ouvré de la Région de Québec Inc.*, 2006 SCC 2 (Quebec's *Civil Code* provisions respecting notice of termination for individual contracts of employment not incorporated into collective agreement; arbitrator had no jurisdiction over dispute); *Severance v. Oliver* (2007), 54 C.C.E.L. (3d) 161 (PEICA) (grievance procedure to be followed), leave to appeal to SCC ref'd [2007] S.C.C.A. No. 74; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16 (Administrative Tribunal of Quebec has exclusive jurisdiction to hear appeals concerning minority language education). **Compare** *McNairn v. U.A., Local 179* (2004), 240 D.L.R. (4th) 358 (Sask. C.A.) (Queen's Bench had jurisdiction to hear dispute about internal union rules and bylaws); *Wolfert v. Shuchuk*, [2003] 7 W.W.R. 587 (Alta. C.A.) (claim for tort of abuse of public office not struck out, notwithstanding workers' compensation board's exclusive jurisdiction to deal with work-related injuries); *Canpar Industries v. I.U.O.E, Local 115*, 2003 BCCA 609 (notwithstanding that collective agreement silent with respect to application of human rights principles, arbitrator had jurisdiction to address issue of accommodation of disabled employee); *Sachdev v. University of Manitoba* (2001), 156 Man. R. (2d) 315 (Man. C.A.) (court had jurisdiction over dispute as to whether employee acting in course of employment); *Naraine v. Ford Motor Co. of Canada Ltd.* (2001), 13 C.C.E.L. (3d) 208 (Ont. C.A.) (prior to legislative amendments to labour relations legislation, arbitration and human rights proceedings generally mutually exclusive).

3:2370 *Procedural Errors*

Before deciding whether to require an applicant who alleges a breach of the duty of fairness to exhaust any rights of administrative appeal or review, a court must first decide if the administrative proceeding at the second level is capable of "curing" the breach by the first level decision-maker. If not, then the administrative remedy will not be an adequate alternative to judicial review. If, on the other hand, the breach of the duty of fairness can be cured on an administrative appeal or review, then the applicant's failure to pursue this remedy may be a bar to the award of a remedy in judicial review proceedings, provided the court is satisfied that, on a pragmatic or functional analysis, this conclusion is appropriate.[221]

A breach of the duty of fairness may be "cured" by an appeal that takes the form of a *de novo* hearing before another administrative body, at least where the appellant is not required to bear a burden of proof that is more onerous than it bore at first instance, where the second decision-maker is free from any reasonable apprehension of bias, and where the hearing is otherwise conducted fairly.[222] Accordingly, in these circumstances an applicant's failure to exhaust this remedy will normally operate as a bar to relief on judicial review. [223]

At the other extreme, it may be clear from the limited powers of the appeal tribunal that a hearing before it can never "cure" procedural

---

[221] At one time, the courts seemed to think that the answer was determined by whether breach of the rules of natural justice rendered the resulting decision "void" or "voidable," on the basis that if it was "void," then there was no "decision" from which to appeal, thus depriving the appellate tribunal of jurisdiction and rendering it incapable of "curing" the defect. Indeed, this conceptual mode of reasoning was taken seriously by the Supreme Court of Canada, and was used in both the majority and minority judgments as an important element in the reasoning in ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561. Specifically, Beetz J. (at 580-87) held that, unlike jurisdictional defects in the strict sense, a breach of the rules of natural justice merely rendered the decision "voidable," and thus appealable, while Dickson J., dissenting (at pp. 607-09), based his conclusion that the applicant did not have to exhaust the right of appeal in part at least on the proposition that breach of the rules of natural justice rendered the committee's decision null and void.

[222] *AA v. Halifax Regional School Board*, 2014 NSCA 64 at paras. 27-9.

[223] ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561; see also ***New Brunswick (Board of Management) v. Dunsmuir*** (2005), 43 C.C.E.L. (3d) 205 (NBQB), aff'd 2006 NBCA 27, aff'd 2008 SCC 9; *Schmidt v. Canada (Attorney General)* (2011), 386 F.T.R. 286 (FC) (*de novo* hearing cured acknowledged procedural lapses) at para. 20; *British Columbia (Securities Commission) v. Burke* (2008), 297 D.L.R. (4th) 464 (BCSC) (unfairness cured on reconsideration); *Mpega v. Université de Moncton* (1999), 213 N.B.R. (2d) 241 (NBQB), rev'd on other grounds (2001), 622 A.P.R. 349 (NBCA); ***Khan v. University of Ottawa*** (1997), 34 O.R. (3d) 535 (Ont. C.A).

unfairness at first instance. For example, an administrative appeal will not cure the defect where procedural unfairness is not an available ground of appeal,[224] or where the breach alleged is based on delay in instituting the first-level administrative proceeding.[225]

In between these extremes, whether a breach of the duty of fairness will be "cured" on appeal will depend very much on the facts of the particular case.[226] The seriousness of the alleged breach,[227] the strength of the basis of a reasonable apprehension of bias,[228] the nature of the appellate body,[229] whether the earlier decision prejudices the appellant on the appeal,[230] including whether the burden of proof shifts to the appellant,[231] the costs and expeditiousness of the appeal,[232] and the breadth of the appellate tribunal's powers, are all relevant to making

---

[224] *Spence v. Prince Albert (City) Commissioners of Police* (1987), 53 Sask. R. 35 (Sask. C.A.); *Fooks v. Assn. of Architects (Alberta)* (1982), 21 Alta. L.R. (2d) 306 (Alta. Q.B.).

[225] ***Misra v. College of Physicians & Surgeons (Saskatchewan)*** (1988), 52 D.L.R. (4th) 477 (Sask. C.A.), leave to appeal to SCC granted (1989), 79 Sask. R. 80(n).

[226] See *Calvin v. Carr*, [1980] A.C. 574 (P.C.), where this threefold division of options is advanced; see also *Allsop v. Alberta (Appeals Commission for Alberta Workers' Compensation)* (2011), 29 Admin. L.R. (5th) 321 (Alta. C.A.) (subsequent cross-examination cured breach) at para. 39; *Schmidt v. Canada (Attorney General)* (2011), 386 F.T.R. 286 (FC) (*de novo* hearing cured); *Wong v. University of Saskatchewan* (2006), 287 Sask. R. 4 (Sask. Q.B.) (student's *de novo* appeal would cure earlier breach); ***Khan v. University of Ottawa*** (1997), 34 O.R. (3d) 535 (Ont. C.A.), where the issues are carefully considered.

[227] E.g. *Batorski v. Moody* (1983), 4 Admin. L.R. 60 (Ont. Div. Ct.) (bias); see also *Yarmoloy v. School District No. 102 (Banff)* (1985), 63 A.R. 390 (Alta. Q.B.) (no hearing); *Police Assn. (New Glasgow) v. New Glasgow (Town)* (1983), 120 A.P.R. 430 (NSTD) (no hearing); *Storm v. Halifax (City) Commissioners of Police* (1987), 193 A.P.R. 365 (NSCA) (lack of notice); and see ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561, *per* Dickson J.

[228] *Merchant v. Law Society of Alberta* (2007), 431 A.R. 349 (Alta. Q.B.), rev'd (2008), 440 A.R. 377 (Alta. C.A.) (appeal could not cure reasonable apprehension of bias in circumstances); *Stewart v. Lac Ste. Anne (County) Subdivision and Development Appeal Board* (2006), 274 D.L.R. (4th) 291 (Alta. C.A.) (second level appeal did not cure); *Bernard v. Canada (Minister of National Revenue)*, 2002 FCA 400 (court rejected allegation of reasonable apprehension of bias; in any event, would be cured by *de novo* appeal to Tax Court); *B.C.G.E.U. v. British Columbia (Labour Relations Board)* (1986), 26 D.L.R. (4th) 560 (BCCA). See also *Mondesir v. Manitoba Assn. of Optometrists* (1998), 163 D.L.R. (4th) 703 (Man. C.A.), rev'g (1997), 117 Man. R. (2d) 38 (Man. Q.B.) (bias in investigating committee will be cured on appeal).

[229] ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561.

[230] ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561.

[231] E.g. *Taylor v. Law Society (British Columbia)* (1980), 116 D.L.R. (3d) 41 (BCSC).

[232] ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561.

this determination.[233]

In the result, an administrative appeal has been found to be an inadequate alternative where applicants have alleged bias[234] or a lack of notice,[235] or where there was no opportunity given to make submissions on the propriety of the administrative action in question.[236] Conversely, where the decision is interlocutory, such as a decision not to hear certain evidence, it may be that exhaustion of the appeal procedure will be required in order to avoid fragmentation of the issues, and because judicial intervention may never be required.[237] However, when it is difficult for the applicant to determine in advance whether a breach may be cured on appeal, it would not seem reasonable to insist that the applicant must resort to a right of appeal before invoking the courts' supervisory jurisdiction.[238]

---

[233] E.g. *Kennedy v. Manitoba (Enforcement Review Act, Commissioner)* (1999), 135 Man. R. (2d) 27 (Man. Q.B.); *Renaissance International v. Minister of National Revenue*, [1983] 1 F.C. 860 (FCA).

[234] ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3; *C.D. Lee Trucking Ltd. v. I.W.A.W. of Canada* (1998), 47 C.L.R.B.R. (2d) 1 (BCSC); *Spence v. Prince Albert (City) Commissioners of Police* (1987), 53 Sask. R. 35 (Sask. C.A.), leave to appeal to SCC ref'd (1987), 58 Sask. R. 80(n); *Batorski v. Moody* (1983), 4 Admin. L.R. 60 (Ont. Div. Ct.); **see also** *Freeman-Maloy v. York University* (2004), 189 O.A.C. 22 (Ont. Div. Ct.) (internal discipline hearing with appeal to president); *Wood v. Wetaskiwin (County No. 10)* (2001), 290 A.R. 37 (Alta. Q.B.) (allegations of bias and breach of duty of fairness are jurisdictional errors), aff'd without reference to point (2003), 2 Admin. L.R.(4th) 265 (Alta. C.A.). **But see** *Ontario College of Art v. Ontario (Human Rights Commn.)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.); *Turnbull v. Canadian Institute of Actuaries* (1995), 33 Admin. L.R. (2d) 191 (Man. C.A.), leave to appeal to SCC ref'd (1996), 130 D.L.R. (4th) vii(n); **compare** *B.C.G.E.U. v. British Columbia (Labour Relations Board)* (1986), 2 B.C.L.R. (2d) 66 (BCCA).

[235] *Morgan v. Canada (National Parole Board)*, [1982] 2 F.C. 648 (FCA); *Conception Bay South (Town) v. Newfoundland (Public Utilities Board)* (1991), 6 Admin. L.R. (2d) 287 (Nfld. S.C.); *Storm v. Halifax (City) Commissioners of Police* (1987), 193 A.P.R. 365 (NSCA).

[236] *Peterson v. Regional Health Authority A*, 2014 NBQB 73 (no opportunity to respond to report resulting in suspension of medical privileges); *Imperial Oil Ltd. v. British Columbia (Waste Management Act, Regional Waste Manager)* (1998), 4 Admin. L.R. (3d) 182 (BCSC).

[237] *Carter v. Oxford Square Investments* (1988), 32 O.A.C. 328 (Ont. C.A.); **see also** *Cannon v. Canada (Assistant Commissioner, RCMP)*, [1998] 2 F.C. 104 (FCTD); ***Howe v. Institute of Chartered Accountants (Ontario)*** (1994), 19 O.R. (3d) 483 (Ont. C.A.), leave to appeal to SCC ref'd (1995), 27 Admin. L.R. (2d) 118(n).

[238] However, in ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561 at p. 588, Beetz J. stated that it was incumbent on the judge at first instance to make this assessment, "difficult as it may be," in order to decide whether to refuse relief.

3:2380 *Constitutional Law Issues*

Where a tribunal has jurisdiction to determine a question of constitutional law, a court may decline to exercise its jurisdiction to decide the question if resort to the tribunal provides an adequate alternative remedy.[239] This is particularly likely to be the case when findings of fact are required for the determination of the constitutional question.[240] And in one case it was also said that the appeal tribunal's understanding of the relevant policy issues made it appropriate for the tribunal to decide the *Charter* challenge to the validity of a bylaw before the court made its decision.[241] Furthermore, the Supreme Court has declined to determine a question of constitutional law which the applicant had failed to raise before the administrative tribunal.[242]

3:2390 *Issue Estoppel/Res Judicata/Abuse of Process*

The related doctrines of issue estoppel and *res judicata*[243] may arise in judicial review proceedings, both directly,[244] possibly as a

---

[239] See generally topic 13:4000, *post*. **Compare** *Ermineskin Cree Nation v. Canada* (2001), 37 Admin. L.R. (3d) 88 (Alta. Q.B.); *(913719 Ontario Ltd. v. North York (City)* (1998), 41 O.R. (3d) 298 (Ont. Div.Ct.); *Billinkoff v. Winnipeg School Division No. 1* (1999), 170 D.L.R. (4th) 50 (Man. C.A.); **and see** topic 13:4400, *post*, in particular.

[240] E.g. ***Falkiner v. Ontario (Ministry of Community & Social Services)*** (1996), 140 D.L.R. (4th) 115 (Ont. Div. Ct.).

[241] *913719 Ontario Ltd. v. North York (City)* (1996), 29 O.R. (3d) 655 (Ont. Gen. Div.), aff'd (1998), 40 O.R. (3d) 413 (Ont. C.A.). **See also** *Dioguardi Tax Law v. Law Society of Upper Canada*, 2016 ONCA 531 at paras. 2 and 4.

[242] E.g. ***Northern Telecom Ltd. v. Communications Workers of Canada***, [1980] 1 S.C.R. 115. **See also** *Chen v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1954 (FCTD) (court will not consider *Charter* issue on review if not raised before tribunal), **as well as** topic 5:2120, *post*.

[243] The doctrine of *res judicata* holds that once a matter between parties has been litigated and decided by a competent tribunal, it cannot be raised again between the same parties. The dispute in question must be between the same parties, it must be identical in both proceedings, and it must have been brought for the same object. Issue estoppel, a doctrine of somewhat broader application, applies to single issues between the parties which were the subject of a prior determination. **And see generally** D.J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000). **See e.g.** ***Authorson (Litigation Administrator of) v. Canada (Attorney General)*** (2007), 283 D.L.R. (4th) 341 (Ont. C.A.); *Maple Leaf Foods Inc. v. Consorzio Del Prosciutto Di Parma* (2009), 3 Admin. L.R. (5th) 206 (FC) (no final decision, so *res judicata* not applicable), aff'd (2010), 407 N.R. 199 (FCA); *Mohl v. University of British Columbia* (2006), 265 D.L.R. (4th) 109 (BCCA) (issues in action not same as in earlier related judicial review); *Cespedes v. University of Toronto* (2004), 182 O.A.C. 390 (Ont. Div. Ct.) (same issues had been dealt with in earlier court proceedings); *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (NSCA); *Smith v. New Brunswick (Human Rights Commission)* (1999), 179 D.L.R. (4th) 28 (NBCA); *Medicine Hat (City) v. Minister of National Revenue* (1986), 86 D.T.C. 6414 (FCA). **And see** *United States of*

preliminary objection,[215] and in connection with review of an administrative tribunal's *application* of the doctrines,[216] although it is more common for them to be applied in subsequent civil proceedings that are independent of the prior administrative decision.[217] In that context, the question arising is similar to that facing a court when a collateral attack is made in the context of enforcement proceedings:[218] that is, whether in the circumstances it is appropriate to permit an

---

America v. Turenne, [2006] 3 W.W.R. 264 (Man. C.A.) (whether issue estoppel operative in extradition context); *Heynen v. Frito-Lay Canada Ltd.* (1999), 179 D.L.R. (4th) 317 (Ont. C.A.); ***Minott v. O'Shanter Development Co.*** (1999), 42 O.R. (3d) 321 (Ont. C.A.); as well as topic 12:6212, *post*.

[214] See e.g. ***British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)***, 2011 SCC 52 (purposive approach to determination of issue estoppel mandated); *Eli Lilly Canada Inc. v. Apotex Inc.* (2009), 356 F.T.R. 181 (FC) (doctrine of issue estoppel prevented party from pursuing notice of allegation or prohibition application) at para. 2. And see *Stark v. Vancouver School District No. 39* (2007), 62 Admin. L.R. (4th) 79 (BCSC); *Lemay v. Canada Post Corp.* (2003), 26 C.C.E.L. (3d) 241 (Ont. Sup. Ct. J.); *Canada (Attorney General) v. Canada (Information Commissioner)* (2002), 18 C.P.R. (4th) 110 (FCTD) (arguments made had earlier been made in unsuccessful motion to strike applications; *res judicata* and issue estoppel prevented arguments from being raised anew); *Ahani v. Canada (Minister of Citizenship and Immigration)* (1999), 170 F.T.R. 153 (FCTD), where a preliminary motion was granted to adopt a recent decision deciding the same constitutional questions, aff'd (2000), 252 N.R. 83 (FCA), aff'd 2002 SCC 2.

[215] *Budlakoti v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 139 at para. 33.

[216] E.g. *Zulkoskey v. Canada (Minister of Employment and Social Development)*, 2016 FCA 268 (unreasonable to conclude that EI hearing had dealt with discrimination); *Ontario (Ministry of Community Safety and Correctional Services) v. De Lottinville*, 2015 ONSC 3085 (Ont. Div. Ct.); *Anishinabek Police Service v. Public Service Alliance of Canada*, 2012 ONSC 4583 (Ont. Div. Ct.); *Canadian Union of Public Employees, Local 79 v. Toronto (City)*, 2012 ONSC 1158 (Ont. Div. Ct.). And see topic 12:4430, *post*.

[217] E.g. ***Danyluk v. Ainsworth Technologies Inc.***, 2001 SCC 44; see also ***Penner v. Niagara Regional Police Services Board***, 2013 SCC 19, reversing *Penner v. Niagara Police Services Board* (2010), 102 O.R. (3d) 688 (C.A.); *Information and Privacy Commissioner v. Newfoundland and Labrador (Minister of the Department of Business)*, 2012 NLTD(G) 28 (declaration refused, as earlier application determined the question); *742190 Ontario Inc. v. Canada (Customs and Revenue Agency)* (2010), 321 D.L.R. (4th) 696 (FCA) at para. 29; *Atlas Industries Ltd. v. S.M.U., Local 296* (2006), 279 Sask. R. 236 (Sask. C.A.); *International Forest Products Ltd. v. British Columbia* (2004), 15 Admin. L.R. (4th) 222 (BCSC (party issue-estopped from commencing action against Crown); *Imperial Oil Ltd. v. Atlantic Oil Workers Union, Local No.1* (2004), 720 A.P.R. 1 (NSSC); *Fuggle v. Airgas Canada Inc.* (2002), 22 C.C.E.L. (3d) 224 (BCSC); *D'Aoust v. 1374202 Ontario Inc.* (2003), 26 C.C.E.L. (3d) 272 (Ont. Sup. Ct. J.); *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (Ont. Sup. Ct. J.); *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (Ont. C.A.); ***Rasanen v. Rosemount Instruments Ltd.*** (1994), 17 O.R. (3d) 267 (Ont. C.A.), leave to appeal to SCC ref'd (1994), 19 O.R. (3d) xvi; *Hughes Land Co. v. Manitoba* (1998), 167 D.L.R. (4th) 652 (Man. C.A.).

[218] E.g. *Canada (Attorney General) v. Lewry*, 2012 FCA 125; *Dufour v. Canada (Attorney General)*, 2012 FC 1243 at para. 26. And see topic 5:0300, *post*.

administrative decision to be redetermined in the subsequent proceeding. As the Ontario Court of Appeal has noted:

> Issue estoppel is a rule of public policy, and as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.[249]

Subsequently, the Supreme Court of Canada underscored the discretionary nature of the doctrine of issue estoppel, and refused to apply it where an employment standards officer did not afford the appellant proper notice and the opportunity to be heard as to her entitlement to commissions.[250] The Court indicated that where the three conditions for issue estoppel exist, a second step is to be taken in deciding whether the doctrine should apply to an administrative decision. In that regard, the language of the grant of authority, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision-maker, the particular circumstances leading to the decision to seek the administrative remedy and the potential for injustice if the doctrine is applied, ought to be considered in such an exercise of discretion.[251] Nevertheless, it will be an error to

---

[249] ***Minott v. O'Shanter Development Co.*** (1999), 42 O.R. (3d) 321 (Ont. C.A.) at p. 340. **And see discussion in** *Atlas Industries Ltd. v. S.M.U., Local 296* (2006), 279 Sask. R. 236 (Sask. C.A.) (arbitrator properly exercised discretion); ***Toronto (City) v. C.U.P.E., Local 79*** (2001), 55 O.R. (3d) 541 (Ont. C.A.), aff'd on other grounds (2003), 232 D.L.R. (4th) 385 (SCC) (relitigation of case barred by doctrine of issue estoppel, *inter alia*); ***Ontario v. O.P.S.E.U.*** (2003), 232 D.L.R. (4th) 443 (SCC); *R. v. Guerin* (2003), 68 O.R. (3d) 338 (Ont. Ct. J.); *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (Ont. Sup. Ct. J.).

[250] ***Danyluk v. Ainsworth Technologies Inc.***, 2001 SCC 44.

[251] ***Danyluk v. Ainsworth Technologies Inc.***, 2001 SCC 44, foll'd *Eli Lilly Canada Inc. v. Apotex Inc.* (2009), 356 F.T.R. 181 (FC) (all requirements for estoppel met; discretion exercised to apply doctrine); *Cherubini Metal Works Ltd. v. U.S.W.A., Local 4122* (2011), 23 Admin. L.R. (5th) 288 (NSSC) at paras. 70*ff*; *Copage v. Annapolis Valley Band*, 2004 NSCA 147 (NSCA), rev'g (2004), 49 C.P.C. (5th) 98 (NSSC); *Fuggle v. Airgas Canada Inc.* (2002), 22 C.C.E.L. (3d) 224 (BCSC) (discretion exercised to refuse to apply doctrine of estoppel by record, due to breaches of natural justice). **And see discussion in** ***British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)***, 2011 SCC 52; *Penner v. Niagara (Police Services Board)* (2010), 102 O.R. (3d) 688 (Ont. C.A.)

fail to address issue estoppel where the circumstances call for application of the doctrine.[252]

Accordingly, in the exercise of discretion, an analysis of the legislation to determine whether the subsequent proceeding will undermine the effective operation of the administrative scheme, whether the administrative decision-making procedure was intended to be exclusive,[253] including the parties' legitimate and reasonable expectations in that regard,[254] and whether the decision-making leading up to the first decision was adequate and fair,[255] will all be necessary.[256] But, while emphasizing the discretionary and flexible nature of the doctrine of issue estoppel,[257] the Supreme Court has held that its applicability to police disciplinary hearings should not be precluded by a rule of public policy based upon judicial oversight of police accountability.[258]

Of course, apart from the question as to whether the prerogative relief requested should be denied in the exercise of the courts' discretion, the essential requirements of the doctrine must be met: that is, not only

(Continued on page 3 - 47)

---

at paras. 38*ff*; *Rahman v. Canada (Minister of Citizenship and Immigration)* (2006), 302 F.T.R. 232 (FC).

[252] *Balasingham v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 456 at para. 23.

[253] ***Minott v. O'Shanter Development Co.*** (1999), 42 O.R. (3d) 321 (Ont. C.A.). **See also** *Desrivières v. Manitoba* (2001), 14 C.C.E.L. (3d) 14 (Man. Q.B.).

[254] ***Penner v. Niagara (Regional Police Services Board)***, 2013 SCC 19 at para. 47. **See also** *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 75 (discretion not to be bound by Provincial Court decision reasonable in that to decide otherwise would undermine administrative scheme).

[255] *Crescenzo v. Vancouver (City) Board of Variance*, 2015 BCSC 504 at paras. 53-4, referring to ***British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)***, 2011 SCC 52.

[256] ***Penner v. Niagara (Regional Police Services Board)***, 2013 SCC 19 at para. 39 (fairness has two perspectives; procedural and as to the result). **See also** *Black Diamond (Town) v. 1058671 Alberta Inc.*, 2015 ABCA 169 (Board erred in finding earlier communications constituted a decision).

[257] ***Penner v. Niagara (Regional Police Services Board)***, 2013 SCC 19 at para. 29.

[258] ***Penner v. Niagara (Regional Police Services Board)***, 2013 SCC 19 at paras. 8 & 35, reversing *Penner v. Niagara (Police Services Board)* (2010), 102 O.R. (3d) 688 (Ont. C.A.).

must the subsequent dispute be between the same parties,[259] and the issue in the judicial review proceeding must be substantially the same as in the earlier one,[260] but as well the first decision must have been "judicial" in nature,[261] and final in its operation.[262] However, where the

---

[259] *Danicek v. Poole*, 2009 BCCA 456 (parties and issue not the same; decision not final) at paras. 9*ff*; *D'Aoust v. 1374202 Ontario Inc.* (2003), 26 C.C.E.L. (3d) 272 (Ont. Sup. Ct. J.) (different parties); *Naraine v. Ford Motor Co. of Canada Ltd.* (2001), 13 C.C.E.L. (3d) 208 (Ont. C.A.) (different parties); *Medicine Hat (City) v. Wilson* (2000), 191 D.L.R. (4th) 684 (Alta. C.A.) (spouses of injured workers distinct from workers themselves).

[260] *Khadr v. Canada (Prime Minister)* (2010), 321 D.L.R. (4th) 413 (FC) (issues not same) at paras. 44, 45, abated 2011 FCA 92; *Calgary (City) v. Alberta (Municipal Government Board)* (2007), 414 A.R. 216 (Alta. Q.B.) (issue different), rev'd on other grounds 2008 ABCA 187; *Authorson v. Canada (Attorney General)* (2004), 69 O.R. (3d) 106 (Ont. Sup. Ct. J.) (issue not same); *Imperial Oil Ltd. v. Atlantic Oil Workers Union, Local No. 1* (2004), 720 A.P.R. 1 (NSSC) (issues not same); *Apotex Inc. v. Merck & Co.* (2002), 214 D.L.R. (4th) 429 (FCA) (issues same); *Naraine v. Ford Motor Co. of Canada Ltd.* (2001), 13 C.C.E.L. (3d) 208 (Ont. C.A.) (issues not same). **See also** *Moody v. Scott*, 2012 BCSC 657 at para. 51 (issue estoppel applied); *Mohl v. University of British Columbia* (2006), 265 D.L.R. (4th) 109 (BCCA) (issues in action not same as in earlier related judicial review); *Kular v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1393 (FCTD) (board must hear evidence before deciding *res judicata* issue). **Compare** *Athwal v. Canadian Imperial Bank of Commerce* (1999), 172 F.T.R. 24 (FCTD) and *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (Ont. C.A.) (different issues or parties); *Machin v. Tomlinson* (2000), 51 O.R. (3d) 566 (Ont. C.A.) (no issue estoppel because no privity of contract).

[261] See particularly discussion in ***Danyluk v. Ainsworth Technologies Inc.***, 2001 SCC 44 (natural justice error does not vitiate judicial nature of decision); *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (Ont. Sup. Ct. J.); *Symington v. Halifax (Regional Municipality)* (2007), 285 D.L.R. (4th) 76 (NSCA) (earlier proceedings under *Police Act* not "judicial").

[262] *Maple Leaf Foods Inc. v. Consorzio Del Prosciutto Di Parma* (2009), 3 Admin. L.R. (5th) 206 (FC) (no final decision, so *res judicata* not applicable), aff'd (2010), 407 N.R. 199 (FCA); *Schamborzki v. Canada (Royal Canadian Mounted Police)* (2010), 369 F.T.R. 261 (FC) (other decisions not final) at para. 48; *Sweetgrass First Nation v. Favel* (2007), 63 Admin. L.R. (4th) 207 (FC) (previous decision binding notwithstanding fact that significant additional evidence proffered); *Thambiturai v. Canada (Solicitor General)* (2006), 294 F.T.R. 268 (FC) (decision not final until appeal period has expired); *Oberlander v. Canada (Attorney General)* (2004), 69 O.R. (3d) 187 (Ont. Sup. Ct. J.) (Federal Court had declined to rule on issues before provincial superior court; no issue estoppel), leave to appeal granted [2004] O.J. No. 1574; *L.M.O. (Re)*, [2003] 6 W.W.R. 740 (Sask. Q.B.) and cases cited therein (in guardianship cases, earlier decision that mother unfit should be not be considered "final", so subsequent applications not subject to principle of *res judicata*); *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 345 (FCTD) (prior decision not final), aff'd 2003 FCA 482; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development* (1999), 171 F.T.R. 91 (FCTD), aff'd (2001), 201 D.L.R. (4th) 35 (FCA); ***Minott v. O'Shanter Development Co.*** (1999), 42 O.R. (3d) 321 (Ont. C.A.), where it was stated that a decision was final notwithstanding that it could be rescinded or varied by an appellate tribunal. **Compare** *Pinet v. Penetanguishene Mental Health Centre (Administrator)* (2006), 80 O.R. (3d) 139 (Ont. Sup. Ct. J.) (live controversy remained, notwithstanding that transfer had already taken place);

first decision-maker had no jurisdiction to determine the issue it purported to decide, the doctrine of *res judicata* or estoppel will, of course, have no application.[263]

As well, courts have affirmed their right[264] and, possibly, the right of tribunals[265] to refuse to hear a matter or give other relief[266] if to do so would be tantamount to an abuse of process.[267] At least one

---

Holder v. College of Physicians and Surgeons (Manitoba), [2003] 1 W.W.R. 19 (Man. C.A.) (decision not final, notwithstanding that petitioner had been told that no further action would be taken); *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 (*res judicata* does not apply if earlier proceedings did not deal with actual substance of case).

[263] *Nametco Holdings Ltd. v. Canada (Minister of National Revenue)* (2002), 298 N.R. 356 (FCA).

[264] *E.g. Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633. See also *Baharloo v. University of British Columbia*, 2014 BCSC 272 (petitions to review Human Rights Commission and Senate decisions to be heard on merits and decision as to abuse of process deferred).

[265] See, however, *Canada (Attorney General) v. Sheriff*, 2007 FCA, rev'g (2005), 18 C.B.R. (5th) 34 (FC), where the court held that the conditions for granting a stay as set out in *Canada v. Tobiass*, [1997] 3 S.C.R. 391 and *R. v. Taillefer*, [2003] 3 S.C.R. 307, had not been met.

[266] E.g. *United States of America v. Khadr* (2010), 322 D.L.R. (4th) 483 (Ont. Sup. Ct. J.) (extradition denied due to gross misconduct of requesting state; stay granted), aff'd (2011), 106 O.R. (3d) 449 (Ont. C.A.).

[267] ***British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)***, 2011 SCC 52 (purposive approach to doctrine mandated); see also *Lansdowne Park Conservancy v. Ottawa (City)*, 2012 ONSC 1975 (Ont. Div. Ct.) at para. 30 (abuse of process to seek judicial review where same issue before Court of Appeal); *Calgary (City) v. Alberta (Human Rights and Citizenship Commission)* (2011), 331 D.L.R. (4th) 715 (Alta. C.A.); *Reece v. Edmonton (City)* (2010), 324 D.L.R. (4th) 172 (Alta. Q.B.) (declaration refused as abuse of process, since criminal prosecution under legislation was proper way to bring issue before court), aff'd 2011 ABCA 238; *Adams v. Canada (Attorney General)* (2011), 22 Admin. L.R. (5th) 351 (Ont. Div. Ct.) at para. 55, suppl. reasons [2011] O.J. No. 3403, reconsideration denied 2011 ONSC 7592; *Esgenoopetitj (Burnt Church) First Nation v. Canada (Human Resources and Skills Development)* (2010), 19 Admin. L.R. (5th) 335 (FC) (abuse of process found) at paras. 24*ff*; *Maple Leaf Foods Inc. v. Consorzio Del Prosciutto Di Parma* (2009), 3 Admin. L.R. (5th) 206 (FC) (abuse of process found) at para. 30, aff'd (2010), 407 N.R. 199 (FCA); *742190 Ontario Inc. v. Canada (Customs and Revenue Agency)* (2010), 321 D.L.R. (4th) 696 (FCA) at para. 29; *Canada (Minister of Citizenship and Immigration) v. Parekh* (2010), 372 F.T.R. 196 (FC) (revocation of citizenship stayed for abuse of process); *Bajwa v. British Columbia Veterinary Medical Assn.*, 2011 BCCA 265 at paras. 32*ff*, rev'g (2010), 9 Admin. L.R. (5th) 245 (BCSC); *563386 B.C. Ltd. v. Barrett* (2009), 309 D.L.R. (4th) 450 (BCCA) (trial judge should not have entertained action); *United States of America v. Tollman* (2006), 271 D.L.R. (4th) 578 (Ont. Sup. Ct. J.) (stay of extradition process granted), citing test in *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Khadr v. Canada (Minister of Foreign Affairs)* (2004), 266 F.T.R. 20 (FC) (abuse of process to attempt to challenge decision in parallel proceedings); *Central Kootenay (Regional District) v. Jane Doe* (2003), 228 D.L.R. (4th) 252 (BCSC) (police had refused to act in unlawful trespass case, so interlocutory injunction sought; court refused on basis proceeding was "officially induced abuse of process");

court has cautioned, however, that the onus on a party to prove abuse of process is greater than to persuade a court to apply the doctrine of *res judicata*.[268] Delay may be a basis for finding abuse of process,[269] but mere

---

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307; *Charette v. Canada (Commissioner of Competition)* (2002), 20 C.P.R. (4th) 61 (FCTD) (applicant's actions amounted to abuse of process; *mandamus* refused), aff'd 2003 FCA 426; *Germany (Federal Republic) v. Ebke* (2001), 205 D.L.R. (4th) 123 (NWTSC) (extradition context; no abuse of process found), aff'd (2003), 224 D.L.R. (4th) 597 (NWTCA); *Bell Canada v. C.T.E.A.* (2001), 271 N.R 4 (FCA) (party could not bring new challenge based on ground if could have invoked it earlier); *Hutchinson v. Newfoundland (Minister of Health and Community Services)* (2001), 614 A.P.R. 254 (Nfld. S.C.) (inordinate delay); ***United States of America v. Shulman*** (2001), 197 D.L.R. (4th) 69 (SCC) (extradition process); *United States of America v. Cobb*, 2001 SCC 19 (extradition context); ***United States of America v. Tsioubris*** (2001), 197 D.L.R. (4th) 67 (SCC) (extradition context); *Holder v. College of Physicians and Surgeons (Manitoba)* (2000), 149 Man. R. (2d) 239 (Man. Q.B.); *R. v. Reeve* (2000), 136 O.A.C. 292 (Ont. C.A.) (discretion to stay should only be exercised in "clearest of cases"). **And see** *Roach v. Canada (Minister of State, Multiculturalism and Citizenship)* (2007), 86 O.R. (3d) 101 (Ont. Sup. Ct. J.) (no abuse of process: 15 years had elapsed, and earlier dispute had not been fully litigated on merits), aff'd 2008 ONCA 124; *Roeder v. Lang Michener Lawrence & Shaw* (2007), 280 D.L.R. (4th) 294 (BCCA); ***Mugesera v. Canada (Minister of Citizenship and Immigration)***, 2005 SCC 39 (motion for permanent stay of proceedings due to alleged abuse of process refused); *Skandrovski v. Canada (Minister of Citizenship and Immigration)* (2005), 29 Admin. L.R. (4th) 70 (FC) (on motion to re-open, tribunal should be informed of any leave applications before court); *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2 (no abuse of process); *Dwyer v. Canada* (2003), 309 N.R. 163 (FCA) (no abuse of process respecting taxpayer); *R. v. Regan*, 2002 SCC 12 (stay of proceedings for abuse of process only in "clearest of cases"; criteria set out), foll'd *R. v. Dial Drug Stores Ltd.* (2003), 63 O.R. (3d) 529 (Ont. Sup. Ct. J.); ***Toronto (City) v. C.U.P.E., Local 79*** (2001), 55 O.R. (3d) 541 (Ont. C.A.) (where relitigation would undermine integrity of adjudicative system, it should not be permitted), aff'd on other grounds (2003), 232 D.L.R. (4th) 385 (SCC) (arbitrator may not revisit criminal conviction); ***Ontario v. O.P.S.E.U.*** (2003), 232 D.L.R. (4th) 443 (SCC) (no mutuality). **Compare** *P. (J.) v. Plecas*, 2015 BCSC 1962 (abuse of process not applicable to executive action); *Canada (Minister of Citizenship and Immigration) v. Bilalov*, 2013 FC 887 (delay did not cause prejudice and therefore no abuse of process); *Main Rehabilitation Co. v. Canada* (2004), 247 D.L.R. (4th) 597 (FCA) (Tax Court of Canada has no jurisdiction to set aside assessment based on abuse of process); *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 345 (FCTD) (no abuse of process found), aff'd 2003 FCA 482; *Guzman v. Canada (Minister of Citizenship and Immigration)* (2002), 39 Admin. L.R. (3d) 310 (FCTD) (judge of trial division (now Federal Court) cannot review decision made by another judge of trial division; motion for order dismissing application on grounds of abuse of process dismissed); *Thomas v. Ontario (Human Rights Commission)* (2001), 31 Admin. L.R. (3d) 117 (Ont. C.A.) (no abuse of process if other tribunal had not and could not address issue); *Canada (Minister of Citizenship and Immigration) v. Obodzinsky* (2001), 278 N.R. 182 (FCA) (revocation of citizenship proceedings despite subject's poor health not tantamount to abuse of process), foll'd *Canada (Minister of Citizenship and Immigration) v. Fast*, 2001 FCT 1269.

[268] *Withler v. Canada (Attorney General)* (2002), 21 C.P.C. (5th) 102 (BCSC).

[269] *Fabbiano v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1219 at para. 8, referring to ***Blencoe v. British Columbia (Human Rights Commission)***,

delay by a tribunal in rehearing a matter after being directed to do so by a court will not, without more, be found to be an abuse of process.[270]

3:3000 MOOTNESS, LACK OF UTILITY AND JUSTICIABILITY

3:3100 Introduction

The doctrines of mootness and justiciability, and the concept that "no useful purpose" would be served by judicial review, all reflect concerns about judicial economy: that is, the recognition that judicial resources are limited and need to be rationed.[271] They also respond to concerns about the *types* of issues which are suitable for resolution by adjudication,[272] and about the proper constitutional limits of judicial power.[273] Accordingly, when deciding whether to exercise their judicial review jurisdiction, courts are alert to the danger of exceeding the limits of judicial power should they pronounce on the legality of governmental action in the abstract,[274] or elaborate on the law other than in the context of resolving a concrete and live dispute. As well, from another perspective, "subsequent events may either sharpen the controversy or remove the need for a decision."[275]

3:3200 Mootness

A matter is "moot" when, at the time of the court's decision, there

---

[2000] 2 SCR 307 at para. 101. See also discussion in ***Robertson v. British Columbia (Commissioner, Teachers Act)***, 2014 BCCA 331.

[270] *Jaballah v. Canada (Minister of Citizenship and Immigration)* (2002), 222 F.T.R. 197 (FCTD). See also *Jaballah (Re)* (2004), 242 D.L.R. (4th) 490 (FCA) (lack of foreseeable end to delays, and respondent's continued detention in solitary confinement constituted abuse of process).

[271] E.g. *Canada (Minister of Citizenship and Immigration) v. Nemsila* (1997), 3 Admin. L.R. (3d) 83 (FCA); *Children's Aid Society of Halifax v. H. (L.T.)* (1989), 230 A.P.R. 44 (NSCA); *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* (1993), 108 D.L.R. (4th) 145 (NSCA), leave to appeal to SCC ref'd (1994), 108 D.L.R. (4th) vii(n).

[272] See L. Fuller, "The Forms & Limits of Adjudication" (1978-79) 92 *Harv. L.R.* 353.

[273] ***Reference re Canada Assistance Plan (Canada)***, [1991] 2 S.C.R. 525. See also *Larouche v. Alberta (Former Court of Queen's Bench Chief Justice)*, 2015 ABQB 25 at paras. 61-2.

[274] ***Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)***, [1995] 2 S.C.R. 97.

[275] *Eton Construction Co. v. R.* (1991), 6 O.R. (3d) 42 at p. 62 (Ont. Gen. Div.) (*per* Borins J.), aff'd [1996] O.J. No. 1049 (Ont. C.A.).

is "no live controversy or concrete dispute,"[276] or where the substratum of the litigation had disappeared,[277] or it has lost its "*raison d'être*."[278] As the Supreme Court explained in a case involving a challenge to the validity of legislation under the *Canadian Bill of Rights:*

> The doctrine of mootness is an aspect of general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.[279]

Accordingly, jurisdiction has generally been declined where disputes

---

[276] ***Borowski v. Canada (Attorney General)***, [1989] 1 S.C.R. 342 at p. 357; see also *Giorio v. Wilson*, 2014 BCSC 786 (no mootness since 24-hour suspension of driver's licence remained on record); *Calgary Board of Education v. Alberta (Information and Privacy Commissioner)*, 2013 ABQB 187 at para. 35 (order outstanding); *Rootenberg v. Canada (Attorney General)*, 2012 FC 1289 at para. 25 (blemish remained on record); *Holyday v. Toronto (City)* (2010), 265 O.A.C. 109 (Ont. Div. Ct.) at para. 18; *Ambulance Paramedics of British Columbia v. British Columbia (Attorney General)* (2010), 9 Admin. L.R. (5th)19 (BCSC) (challenged decision-maker *functus*) at para. 60; *Gomez v. Canada (Minister of Public Safety and Emergency Preparedness)* (2010), 372 F.T.R. 168 (FC) at para. 44; *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)* (2009), 309 D.L.R. (4th) 411 (FCA) (contrary to trial judge's conclusion, live controversy still existed; application not moot) at para. 27; **compare** *Schaeffer v. Wood* (2011), 107 O.R. (3d) 721 (Ont. C.A.) (legality of police conduct when S.I.U. is involved remains a live issue) at paras. 44-7; *Schamborzki v. Canada (Royal Canadian Mounted Police)* (2010), 369 F.T.R. 261 (FC) (live controversy remained, since court's judgement would have "significant practical effect" on rights of parties) at para. 35; *Siksika First Nation v. Alberta (Director of Southern Region, Alberta Environment)* (2007), 75 Admin. L.R. (4th) 75 (Alta. C.A.) (trial judge erred in declaring moot; live issues existed); *Neto v. Klukach* (2004), 12 Admin. L.R. (4th) 101 (Ont. Sup. Ct. J.) (situation confronting patient with bipolar disorder likely to recur; issue still "live").

[277] ***Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)***, [1995] 2 S.C.R. 97; *Canadian Pacific Ltd. v. Weatherbee; Canadian Pacific Ltd. v. Pullman* (1979), 14 C.P.C. 225 (Ont. H.C.J.), aff'd (1979), 26 O.R. (2d) 776 (Ont. C.A.); *Inuvik Housing Authority v. Koe* (1991), 85 D.L.R. (4th) 548 (NWTSC).

[278] *Cablesystems (Ontario) Ltd. v. Consumers' Assn. (Canada)*, [1977] 2 S.C.R. 740. See also D.J.M. Brown, *Civil Appeals* (Toronto: Carswell, looseleaf) at topic 5:1000.

[279] ***Borowski v. Canada (Attorney General)***, [1989] 1 S.C.R. 342 at p. 353. And on the power to abate an appeal on the ground that a *Charter* challenge to administrative action had become moot, see *Maltby v. Saskatchewan (Attorney General)* (1984), 10 D.L.R. (4th) 745 (Sask. C.A.).

have been characterized as "moot,"[280] "academic,"[281] "advisory,"[282]

---

[280] *Meigs v. Saskatchewan Penitentiary (Institutional Head)*, 2012 SKQB 282 (transfer to medium security institution); *Pembina Institute for Appropriate Development v. Alberta (Utilities Commission)* (2011), 27 Admin. L.R. (5th) 10 (Alta. C.A.); *Chauvin v. Canada* (2009), 35 F.T.R. 200 (FC) (challenge to Dr. Morgentaler's investiture in Order of Canada dismissed as moot); *Canada (Attorney General) v. Elguindy* (2009), 99 O.R. (3d) 137 (Ont. C.A.) (appeal of *habeas corpus* application dismissal); *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] 12 W.W.R. 599 (Man. C.A.) at paras. 368*ff.*; ***Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*** (2009), 273 N.S.R. (2d) 258 (NSSC) at para. 82, rev'd on grounds tribunal should not have been prohibited from proceeding 2010 NSCA 8, aff'd 2012 SCC 10; *Oakland/Indian Point Residents Assn. v. Seaview Properties Ltd.* (2008), 272 N.S.R. (2d) 156 (NSSC) (some development permits sought to be quashed had expired); *Ross v. Riverband Institution (Warden)*, 2009 SKCA 23 (*habeas corpus* application moot, since prisoner moved from segregation); *Abbott Laboratories v. Canada (Minister of Health)* (2007), 371 N.R. 68 (FCA); *Palka v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 81 Admin. L.R. (4th) 239 (FC) (stay of removal orders renders judicial review applications moot); *Vidéotron Telecom Ltée v. C.E.P.* (2005), 345 N.R. 130 (FCA) (judicial review of initial decision, when reconsideration decision on merits not challenged, led to dismissal of application as moot); ***Jane Doe v. Canada (Attorney General)*** (2005), 75 O.R. (3d) 725 (Ont. C.A.) (trial judge had correctly decided issue moot; however, emergence of another applicant in same situation warranted remission to another judge on expedited basis); *Newlab Clinical Research Inc. v. Newfoundland and Labrador Assn. of Public and Private Employees* (2004), 13 Admin. L.R. (4th) 165 (Nfld. & Lab. C.A.) (judicial review of certification order had already occurred; appeal of stay of it moot); *Red Mountain Residents Assn. v. British Columbia (Minister of Forests, Arrow Forest District)* (2003), 11 B.C.L.R. (4th) 246 (BCCA) (disputed road already built); *Rhéaume v. Canada (Attorney General)* (2003), 311 N.R. 153 (FCA) (appeal board had been created); *Canada (Information Commissioner) v. Canadian Cultural Property Export Review Board* (2002), 20 C.P.R. (4th) 214 (FCA) (appeal dismissed as moot because disputed documents already in public domain); *Narvey v. Canada (Minister of Citizenship and Immigration)* (2000), 265 N.R. 205 (FCA) (subject of litigation died). **Compare** *Ontario (Attorney General) v. Ontario (Health Sevices Appeal and Review Board)* (2006), 262 D.L.R. (4th) 688 (Ont. Div. Ct.) (statute in issue not yet in force; further, issue raised was one of general importance as "test case"); *Lo v. Canada (Public Service Commission Appeal Board)* (1997), 222 N.R. 393 (FCA); *Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment & Public Safety)* (1992), 97 Sask. R. 135 (Sask. C.A.); and *Glynos v. Canada* (1992), 96 D.L.R. (4th) 95 (FCA), where it was held that an issue had not become moot.

[281] That is, there is no party whose interests would be affected, hence the issue is of only "academic" interest. **See e.g.** *Secunda Marine Services Ltd. v. Canada (Transport, Marine Transport, Atlantic Region)* (2003), 48 Admin. L.R. (3d) 306 (NSSC); *Bouttavong v. Canada (Minister of Citizenship and Immigration)*, [2003] 4 F.C. 143 (FCTD) (issue became moot on coming into force of *Immigration and Refugee Protection Act*), aff'd (2005), 344 N.R. 134 (FCA); *Canada (Minister of Citizenship and Immigration) v. Nemsila* (1997), 3 Admin. L.R. (3d) 83 (FCA); **compare** *Ottawa (City) v. Ontario (Attorney General)* (2002), 64 O.R. (3d) 703 (Ont. C.A.) (in stating case to court about interpretation of Regulations, not necessary that tribunal make findings of fact).

[282] *P.S.A.C. v. Canada (Communications Security Establishment, Department of National Defence)* (1989), 97 N.R. 382 (FCA). **See also** *R. v. Banks* (2007), 84 O.R. (3d) 1 (Ont. C.A.).

"hypothetical,"[283] or whose resolution would serve "no useful purpose."[284]

Nevertheless, unless legislation provides otherwise,[285] courts retain a residual discretion to decide such cases.[286] And in deciding whether to exercise their discretion, they have taken into account such factors as: the extent to which the court's competence to resolve legal disputes through the adversary system would be preserved;[287] concern for judicial

---

[283] *Almrei (Re)* (2008), 331 F.T.R. 301 (FC) (factual matrix for *Charter an* analysis not established); *R. v. Lindsay*, [2002] 1 W.W.R. 498 (Man. Q.B.) (constitutional matters should not be decided in abstract); *Lavigne v. Canada (Human Resources Development)*, 2001 FCT 1365 and cases cited therein (*Charter* decisions should not be made in factual vacuum) aff'd (2003), 308 N.R. 186 (FCA); **see also** *Vignola v. Keable*, [1983] 2 S.C.R. 112, where (at 119-20) the Court stated "I do not think the Court should issue conditional, hypothetical or indeterminate injunctions"; *Adviento v. Canada (Minister of Citizenship and Immigration)* (2003), 9 Admin. L.R. (4th) 314 (F.C.) (solid factual foundation to decide *Charter* issue not established); *P.I.P.S. v. Canada (Customs and Revenue Agency)* (2004), 251 F.T.R. 56 (FC) (dispute too speculative). **Compare** ***R. v. Mills***, [1999] S.C.J. No. 68 (SCC); ***Solosky v. R.***, [1980] 1 S.C.R. 821; *Scott v. British Columbia (Attorney General)*, [1986] 5 W.W.R. 207 (BCSC).

[284] *R. v. Canada (Board of Broadcast Governors)*, [1962] O.R. 657 (Ont. C.A.); **see also** *BC Civil Liberties Assn. v. University of Victoria*, 2016 BCCA 162 at para. 47; *Hnatiuk v. Society of Management Accountants of Manitoba*, 2013 MBCA 31 at para. 78 (subsequent proceeding cured any defects); *Chakra v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 112; *Cheslatta Carrier Nation v. British Columbia*, [2000] 10 W.W.R. 426 (BCCA); *Arthur v. Canada (Attorney General)* (1999), 254 N.R. 136 (FCA) (individual no longer employed). **And see *dicta* in** *Jazairi v. Ontario (Human Rights Commission)* (1999), 175 D.L.R. (4th) 297 (Ont. C.A.).

[285] E.g. *Privacy Act*, R.S.C. 1985, c. P-21, s. 41, as applied in *Frezza v. Canada (Minister of National Defence)*, 2014 FC 32 (once information is provided there is no remedy).

[286] ***Borowski v. Canada (Attorney General)***, [1989] 1 S.C.R. 342. **And see e.g.** *Khela v. Mission Institution* (2011), 27 Admin. L.R. (5th) 41 (BCCA) (law on *habeas corpus* and prisoners' rights not settled, so discretion exercised to hear appeal) at paras. 36-8 aff'd 2014 SCC 24; *McDougall v. Canada (Attorney General)* (2011), 386 F.T.R. 8 (FC) at para. 49; *Kawartha Pine Ridge District School Board v. Grant* (2010), 101 O.R. (3d) 252 (Ont. Div. Ct.) (proper interpretation of new legislation of great importance to school boards and students); *R. v. Latham* (2010), 346 Sask. R. 175 (Sask. C.A.); *Statham v. Canadian Broadcasting Corp.* (2009), 353 F.T.R. 102 (FC) at para. 30, aff'd (2010), 326 D.L.R. (4th) 228 (FCA); *Kahnapace v. Canada (Attorney General)* (2010), 407 N.R. 195 (FCA) at paras. 7*ff*; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62; *C.U. v. McGonigle*, [2003] 6 W.W.R. 629 (Alta. C.A.) (although appeal moot, issue determined due to possibility of similar cases in future); *Neighbouring Rights Collective of Canada v. SOCAN* (2003), 26 C.P.R. (4th) 257 (FCA); *Tower v. Canada (Minister of National Revenue)* (2003), 231 D.L.R. (4th) 318 (FCA) (interpretation of *Income Tax Act*). **Compare** *Campbell v. British Columbia (Minister of Forests and Range)*, 2012 BCCA 274 (law in flux; issue of standing likely to arise again, so appeal dismissed as moot); *Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (Ont. C.A.). **See further** D.J.M. Brown, *Civil Appeals* (Toronto: Canvasback Publishing, looseleaf) at topic 5:2320.

[287] E.g. *Allen v. British Columbia College of Teachers* (1998), 9 Admin. L.R. (3d) 320 (BCCA), where the court said that it was a necessary prerequisite that one party appear to support the judgment below; *Wiebe v. Alberta (Labour Relations Board)* (2001), 204

economy;[288] and the limits of the courts' proper law-making function.[289] Put otherwise:

> ...a court may relax the rule and in its discretion determine the question of law when there is no lis inter partes if the following exist namely: (1) There is an 'actual interest' still in existence; (2) There is an important question of law as to which there is a difference of opinion in the courts; or (3) It would not otherwise ever be possible to bring the question before the court for determination.[290]

Applying these principles, courts have exercised their discretion to rule upon the validity of Regulations even though they had been replaced, where the Attorney General, and not the initial complainant, was appealing the decision[291] and the new Regulations contained very similar language to that in the Regulations being challenged.[292]

D.L.R. (4th) 169 (Alta. C.A.). **And see discussion** in *Lavoie v. Canada (Minister of the Environment)* (2002), 43 Admin. L.R. (3d) 209 (FCA).

[288] *Somodi v. Canada (Minister of Citizenship and Immigration)* (2009), 311 D.L.R. (4th) 335 (FCA) (judicial economy could result from answering certified question, notwithstanding that actual dispute now moot); *Mental Health Centre Penetanguishene v. Ontario* (2010), 260 O.A.C. 125 (Ont. C.A.) (decision would have practical impact on many others, and is otherwise evasive of review; discretion exercised to hear dispute); *Hendricks v. Canada (Attorney General)* (2004), 238 D.L.R. (4th) 577 (Que.C.A.) (not appropriate to use judicial resources on issue already subject of reference to Supreme Court of Canada). **And see discussion** in *Alberta Teachers' Assn. v. Rocky View School Division No. 41* (2005), 32 Admin. L.R. (4th) 44 (Alta. Q.B.) (resolution would have limited precedential value).

[289] ***Borowski v. Canada (Attorney General)***, [1989] 1 S.C.R. 342. **And see** *PC Ontario Fund v. Essensa*, 2012 ONCA 453 at para. 18; *Thamotharampillai v. Canada (Solicitor General)* (2005), 37 Admin. L.R. (4th) 1 (FC); *Alfred v. Canada (Minister of Citizenship and Immigration)* (2005), 279 F.T.R. 7 (FC); *Quigley v. Canada (House of Commons)*, 2003 FCA 465 (FCA); *Wiebe v. Alberta (Labour Relations Board)* (2001), 204 D.L.R. (4th) 169 (Alta. C.A.); *Glacier View Lodge Society v. British Columbia (Minister of Health)* (2000), 75 B.C.L.R. (3d) 373 (BCCA); *Canada (Minister of Citizenship and Immigration) v. Nemsila* (1997), 3 Admin. L.R. (3d) 83 (FCA).

[290] *Regina Senior Officer's Assn. v. Police Bd. of Commissioners (Regina)*, [1982] 4 W.W.R. 627 at p. 631 (Sask. Q.B.).

[291] ***Forget v. Quebec (Solicitor General)***, [1988] 2 S.C.R. 90. **See also** *Baril v. Obelnicki* (2007), 279 D.L.R. (4th) 304 (Man. C.A.); *Dixon v. Canada (Somalia Inquiry Commission)* (1997), 3 Admin. L.R. (3d) 306 (FCA) (new order-in-council).

[292] ***Mahe v. Alberta***, [1990] 1 S.C.R. 342; **compare** ***2747-3174 Quebec Inc. v. Québec (Régie des permis d'alcool)***, [1996] 3 S.C.R. 919, where the Régie had been abolished by statute, but had been replaced by a similar body; *Liebmann v. Canada (Minister of National Defence)* (2001), 203 D.L.R. (4th) 642 (FCA) (new policy had substantially different wording); *Holland v. Canada (Attorney General)*, [2000] F.C.J. No. 1367 (FCTD) (R.C.M.P. replaced by new Chief Firearms Officer).

Similarly, courts have exercised their discretion to determine judicial review proceedings on their merits, even though the immediate dispute had become moot, in cases relating to the release of information about trade negotiations,[293] the obligation to conduct special reviews relating to the use of pest control products,[294] the legality of a Minister's appointment of a Third Party Manager,[295] anti-competition disputes,[296] immigration matters,[297] tariff decisions by the Copyright Board,[298] a dispute about pari-mutuel betting,[299] the jurisdiction of a Rental Officer,[300] the release of detainees on conditions,[301] the application of essential-services guidelines,[302] the implementation of a fish harvesting plan,[303] a *habeas corpus* appeal,[304] prison transfers,[305] correspondence rights of inmates,[306] mental health

---

[293] *Canada (Information Commissioner) v. Canada (Minister of External Affairs)* (1988), 32 Admin. L.R. 265 (FCTD).

[294] *Üquiterre v. Canada (Minister of Health)*, 2016 FC 554 at para. 37.

[295] *Attawapiskat First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2012 FC 948. **See also** *Dehcho First Nations v. Canada (Attorney General)*, 2012 FC 1043 at para. 40 (a live controversy can exist where a question arises as to the Minister's lawful exercise of power).

[296] *Canada (Commissioner of Competition) v. Labatt Brewing Co.* (2008), 289 D.L.R. (4th) 500 (FCA) (situation likely to recur); *Air Canada v. Canada (Commissioner of Competition)* (2002), 18 C.P.R. (4th) 31 (FCA).

[297] *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 345 at para. 43; *Kozomara v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 715 at paras. 21-2; *Panahi-Dargahlloo v. Canada (Minister of Citizenship and Immigration)* (2010), 357 F.T.R. 9 (FC) at paras. 23-25; *Alfred v. Canada (Minister of Citizenship and Immigration)* (2005), 279 F.T.R. 7 (FC) (applicant had already been removed from Canada); *Figurado v. Canada (Solicitor General)* (2005), 28 Admin. L.R. (4th) 82 (FC) (applicant had already been removed from Canada); *Lai v. Canada (Minister of Citizenship and Immigration)* (2001), 273 N.R. 264 (FCA); *Cuskic v. Canada (Minister of Citizenship and Immigration)* (2000), 261 N.R. 73 (FCA); *Canada (Minister of Citizenship and Immigration) v. Chaudhry* (1999), 178 D.L.R. (4th) 110 (FCA); *Freitas v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 432 (FCTD). **See also** *Shariff v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 640 at para. 24; *Van Vlymen v. Canada (Solicitor General)*, [2005] 1 F.C.R. 617 (FC) (issue capable of repetition, notwithstanding new legislation). **Compare** *Osakpamwan v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 267 (no removal order and no adequate adversarial presentation); *Harvan v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1026 (no adversarial presentation).

[298] *Neighbouring Rights Collective of Canada v. SOCAN* (2003), 26 C.P.R. (4th) 257 (FCA).

[299] *Horsemen's Benevolent and Protective Assn. v. Ontario Racing Commission* (1997), 37 O.R. (3d) 430 (Ont. C.A.).

[300] *Union of Northern Workers v. Carriere*, 2013 NWTSC 5.

[301] *Canada (Ministre de la Sécurité publique et de la Protection civile) v. Ramirez*, 2013 FC 387 at para. 8.

[302] *Health Employers Assn. of British Coumbia v. B.C.N.U.* (1997), 146 D.L.R. (4th) 329 (BCSC).

treatments,[307] mandatory blood transfusions for children under protective legislation,[308] the suspension of a student for marijuana use under new legislation,[309] a municipal bylaw because the situation encountered was likely to recur,[310] the constitutionality of special balloting legislation,[310.1] the test for an injunction,[311] changes to shift schedules that were subject to arbitration,[312] a choice of dispute-resolution mechanisms,[313] a labour dispute that had come to an end,[314] and picketing during a strike.[315] As well, the courts have not declined to decide a challenge to the use of a pesticide that had ceased, but could resume at any time;[316] where the specific relief sought had not previously been obtained;[317] where it concerned important issues

---

[304] *Assoc. des crevettiers acadiens du Golfe inc. v. Canada (Attorney General)* (2011), 385 F.T.R. 302 (FC) (issues raised would recur).

[305] *Fraser v. Kent Institution* (1998), 167 D.L.R. (4th) 457 (BCCA).

[306] *Brown v. Canada (Correctional Service)* (2004), 17 Admin. L.R. (4th) 154 (FC). **See also** *Charlie v. Chafe*, 2016 BCSC 2292 (directions in regard to procedural fairness when an inmate may be assigned to ESP). **Compare** *Skulsh v. Katz*, 2012 BCSC 350 (discretion exercised not to hear moot issue which raised difficult questions of law and was fact-specific).

[307] ***Solosky v. R.***, [1980] 1 S.C.R. 821; **compare** *Jamieson v. British Columbia (Attorney-General)* (1971), 21 D.L.R. (3d) 313 (BCSC).

[308] *Mental Health Centre Penetanguishene v. Ontario* (2010), 260 O.A.C. 125 (Ont. C.A.) (hospital transfer); *British Columbia (Forensic Psychiatric Services Commission) v. British Columbia (Mental Health Act Review Panel)* (2001), 208 D.L.R. (4th) 553 (BCSC); *Rogerson v. Alberta Hospital (Edmonton)* (1999), 43 C.P.C. (4th) 104 (Alta. Q.B.). **See also** *British Columbia (Attorney General) v. British Columbia (Adult Forensic Psychiatric Services)* (2004), 15 Admin. L.R. (4th) 274 (BCCA), rev'd on other grounds (2006), 264 D.L.R. (4th) 10 (SCC).

[309] *Manitoba (Director of Child and Family Services) v. C.(A.)* (2007), 276 D.L.R. (4th) 41 (Man. C.A.), leave to appeal to SCC granted [2007] S.C.C.A. No. 194.

[310] *Kawartha Pine Ridge District School Board v. Grant* (2010), 101 O.R. (3d) 252 (Ont. Div. Ct.).

[310] *3746331 Manitoba Inc. v. Winnipeg (City)* (2000), 146 Man. R. (2d) 268 (Man. Q.B.). **See also** *Fourth Generation Realty Corp. v. Ottawa (City)* (2005), 254 D.L.R. (4th) 315 (Ont. C.A.); *Harrison Hot Springs (Village) v. Kamenka* (2004), 243 D.L.R. (4th) 141 (BCCA); *Mr. Pawn Ltd. v. Winnipeg (City)* (2000), 151 Man. R. (2d) 5 (Man. Q.B.).

[310.1] *Mitchell v. Jackman*, 2016 NLTD(G) 132.

[311] ***Canada (Human Rights Commission) v. Canadian Liberty Net***, [1998] 1 S.C.R. 626.

[312] ***B.W.M.E. v. Canadian Pacific Ltd.*** (1996), 93 B.C.L.R. (2d) 176 (BCCA), aff'd [1996] 2 S.C.R. 495.

[313] *Professional Institute of the Public Service of Canada v. Canada (Food Inspection Agency)*, 2012 FCA 19 at para. 16.

[314] *C.U.P.W. v. Canada (Attorney General)* (1978), 36 N.R. 583 (FCA) at p. 586.

[315] *K Mart Canada Ltd. v. U.F.C.W., Local 1518*, [1998] 2 W.W.R. 312 (BCCA), rev'd [1999] S.C.J. No. 44; *Great Atlantic & Pacific Co. of Canada v. U.F.C.W, Locals 175 & 633* (1995), 24 O.R. (3d) 809 (Ont. Div. Ct.).

respecting the administration of a public insurance scheme,[318] constitutional issues that were of significance to a number of other persons;[319] and matters where the applicants remained prejudiced by decisions that had "collateral consequences" for them.[320] Moreover, courts have cautioned that *Charter* and other constitutional challenges should be decided on the basis of actual factual disputes, rather than on a hypothetical basis.[321]

3:3300 Futility and No Useful Purpose to be Served

While akin to the doctrine of mootness, the notion that "no useful purpose would be served," or that an adjudication would be "futile," relates to the efficacy of any *relief* that a court might grant, rather than to the loss of the substratum of the application or appeal.[322] Generally, where the remedy sought would serve "no useful purpose,"[323] or

---

[316] *Pulp, Paper & Woodworkers of Canada, Local 8 v. Canada (Minister of Agriculture)* (1991), 6 Admin. L.R. (2d) 121 (FCTD), aff'd (1994), 174 N.R. 37 (FCA).

[317] *Strykiwsky v. Mills*, [2000] F.C.J. No. 1404 (FCTD).

[318] *Shier v. Manitoba Public Insurance Corp.* (2008), 231 Man. R. (2d) 198 (Man. C.A.).

[319] E.g. *Toronto Star Newspapers Ltd. v. Canada* (2009), 94 O.R. (3d) 82 (Ont. C.A.) (publication ban), aff'd 2010 SCC 21; *Esquega v. Canada (Attorney General)*, [2008] 1 F.C.R. 795 (FC); (issue "rises continually in the context of Band elections" at para. 59), rev'd on other grounds 2008 FCA 182; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (remedial authority of judge respecting *Charter* violations); *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Moose Jaw (City) v. Saskatchewan (Human Rights Commn.)*, [1989] 2 S.C.R. 1317; ***Reference re: Secession of Quebec***, [1998] 2 S.C.R. 217; *M. v. H.* (1999), 171 D.L.R. (4th) 577 (SCC); ***New Brunswick (Minister of Health and Community Services) v. G. (J.)*** (1999), 177 D.L.R. (4th) 124 (SCC) (court has jurisdiction to reformulate constitutional question); **see also e.g.** ***Jane Doe v. Canada (Attorney General)*** (2005), 75 O.R. (3d) 725 (Ont. C.A.); *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2000), 196 D.L.R. (4th) 136 (Ont. Div. Ct.), aff'd (2001), 201 D.L.R. (4th) 698 (Ont. C.A.); ***New Brunswick (Minister of Health and Community Services) v. G.(J.)*** (1997), 145 D.L.R. (4th) 349 (NBCA), rev'd [1999] 3 S.C.R. 46; *Dixon v. Canada (Somalia Inquiry Commission)* (1997), 3 Admin. L.R. (3d) 306 (FCA). **But see** *Chakra v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 112 (even if judicial review allowed to proceed, constitutional issue would not necessarily be decided).

[320] *Nikolayeva v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 708 (FCTD); *Freitas v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 432 (FCTD); *Roberts v. Ontario* (1994), 19 O.R. (3d) 387 (Ont. C.A.); *Landreville v. R.*, [1973] F.C. 1223 (FCTD); **see also** ***Vic Restaurant Inc. v. Montreal***, [1959] S.C.R. 58; *Figurado v. Canada (Solicitor General)* (2005), 28 Admin. L.R. (4th) 82 (FC); **compare** *Margaree Environmental Assn. v. Nova Scotia (Minister of the Environment)* (1989), 58 D.L.R. (4th) 544 (NSCA).

[321] E.g. *R. v. Banks* (2007), 84 O.R. (3d) 1 (Ont. C.A.) and cases cited therein.

[322] However, on occasion the concept has been used to refer to that circumstance: **e.g.** *R. v. Canada (Board of Broadcast Governors)*, [1962] O.R. 657 (Ont. C.A.); **see also** *R. v. D. (G.)* (1991), 46 O.A.C. 1 (Ont. C.A.), leave to appeal to SCC ref'd (1991), 3 O.R. (3d) xiii(n); *Landreville v. R.*, [1973] F.C. 1223 (FCTD).

involved something impossible to implement in law or fact,[324] judicial review proceedings have been dismissed.

Moreover, even when the relief sought could have a future impact on the parties and others,[325] it may nevertheless be refused on the basis that it would "serve no useful purpose,"[326] would "result in a declaration in the air,"[327] or would "have no practical effect."[328] That is not to say, however, that such relief need have "legal effect" to serve a useful purpose.[329] Indeed, the Supreme Court has noted that:

> Prerogative relief should only be refused on the ground of futility in those few instances where the issuance of a prerogative writ would be effectively nugatory. For example, a case where the order could not possibly be implemented...It is a different matter, though, where it cannot be determined *a priori* that an order in the nature of prerogative relief will have no practical effect.[330]

As well, courts have generally refused to speculate about possible outcomes in the event that procedural proprieties are observed, or to

---

[323] *Jess v. Estevan (City)*, 2013 SKQB 99 at paras. 44-5; *Awed v. Canada (Minister of Citizenship and Immigration)* (2006), 46 Admin. L.R. (4th) 233 (FC); *Charette v. Canada (Commissioner of Competition)* (2003), 312 N.R. 358 (FCA) (no practical value); *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)* (1998), 223 N.R. 212 (FCA); *Brown v. Waterloo (Region) Commissioners of Police* (1985), 7 O.A.C. 518 (Ont. Div. Ct.), leave to appeal to Ont. C.A. refused (1985), 12 Admin. L.R. xxxvii(n) (relief would result in reinstatement which would not be appropriate); *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191 (Ont. Div. Ct.), aff'd (1987), 20 O.A.C. 381 (Ont. C.A.) (result would be reinstatement of minister in position already filled); *Moore v. New Brunswick (Civil Service Commn.)* (1981), 88 A.P.R. 98 (NBQB) (transfer of operations made relief pointless).

[324] *Vara v. Canada (Minister of Manpower & Immigration)*, [1976] 2 F.C. 139 (FCTD).

[325] ***Solosky v. R.***, [1980] 1 S.C.R. 821; *Montana Band of Indians v. R.*, [1991] 2 F.C. 30 (FCA).

[326] ***Eli Lilly & Co. v. Novopharm Ltd.***, [1998] 2 S.C.R. 129; ***Horsemen's Benevolent & Protective Assn. of Ontario v. Ontario Racing Commn.*** (1995), 25 O.R. (3d) 206 (Ont. Div. Ct.) (no purpose because Commission had no jurisdiction over simulcast racing dates).

[327] *Bekar v. Bulkley Nechako (Regional District)* (1987), 19 B.C.L.R. (2d) 256 (BCSC), rev'd in part (1989), 60 D.L.R. (4th) 602 (BCCA).

[328] E.g. *Bull v. Canada (Attorney General)*, 2002 FCT 374 (review by appeal board concerning eligibility of councillor whose term had expired denied); *Ratepayers of Calgary (City) v. Canada*, [2000] 4 W.W.R. 274 (Alta. Q.B.), aff'd (2001), 286 A.R. 128 (Alta. C.A.); *Canadian Pacific Forest Products Ltd. v. British Columbia (Minister of Forests)* (1993), 17 Admin. L.R. (2d) 261 (BCSC) (purpose of meeting had been obviated by policy announcement).

[329] E.g. *Landreville v. R.* (1973), 41 D.L.R. (3d) 574 (FCTD), where a judge who had resigned sought a declaration that the commission of enquiry leading to his resignation was flawed as it continued to bear upon his reputation.

[330] ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3 at p. 80.

accede to an argument that relief should not be granted because the tribunal would have reached the same decision, regardless of the breach of the duty of fairness.[331] However, in unusual circumstances a court may be satisfied that the tribunal's decision was inevitable in law or on the facts, and that since the error was plainly immaterial to the result, the court should decline to grant relief rather than require the agency to go through the formality of conducting another hearing when the outcome was inevitable.[332] Hence a judicial review application was dismissed in relation to the promulgation of a regulation.[333] And in another instance, it was held that, where the failure by a tribunal to observe procedural fairness is insignificant, the decision can still be upheld if it is otherwise reasonable.[334] Likewise, where subsequent jurisprudence overcame a failure to consider a matter, an order for reconsideration was not made.[335]

3:3400 Justiciability

In general, a court may refuse in its discretion to answer questions that are not "justiciable."[336] That is, the question whether the courts are an appropriate forum for the resolution of the dispute is in issue.[337] In one sense, the doctrine of justiciability deals with the

---

[331] E.g. ***Kane v. University of British Columbia***, [1980] 1 S.C.R. 1105; **see also** ***Cardinal v. Kent Institution***, [1985] 2 S.C.R. 643; *Desroches v. R.* (1983), 42 O.R. (2d) 758 (Ont. Div. Ct.); ***Lakeside Hutterian Colony v. Hofer***, [1992] 3 S.C.R. 165. **And see further** topic 3:8100, *post*.

[332] ***Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board***, [1994] 1 S.C.R. 202, foll'd *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 at paras. 117, 154; *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)* (2010), 320 D.L.R. (4th) 310 (BCCA) (doctrine of futility applies even when bias alleged); *Canada (Minister of Citizenship and Immigration) v. Nkunzimana* (2005), 54 Admin. L.R. (4th) 122 (FC); *Sinclair v. Conservative Party of Canada* (2004), 23 Admin. L.R. (4th) 86 (FC), aff'd 2005 FCA 383; *Lord's Evangelical Church of Deliverance and Prayer of Toronto v. Canada* (2004), 328 N.R. 179 (FCA) (revocation of charitable status), suppl. reasons 2006 FCA 3; **see also** *Adewusi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 75 at para. 9. **Compare** the more equivocal statement in *Evershed v. Ontario* (1984), 5 D.L.R. (4th) 340 at p. 344 (Ont. Div. Ct.), aff'd (1985), 17 D.L.R. (4th) 168 (Ont. C.A.), to the effect that the duty of fairness "has no relation to the *inevitability* of the result but only as to the procedure that must be followed" [emphasis added]. **See also** topic 3:8200, *post*.

[333] *Amalorpavanathan v. Ontario (Minister of Health and LongTerm Care)*, 2013 ONSC 5415 (Ont. Div. Ct.) at paras. 15-16.

[334] *Oliver v. Canada (Customs and Revenue Agency)* (2004), 23 Admin. L.R. (4th) 44 (FC).

[335] *K. (N.) v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1040 at para. 24.

[336] See also topics 1:7310, *ante*; 15:2121, *post*.

[337] ***Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resour-***

inherent characteristics of a dispute which make it suitable for adjudication by the courts.[338] And while a breach of a statute need not be shown in order for a matter to be justiciable in judicial review proceedings,[339] an application may be dismissed for lack of a justiciable issue where no infringement of a right or interest is alleged.[340]

The concept of "justiciability" can also connote the inherent difficulties of establishing matters of a public policy or political nature through forensic evidence. This point has been cogently expressed in an English case, which was quoted with approval in the Supreme Court of Canada as follows:

> ... The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury.[341]

---

ces), [1989] 2 S.C.R. 49 at p. 90, *per* Dickson C.J.C. quoting from ***Operation Dismantle Inc. v. R.***, [1985] 1 S.C.R. 441. **And see *Reference re: Secession of Quebec***, [1998] 2 S.C.R. 217; *Copello v. Canada (Minister of Foreign Affairs)*, 2001 FCT 1350, aff'd (2003), 3 Admin. L.R. (4th) 214 (FCA); *C.U.P.E. v. Canada (Minister of Health)* (2004), 244 D.L.R. (4th) 175 (FC).

[338] *Schaeffer v. Wood* (2011), 107 O.R. (3d) 721 (Ont. C.A.) at para. 43; *Criminal Defence Lawyers Assn. (Saskatoon). v. Saskatchewan*, [1984] 3 W.W.R. 707 at p. 713 (Sask. Q.B.); **see also *Reference re Canada Assistance Plan (Canada)***, [1991] 2 S.C.R. 525; *Medhurst v. Medhurst* (1984), 45 O.R. (2d) 575 (Ont. H.C.J.); *Dehler v. Ottawa Civic Hospital* (1979), 25 O.R. (2d) 748 (Ont. H.C.J.).

[339] *Montana Band of Indians v. R.*, [1991] 2 F.C. 30 (FCA); **see also *Smith v. Canada (Attorney General)*** (2009), 307 D.L.R. (4th) 395 (government withdrawal of clemency support for Canadian subject to death penalty abroad judicially reviewable); *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279.

[340] E.g. *Grain Farmers of Ontario v. Ontario (Ministry of the Environment and Climate Change)*, 2016 ONCA 283 (no dispute over farmers' rights, simply a challenge to wisdom of regulation); *University of British Columbia v. British Columbia College of Teachers* (2002), 213 D.L.R. (4th) 149 (BCCA) (dispute over nature of university program non-justiciable); *Schreiber v. Canada (Attorney General)*, [2000] 1 F.C. 427 (FCTD); *Akinbobala v. Canada (Attorney General)* (1997), 155 F.T.R. 215 (FCTD). **See also *Sauvé v. Canada (Attorney General)***, 2016 FC 401 at paras. 82-3 (protocol for disclosure of information not ripe for determination); *Ndegwa v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 249 (impugned decision not the one for which leave granted); *Franke Kindred Canada Ltd. v. Gacor Kitchenware (Ningbo) Co.*, 2012 FCA 316 (no allegation of reviewable error); *Thibault v. Ontario (Attorney General)*, 2012 ONSC 801 (Ont. Div. Ct.) (review of police services generally); *Kimoto v. Canada (Attorney General)* (2011), 25 Admin. L.R. (5th) 248 (FC), aff'd 2011 FCA 291.

[341] *Chandler v. Director of Public Prosecutions*, [1964] A.C. 763 at pp. 798-99 (H.L.) (*per*

Such issues of justiciability most frequently arise in a constitutional setting where the debate is whether courts or Parliament should decide an issue.[342] For example, the act of giving Royal Assent by the Governor-General is not justiciable as it is an aspect of enacting legislation.[343] Similarly, the lack of a justiciable issue has led to the dismissal of judicial review proceedings where the issues were the failure to consult a Yukon representative about constitutional talks,[344] the existence of a deadlock in the Senate,[345] witholding or granting honours,[346] failure of a provincial minister to ensure animal health protection,[347] the existence of an international treaty,[348] and the refusal by a minister to supply information that the Auditor General had demanded pursuant to statute.[349]

Lord Radcliffe), as quoted by Wilson J. in ***Operation Dismantle Inc. v. R.***, [1985] 1 S.C.R. 441. **But compare** the statement by Wilson J. in that case (at pp. 465-66) responding to the contention in the Federal Court of Appeal to the effect that policy questions are inherently unsuited to adjudication: "it can be pointed out that, however unsuited courts may be for the task, they are called upon all the time to decide questions of principle and policy."

[342] ***Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)***, [1989] 2 S.C.R. 49; **see also** ***Friends of the Earth v. Canada (Governor in Council)*** (2008), 39 C.E.L.R. (3d) 191 (FC) (government's failure to comply with Kyoto Protocol not justiciable); *Victoria (City) v. Adams* (2009), 313 D.L.R. (4th) 29 (BCCA) (notwithstanding that political concerns raised, legality of bylaw justiciable); *Representative for Children and Youth v. B.C. (Premier)*, [2010] 1 W.W.R. 163 (BCSC) (issue concerning disclosure of Cabinet submissions is justiciable); *Khadr v. Canada (Attorney General)* (2006), 268 D.L.R. (4th) 303 (FC) (issuance of passports); *Canadian Assn. of the Deaf v. Canada* (2006), 272 D.L.R. (4th) 55 (FC) (failure to accommodate needs of deaf persons justiciable); *C.U.P.E. v. Canada (Minister of Health)* (2005), 21 Admin. L.R. (4th) 108 (FC) (issue was of inherently political nature); **see further** *PSAC v. Canada (Attorney General)*, 2013 FC 918 at paras. 34-6 (Minister's decision to order vote in a public labour relations context justiciable), referring to a survey of the case law on justiciability in *Kelly v. Canada (Attorney General)*, 2013 ONSC 1220 (Ont. S.C.J.); ***Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*** (2002), 211 D.L.R. (4th) 741 (Ont. C.A.) (reasons for passing Regulations not justiciable); ***Black v. Chrétien*** (2000), 47 O.R. (3d) 532 (Ont. Sup. C.J.), aff'd (2001), 199 D.L.R. (4th) 228 (Ont. C.A.); *Sark v. Abegweit Band (Council)*, 2001 FCT 1184 (matter justiciable).

[343] *Galati v. Johnston*, 2015 FC 91 at paras. 44 *ff.*

[344] *Penikett v. R.* (1988), 21 B.C.L.R. (2d) 1 (Yuk. C.A.), leave to appeal to SCC ref'd (1988), 46 D.L.R. (4th) vi(n). **Compare** ***Hupacasath First Nation v. Canada (Minister of Foreign Affairs)***, 2015 FCA 4 at paras. 68-70 (although the signing of a treaty may not be justiciable, the issue of whether there is an obligation to consult as to its impact is justiciable).

[345] *LeBlanc v. Canada* (1991), 3 O.R. (3d) 429 (Ont. C.A.).

[346] ***Black v. Advisory Council for the Order of Canada***, [2012] F.C.J. No. 1309 at para. 51, aff'd 2013 FCA 267.

[347] *Teja's Animal Refuge v. Quebec (Attorney General)* (2009), 100 Admin. L.R. (4th) 292 (Que. C.A.).

[348] *Wilcox v. Canada (Minister of Foreign Affairs)*, 2015 FC 1266 at para. 26.

[349] ***Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resour-***

However, although the decision on its merits may not be justiciable, where there has been a legitimate expectation created as to the procedure to be followed, the question of compliance is justiciable.[350] As well, justiciability questions can arise when matters of standing[351] and intervention require determination.[352]

3:4000 PREMATURITY

3:4100 Introduction

Prematurity issues tend to arise most frequently where the relief sought is in the nature of prohibition or an injunction, or a declaration,[353] although they can also arise in connection with other types of remedy.[354] Moreover, the considerations bearing on the court's exercise of discretion are similar to those relating to the requirement that administrative procedures be exhausted.[355] Indeed, it may be difficult to disentangle these "adequate alternative remedy"[356] and "exhaustion" issues from concerns about prematurity.[357] Nevertheless, prematurity issues can arise in three general sets of circumstances.

---

ces), [1989] 2 S.C.R. 49, where the Court considered that the duty of the Auditor to report to the House of Commons was in the circumstances an adequate alternative remedy to judicial review. **See also** *C.U.P.E. v. Canada (Minister of Health)* (2004), 244 D.L.R. (4th) 175 (FC).

[350] ***Black v. Advisory Council for the Order of Canada***, [2012] F.C.J. No. 1309 at paras. 64*ff*, aff'd 2013 FCA 267. As to the doctrine of legitimate expectations generally, see topic 7:1700, *post*.

[351] See topic 4:3522, *post*; **see also** *Lelond v. Park West School Division*, 2015 MBCA 116; ***Finlay v. Canada (Minister of Finance)*** (1983), 1 Admin. L.R. 76 (FCA), aff'd [1986] 2 S.C.R. 607; *Schaeffer v. Wood* (2011), 107 O.R. (3d) 721 (Ont. C.A.); *Fogo (Town) v. Newfoundland* (2000), 23 Admin. L.R. (3d) 138 (Nfld. S.C.); *Ratepayers of Calgary (City) v. Canada*, [2000] 4 W.W.R. 274 (Alta. Q.B.), aff'd (2001), 286 A.R. 128 (Alta. C.A.); *Federation of Metropolitan Toronto Tenants' Assns. v. York (City)* (1988), 51 D.L.R. (4th) 731 (Ont. Div. Ct.); ***Thorson v. Canada (Attorney General) (No. 2)***, [1975] 1 S.C.R.

[352] *Bagnell v. Canada (Minister of Fisheries & Oceans)* (1987), 10 F.T.R. 150 (FCTD); **see also** *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (FCTD), rev'd in part [1990] 1 F.C. 90 (FCA).

[353] E.g. *Coldwater Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2014 FCA 277 (premature to seek prohibition and declaration as to the extent of Ministers power to consent).

[354] E.g. *Saine v. Beauchesne*, [1963] S.C.R. 435, where the relief sought was *certiorari*; *Jans v. Jans*, 2014 SKQB 54 (*certiorari* and *mandamus* sought).

[355] See generally topic 3:2300, *ante*.

[356] E.g. *Singh v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 826 at para. 43; *Boles v. Law Society of British Columbia*, 2013 BCSC 22 at para. 46. **And see** generally topic 3:2200, *ante*.

[357] ***Wilson and Atomic Energy of Canada Ltd., Re***, 2015 FCA 17 at para. 21, rev'd on merits 2016 SCC 29; **see also** *Canadian National Railway v. BNSF Railway*, 2016 FCA 284

First, a matter may be premature or "unripe" in the sense that the legal or practical requirements of judicial review have not been met, as, for example, where no statutory power has yet been exercised and it is not immediately likely to be exercised.[358] In these circumstances, there will normally be little room for a court to entertain the proceeding in the exercise of its discretion.[358.1]

Second, where an interim or interlocutory decision has been made, there will be a record of the proceeding, so in that sense it is "ripe" for review. However, the court has a discretion as to whether to undertake review before the administrative process has been completed. In those circumstances, the pivotal consideration for a court is the need to avoid fragmenting the administrative process and encouraging piecemeal resort to the courts.[359] Furthermore, if the court declines to grant relief until the final administrative decision has been rendered, there may be no dispute left to resolve.[360]

And third, courts now generally defer a determination of an allegation that an administrative decision-maker has no jurisdiction over a matter or has breached the duty of fairness until the administrative process is complete. Not only does this avoid fragmentation of the issues and possibly unnecessary litigation, but it also permits the reviewing court to have the benefit of a complete record[361] and, through the tribunal's reasons for decision, its

---

at para. 15; ***Black v. Canada (Attorney General)***, 2012 FC 1306 at para. 56 (aff'd 2013 FCA 201), ref'g to ***CB Powell Ltd v Canada (Border Services Agency)***, 2010 FCA 61; *Timberwolf Log Trading Ltd. v. British Columbia (Comm'r apptd Pursuant to s. 142.11 Forest Act)* (2011), 331 D.L.R. (4th) 405 (BCCA); *Khan v. Scarborough General Hospital*, [2009] O.J. No. 5437 (Ont. Div. Ct.) at para. 31 *Deloitte & Touche LLP v. Institute of Chartered Accountants (Alberta)* (2006), 406 A.R. 232 (Alta. Q.B.); *Nova Scotia (Securities Commission) v. Potter* (2006), 266 D.L.R. (4th) 147 (NSCA); *Condo v. Canada (Attorney General)* (2004), 256 F.T.R. 291 (FC); *Pearlman v. University of Saskatchewan* (2004), 248 Sask. R. 35 (Sask. Q.B.); ***Pearlman v. University of Saskatchewan***, [2002] 8 W.W.R. 451 (Sask. C.A.).

[358] E.g. *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217 at para. 34 (premature to challenge proposed order by CRTC relating to substitution in connection with Super Bowl when order not made); *Lukács v. Canada (President, Natural Sciences and Engineering Research Council)*, 2015 FC 267 at para. 58 (OIC had not yet investigated); *Peguis First Nation v. Canada (Attorney General)*, 2013 FC 276 (application struck where no indication government did not intend to consult), aff'd 2014 FCA 7.

[358.1] But see *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500 at paras. 61-3 (issues fully argued, and practical reliance on non-binding opinions warranted decision on merits).

[359] E.g. *Mosaic Potash Colonsay ULC v. USW, Local 7656*, 2016 SKCA 78 at paras. 18-19 (refusal to order transcription of an arbitration); *Macpherson v. Huron (County)*, 2015 ONSC 6327 (Ont. Div. Ct.) at para.29.

[360] ***Wilson and Atomic Energy of Canada Ltd., Re***, 2015 FCA 17 at para. 31, rev'd on merits 2016 SCC 29.

"expertise."[362] As well, a court may be reluctant to decide a question of statutory interpretation before findings of fact have been made to provide a concrete context for an answer.[363]

3:4200 Lack of Ripeness

While judicial relief need not be delayed until allegedly unlawful administrative action has been taken,[364] the institution of judicial review proceedings will be premature in the strict sense if it is not clear that the act will be inconsistent with the grant of authority,[365] or in contravention of the requirements of procedural fairness.[366] From another perspective, the concern underlying this principle is that any

---

[361] E.g. *Commission Scolaire Francophone du Yukon c. Yukon (Tribunal d'Appel de l'Éducation)*, 2015 YKSC 24 at para. 21; *Kawula v. Institute of Chartered Accountants (Saskatchewan)* (2010), 348 Sask. R. 213 (Sask. Q.B.) at para. 31 (no record existed yet therefore no basis on which court could intervene), aff'd 2011 SKCA 80.

[362] E.g. *Canada (Attorney General) v. Hotte* (2005), 295 F.T.R. 14 (FC); *Nova Scotia (Securities Commission) v. Potter* (2006), 266 D.L.R. (4th) 147 (NSCA) (fact that deference owed to decision of securities commission strengthened arguments against interference at preliminary stage); *Cybulski v. Ontario (Human Rights Commission)* (2005), 206 O.A.C. 216 (Ont. Div. Ct.); *Shaughnessy v. Investment Dealers Assn. of Canada* (1999), 125 O.A.C. 265 (Ont. Div. Ct.); *Newfoundland (Human Rights Commission) v. Newfoundland (Department of Health)* (1998), 13 Admin. L.R. (3d) 142 (Nfld. C.A.); *Canada (Department of National Defence) v. Ontario (Workers' Compensation Board)* (1992), 8 Admin. L.R. (2d) 122 (Ont. Div. Ct.).

[363] E.g. *P.I.P.S. v. Canada (Customs and Revenue Agency)* (2004), 251 F.T.R. 56 (FC); *Graham v. Alberta (Director, Chemicals Assessment & Management, Environmental Protection)*, [1998] 3 W.W.R. 271 (Alta. C.A.); *Thompson v. Chiropractors' Assn. (Saskatchewan)* (1996), 36 Admin. L.R. (2d) 273 (Sask. Q.B.).

[364] *Canadian Indemnity Co. v. British Columbia (Attorney General)* (1974), 56 D.L.R. (3d) 7 (BCSC), aff'd [1976] 2 W.W.R. 499 (BCCA), aff'd [1977] 2 S.C.R. 504 (declaration sought challenging constitutionality of statutory provisions before they are proclaimed). **See also** *Ishaq v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 156 (mandatory policy as to face-coverings to be applied by Citizenship Judge); ***Reference re: Secession of Quebec***, [1998] 2 S.C.R. 217.

[365] E.g. *Marchand v. College of Massage Therapists of British Columbia*, 2012 BCSC 703 (lawfulness of Registrar's cancellation of election, and substitution of election by mail-in ballots).

[366] *Canada (Attorney General) v. Canada (Information Commissioner)* (2004), 15 Admin. L.R. (4th) 58 (FC), rev'd on other grounds (2005), 253 D.L.R. (4th) 590 (FCA); ***Smolensky v. British Columbia Securities Commission*** (2004), 236 D.L.R. (4th) 262 (BCCA); *Canada (Attorney General) v. Moore* (1998), 160 F.T.R. 233 (FCA). **See also** *Abbott Laboratories v. Canada (Minister of Health)* (2003), 28 C.P.R. (4th) 79 (FCTD) (not yet clear parties would not be able to meet deadline; application to extend time-limits premature). However, a constitutional challenge to a bill may be entertained, even though there is no certainty that it will be enacted in that form or at all: **e.g.** *Canadian Indemnity Co. v. British Columbia (Attorney General)* (1975), 56 D.L.R. (3d) 7 (BCSC), aff'd [1976], 2 W.W.R. 449 (BCCA), aff'd [1977], 2 S.C.R. 504.

remedy sought in judicial review proceedings should completely dispose of a matter.[367]

For example, judicial review proceedings have been dismissed for prematurity: where proposed amendments to a statute had yet to be enacted;[368] where a sufficient factual matrix for *Charter* analysis had not yet been established;[369] where it was not yet clear whether prejudice had resulted from a tribunal's delay;[370] where it was not possible to determine whether the exercise of a statutory power was "proposed";[371] where a decision on the admission or relevance of evidence had not yet been made by a tribunal;[372] where evidence had not yet been excluded as irrelevant;[373] where it was not yet clear how a tribunal would interpret the confidentiality provisions of a statute;[374] where it was not yet clear that refusal of access to records had been denied,[375] where a request for an adjournment had not yet been refused;[376] where the consultation process had not been completed;[377] where disclosure had allegedly been inadequate;[378] where particulars

---

[367] E.g. *Romanuck v. Penkala* (1984), 35 Sask. R. 216 (Sask. Q.B.), aff'd (1987), 56 Sask. R. 27 (Sask. C.A.).

[368] E.g. *2005 Robert Julien Family Delaware Dynasty Trust v. Canada (Minister of National Revenue)* (2008), 381 N.R. 325 (FCA).

[369] See *Almrei (Re)* (2008), 331 F.T.R. 301 (FC) and cases cited therein; *Almrei (Re)*, 2009 FC 322 at para. 54. **See also** *Ewert v. Canada (Attorney General)* (2008), 382 N.R. 370 (FCA).

[370] *Ukrainian Museum of Canada v. Saskatchewan (Human Rights Commission)* (2010), 356 Sask. R. 220 (Sask. Q.B.) at paras. 50-52.

[371] E.g. ***S.E.I.U., Local 204 v. Broadway Manor Nursing Home*** (1984), 48 O.R. (2d) 225 (Ont. C.A.), leave to appeal to SCC ref'd (1985), 8 O.A.C. 320; **and see** topic 2:2424, *ante*.

[372] *Sawridge Band v. Canada* (2005), 265 F.T.R. 1 (FC), suppl. reasons 2006 FC 656; *Cara Operations Ltd. v. Canada (Registrar of Trade Marks)* (1985), 10 Admin. L.R. 27 (FCTD). **See also** *Prousky v. Law Society of Upper Canada* (1987), 61 O.R. (2d) 37 (Ont. H.C.J.), aff'd (1987), 62 O.R. (2d) 224 (Ont. C.A.), where prohibition was sought of a refusal to quash a *subpoena*.

[373] *Carter v. Oxford Square Investments* (1988), 32 O.A.C. 328 (Ont. C.A.); **see also** ***Howe v. Institute of Chartered Accountants (Ontario)*** (1994), 19 O.R. (3d) 483 (Ont. C.A.), leave to appeal to SCC ref'd (1995), 27 Admin. L.R. (2d) 118(n).

[374] ***Smolensky v. British Columbia Securities Commission*** (2004), 236 D.L.R. (4th) 262 (BCCA).

[375] *Statham v. Canadian Broadcasting Corp.* (2009), 353 F.T.R. 102 (FC), aff'd (2010), 326 D.L.R. (4th) 228 (FCA).

[376] *Samra v. Canada (Minister of Employment & Immigration)* (1981), 110 D.L.R. (3d) 693 (FCTD); *Dodd v. Ontario (Chiropractic Review Committee)* (1978), 23 O.R. (2d) 423 (Ont. Div. Ct.).

[377] *Conseil des Innus de Ekuanitshit v. Canada (Procureur général)*, 2013 FC 418 at para. 112, aff'd 2014 FCA 189.. **See also** *Tsleil-Waututh Nation v. National Energy Board*, 2016 FCA 219 at para. 113.

[378] *Hancock v. Shreve* (1992), 8 Admin. L.R. (2d) 128 (Ont. Div. Ct.).

should have been requested before seeking judicial review;[379] where there was no indication as to how Cabinet might decide an issue;[380] where no final decision had been made by a government official that could be appealed to the tribunal that was the subject of the prohibition application;[381] where there were outstanding issues to be dealt with by a labour arbitrator,[382] where a tribunal had retained jurisdiction over the implementation of its decision;[383] and where the impugned administrative action procedures had not been completed.[384]

It will also be premature to seek judicial review for non-fulfilment of a statutory condition precedent for taking administrative action, if at the time no action had been taken and the condition was still capable of being fulfilled.[385] Conversely, failure to challenge a federal action at an earlier stage will not necessarily bar an application for judicial review of a later federal decision.[386] Of course, relief will be refused on

---

[379] *Wilson v. Law Society (British Columbia)*, [1974] 5 W.W.R. 642 (BCSC); **see also** *Brendzan v. Law Society (Alberta)* (1997), 47 Admin. L.R. (2d) 306 (Alta. Q.B.); *A.T.A. v. Youngberg*, [1978] 1 W.W.R. 538 (Alta. C.A.).

[380] *Inuvialuit Regional Corp. v. R.* (1992), 5 Admin. L.R. (2d) 66 (FCTD).

[381] *Dabor Motors Ltd. v. MacCormac* (1974), 5 O.R. (2d) 473 (Ont. Div. Ct.); **and see** *Argueles v. Canada (Minister of Citizenship and Immigration)* (2004), 263 F.T.R. 30 (FC) (deportation order had not yet reached enforcement stage); *Centre for Research-action on Race Relations v. Canada (Canadian Radio-Television and Telecommunications Commission)* (2000), 266 N.R. 344 (FCA); *504578 Ontario Ltd. v. Great Lakes Fisherman & Allied Workers' Union* (1986), 56 O.R. (2d) 781 (Ont. H.C.J.), aff'd [1990] O.L.R.B. Rep. 117 (Ont. C.A.), leave to appeal to SCC ref'd (1990), 43 O.A.C. 160(n). **See also** *United Management Ltd. v. Calgary (City)* (1985), 68 A.R. 77 (Alta. C.A.), where an appeal was premature on the ground that the tribunal was bound to hear further argument before making a final decision.

[382] *Communications, Energy and Paperworkers, Union of Canada, Local 1S v. Sasktel*, 2012 SKQB 264.

[383] *Ontario v. Ontario (Human Rights Commission)* (2001), 145 O.A.C. 156 (Ont. Div. Ct.).

[384] E.g. *Shea v. Canada (Attorney General)* (2006), 296 F.T.R. 81 (FC); *Duffin Capital Corp. v. Ontario (Minister of Municipal Affairs and Housing)* (2005), 198 O.A.C. 192 (Ont. Sup. Ct. J.); *Condo v. Canada (Attorney General)* (2004), 256 F.T.R. 291 (FC); *Parrish v. Canada (Attorney General)* (2003), 254 F.T.R. 163 (FCTD); *Pearlman v. University of Saskatchewan* (2004), 248 Sask. R. 35 (Sask. Q.B.); *Turp v. Canada (Prime Minister)* (2003), 237 F.T.R. 248 (FC); *Ledcor Industries Ltd. v. L.I.U., Local 92*, [1999] F.C.J. No. 1909 (FCA); *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* (1993), 108 D.L.R. (4th) 145 (NSCA), leave to appeal to SCC ref'd (1994), 108 D.L.R. (4th) vii(n). **See also** topic 3:2300, *ante*.

[385] *St. John's (City) v. St. John's Development Corp.* (1986), 178 A.P.R. 39 (Nfld. S.C.). **See also** *Canada (Information Commissioner) v. Minister of National Defence)* (1999), 240 N.R. 244 (FCA) (party could not apply for judicial review until condition precedent fulfilled).

[386] *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)* (1998), 238 N.R. 88 (FCA).

substantive grounds if the alleged condition is not a prerequisite to the administrative proceeding.[387]

3:4300 Interim and Interlocutory Decisions

Courts have cautioned that they will only entertain proceedings for judicial review of interim decisions where the administrative action is "clearly erroneous,"[388] where there are other special circumstances,[389] or where the inconvenience and cost warrant intervention, because such judicial review proceedings have the obvious effect of fragmenting and protracting proceedings.[390]

---

[387] *Ontario (Board of Funeral Services) v. Blondell* (1994), 20 O.R. (3d) 772 (Ont. Gen. Div.); *R. v. Johansen* (1975), 54 D.L.R. (3d) 706 (Alta. S.C.), aff'd (1976), 67 D.L.R. (3d) 466 (Alta. C.A.).

[388] E.g. *Lilly v. Gairdner* (1973), 2 O.R. (2d) 74 (Ont. Div. Ct.). **See also** *Houle v. Mascouche (Ville)* (1999), 179 D.L.R. (4th) 90 (Que. C.A.). **And see discussion in** *Merck and Co. v. Canada (Attorney General)* (1999), 1 C.P.R. (4th) 490 (FCA).

[389] ***Black v. Advisory Council for the Order of Canada***, [2012] F.C.J. No. 1309 at para. 42 (applicant otherwise would have no relief), aff'd 2013 FCA 267; *Edgewater Casino v. ChubbKennedy*, 2014 BCSC 416 (decision to proceed with complaint reviewed where timeliness and "no reasonble chance of success" in issue), aff'd 2015 BCCA 9; *Joinson v. Teck Coal*, 2014 BCSC 642 (issue whether any prospect of success); *Goddard v. Dixon*, 2012 BCSC 161 (decision to proceed with complaint reviewed because of jurisdictional and fairness issues); *Indigo Books & Music Inc. v. C. & J. Clark International Ltd.* (2010), 16 Admin. L.R. (5th) 21 (FC) (no special circumstances, especially since adequate and preferable alternate remedies existed); *Ibrahim v. Ontario College of Pharmacists* (2011), 19 Admin. L.R. (5th) 122 (Ont. Div. Ct.) (less disruption would result if judicial review proceeded) at paras. 5, 9; *Ontario (Attorney General) v. Toronto Star* (2010), 101 O.R. (3d) 142 (Ont. Sup. Ct. J.) (fundamental question of tribunal's jurisdiction relative to ongoing prosecution raised); *Canada Post Corp. v. C.U.P.W.* (2010), 364 F.T.R. 177 (FC) at para. 40, rev'd on other grounds 2011 FCA 24; *Alberta (Minister of Employment and Immigration) v. Alberta Federation of Labour* (2009), 7 Alta. L.R. (5th) 112 (Alta. Q.B.) (potential to defeat freedom-of-information legislation's purpose warranted intervention) at para. 57; *Bear Hills Charitable Foundation v. Alberta (Gaming and Liquor Commission)* (2008), 89 Admin. L.R. (4th) 275 (Alta. Q.B.) (manifestly unjust to allow delay to continue) at para. 41; *Stirrat Laboratories Ltd. v. Health Sciences Assn. of Alberta* (1996), 1 Admin. L.R. (3d) 200; *Parmalat Canada Inc. v. Sysco Corp.* (2009), 338 F.T.R. 1 (FC) (no other adequate remedy exists) at para. 24; ***Insurance Corp. of British Columbia v. Yuan***, [2009] 10 W.W.R. 252 (BCCA) at paras. 24-5; *Canada (Minister of Public Safety and Emergency Preparedness) v. Crichlow* (2007), 63 Admin. L.R. (4th) 139 (FC) ("tainted with fatal jurisdictional defect"); *Szczecka v. Canada (Minister of Employment and Immigration)* (1993), 25 Imm. L.R. (2d) 70 (FCA), foll'd *Canada (Minister of Citizenship and Immigration) v. Fox*, 2009 FC 987 (adjournment decision); *Roulette v. Sandy Bay Ojibway First Nation* (2006), 49 C.C.E.L. (3d) 305 (FC); *Blackburn v. Canada Post* (2000), 190 F.T.R. 82 (FCTD) (question of jurisdiction). **See also** *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611* (2010), 7 Admin. L.R. (5th) 34 (BCCA) (leave to appeal decision granted, since important administrative law issue at stake, and could change nature of judicial review hearing) at para. 9; *Edwards v. Alberta (Law Enforcement Review Board)*, 2009 ABCA 383 ("exceedingly slow pace" of proceedings warranted court's intervention; leave to appeal granted) at para. 10.

Moreover, the same approach will be followed even when the allegation is that there has been a breach of procedural fairness.[391] Similarly,

---

[390] *Ontario (Attorney General) v. OSSTF*, 2015 ONSC 2438 (Ont. Div. Ct.) at para. 17; *Sohi v. Malenstyn*, 2013 BCSC 1318 at para. 17, ref'g to ***Vancouver (City) v. B.C. (Assessment Appeal Board)*** (1996), 135 D.L.R. (4th) 48 (B.C.C.A.) at paras. 267; *Toronto (City) v. The Dream Team*, 2012 ONSC 3904 (Ont. Div. Ct.), ref'g to ***Volochay v. College of Massage Therapists of Ontario***, 2012 ONCA 541; **and see e.g.** *Bentley v. British Columbia (Police Complaint Commissioner)*, 2012 BCSC 106 (challenge to issue of "new information"dismissed as premature); *O'Toole v. Law Society of New Brunswick*, 2012 NBQB 336 (application premature), aff'd 2013 NBCA 67; *Landry v. Law Society of Upper Canada* (2011), 106 O.R. (3d) 728 (Ont. Div. Ct.) (application dismissed as premature; no exceptional circumstances discerned); *Rudinskas v. College of Physicians and Surgeons of Ontario* (2011), 285 O.A.C. 218 (Ont. Div. Ct.) at para. 73; *Haigh v. College of Denturists of Ontario* (2011), 280 O.A.C. 292 (Ont. Div. Ct.) (judicial review application premature); *Nishnawbe Aski Nation v. Eden* (2009), 99 Admin. L.R. (4th) 83 (Ont. Div. Ct.) at paras. 59*ff* (application not premature in circumstances), rev'd on other grounds 2011 ONCA 187; *Ackerman v. Ontario (Provincial Police)* (2010), 259 O.A.C. 163 (Ont. Div. Ct.) (application premature); *Aroda v. Ontario (Human Rights Commission)* (2010), 259 O.A.C. 384 (Ont. Div. Ct.) (no extraordinary circumstances); *Izzett v. Toronto (City) Police Services* (2010), 262 O.A.C. 182 (Ont. Div. Ct.); *Kawula v. Institute of Chartered Accountants of Saskatchewan* (2010), 348 Sask. R. 213 (Sask. Q.B.), aff'd 2011 SKCA 80; *Bartakovic v. Canada (Attorney General)* (2010), 366 F.T.R. 170 (FC); *Abouabdallah v. College of Dental Surgeons of Saskatchewan* (2010), 11 Admin. L.R. (5th) 315 (Sask. Q.B.) (professional discipline) at para. 16, aff'd 2010 SKCA 129; *York University v. York University Staff Assn.*, [2008] O.J. No. 4093 (Ont. Div. Ct.); *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* (2008), 304 D.L.R. (4th) 238 (NSCA); *Sanofi-Aventis, Canada Inc. v. Canada (Attorney General)*, 2009 FC 965 at paras. 27*ff*; *Wal-Mart Canada Corp. v. U.F.C.W., Local 1400*, 2009 SKQB 290 (employer's preliminary objection dismissed; "premature and disrespectful" to decide before jurisdictional issue settled) at para. 10, aff'd (2010), 321 D.L.R. (4th) 397 (Sask. C.A.); *Pinaymootang First Nation v. Canada (Minister of Indian Affairs and Northern Development)*, 2009 FC 385 at para. 14; ***C.B. Powell Ltd. v. Canada (Border Services Agency)***, 2010 FCA 61; *Canada (Attorney General) v. Brar* (2007), 78 Admin. L.R. (4th) 163 (FC); *Cosgrove v. Canada (Attorney General)* (2008), 331 F.T.R. 271 (FC); *Syncrude Canada Ltd. v. Alberta (Human Rights and Citizenship Commission)* (2008), 432 A.R. 333 (Alta. C.A.); *Gore v. College of Physicians and Surgeons of Ontario* (2008), 92 O.R. (3d) 195 (Ont. Div. Ct.) (challenge by doctors to professional discipline dismissed as premature), aff'd in the result (2009), 96 O.R. (3d) 241 (Ont. C.A.); *Consumers' Assn. of Canada (Manitoba) Inc. v. Manitoba (Public Utilities Board)* (2006), 212 Man. R. (2d) 109 (Man. C.A.); *Taliano v. College of Physicians and Surgeons (Ontario)* (2007), 228 O.A.C. 118 (Ont. Div. Ct.); *Butterfield v. Canada (Attorney General)* (2006), 297 F.T.R. 34 (FC) (scheduling decision interlocutory and not subject to judicial review), aff'd 2007 FCA 290; *Nova Scotia (Securities Commission) v. Potter* (2006), 266 D.L.R. (4th) 147 (NSCA); *T.F. v. Ontario (Health Insurance Plan, General Manager)* (2006), 217 O.A.C. 8 (Ont. Div. Ct.) (impugned decision was prehearing motion on procedural matter; judicial review denied); *York (Regional Municipality) Police v. Ontario (Civilian Commission on Police Services)* (2005), 193 O.A.C. 308 (Ont. Div. Ct.) (application for judicial review stayed since would fragment and delay process). **And see *dicta*** in *Sazant v. McKay* (2010), 271 O.A.C. 63 (Ont. Div. Ct.) at paras. 38ff.

[391] ***Charkaoui v. Canada (Citizenship and Immigration)***, 2008 SCC 38 (stay of proceedings not warranted); **see also** *Azeff v. Ontario (Securities Commission)*, 2014 ONSC 5365 (Ont. Div. Ct.) (no intervention where refusal of adjournment did not breach duty of fairness); *Alberta Wilderness Assn. v. Canada (Attorney General)* (2008), 39 C.E.L.R. (3d) 23 (FC) (refusal of adjournment; judicial intervention not warranted); *Sander v. Certified General Accountants Assn.* (2007), 306 Sask. R. 46 (Sask. Q.B.) (application premature);

courts have declined on the ground of prematurity to determine whether a tribunal is sufficiently independent to qualify as an adequate alternative remedy before the tribunal has actually been set up or rendered its decision.[392] Likewise, an allegation that limiting participation to written submissions was inadequate was dismissed as premature.[393]

Although the agreement of the parties to bifurcate a proceeding will usually be accepted,[394] it may not always suffice to permit review before the whole proceeding is completed.[395] In other circumstances, judicial intervention may be forthcoming where an applicant is able to demonstrate that the cost and inconvenience of continuing the administrative proceeding to completion outweigh any advantages associated with awaiting a decision by the administrative agency,[396] For example, this has occurred where the breach of the duty of fairness has taken the form of: inadequate notice;[397] non-disclosure to a

---

Jaouadi v. Canada (Minister of Citizenship and Immigration) (2003), 257 F.T.R. 161 (FC); *A.M.P.M. Holdings Ltd. v. British Columbia (Liquor Control and Licensing Branch)* (2004), 14 Admin. L.R. (4th) 322 (BCSC) (reconsideration should take place); *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd.*, [2003] 2 W.W.R. 392 (Sask. Q.B.) (application premature; court nevertheless considered issue); ***Howe v. Institute of Chartered Accountants (Ontario)*** (1994), 19 O.R. (3d) 483 (Ont. C.A.), leave to appeal to SCC ref'd (1995), 21 O.R. (3d) xvi(n), foll'd *Talarico v. Law Society of Upper Canada*, 2012 ONSC (Ont. Div. Ct.) 2493 (refusal to order the production of documents does not go to jurisdiction).

[392] ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3; *Bissett v. Canada (Minister of Labour)*, [1995] 3 F.C. 762 (FCTD). **See also** *Montgomery v. Edmonton (City) Police Services* (1999), 253 A.R. 222 (Alta. Q.B.).

[393] *Boulos v. Canada (Attorney General)*, 2012 FC 292.

[394] E.g. *University of Saskatchewan and CUPE, Local 1975, Re*, 2014 SKQB 190 at paras. 14-15 (agreement of the parties made initial decision a final award).

[395] E.g. *Dorn v. Assn. of Professional Engineers and Geoscientists of Manitoba*, 2014 MBCA 25 at para. 17.

[396] E.g. *obiter* discussion in *Roosma v. Ford Motor Co. of Canada* (1988), 66 O.R. (2d) 18 (Ont. Div. Ct.). **And see** *Condominium Corp. No. 052 0580 v. Alberta (Human Rights Commission)*, 2016 ABQB 183 at para. 56; *Goddard v. Dixon*, 2012 BCSC 161 at paras. 59-61 (screening decision to refer complaint to hearing was not premature); *Alberta (Information and Privacy Comm'r) v. Alberta (F.O.I.P.P.A. Adjudicator)* (2011), 331 D.L.R. (4th) 433 (Alta. C.A.) at para. 2; *Toronto (City) v. Home Depot Holdings Inc.* (2010), 272 O.A.C. 81 (Ont. Div. Ct.) (decision would be of assistance in other cases); *U.F.C.W. Int. Union v. Rol-Land Farms Ltd.* (2008), 77 Admin. L.R. (4th) 306 (Ont. Div. Ct.) (whether individual wrongly given party status); *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon* (2005), 35 Admin. L.R. (4th) 213 (FC) (impugned decision would be finally dispositive of witness' privacy rights; application not premature); *Universal Workers Union, Local 183 v. Ontario (Human Rights Commission)* (2006), 39 Admin. L.R. (4th) 285 (Ont. Div. Ct.); *Schilthuis v. College of Veterinarians of Ontario* (2005), 23 Admin. L.R. (4th) 80 (Ont. Div. Ct.).

[397] E.g. *Volochay v. College of Massage Therapists of Ontario* (2011), 30 Admin. L.R. (5th) 327 (Ont. Div. Ct.), rev'd 2012 ONCA 541; *McIntosh v. College of Physicians and Surgeons*

participant of material that had been disclosed to other parties;[398] a question as to whether solicitor-client privilege applied to Independent Counsel;[399] an order has been made that counsel for a party be disqualified,[400] wrongly compelling persons to appear as witnesses;[401] a long delay in issuing an award on the merits;[402] failure to see the decision whether to review a late-filed complaint as a discrete substantive step;[403] an improper delegation;[404] exclusion of relevant evidence sufficient to constitute a breach of natural justice;[405] a determination that evidence is not privileged;[406] refusal to permit a party to adduce evidence and cross-examine;[407] refusal to refer reconsideration to a different adjudicator,[408] and bias.[409] As well,

---

(Ontario) (1998), 169 D.L.R. (4th) 524 (Ont. Div. Ct.); *Storm v. Halifax (City) Commissioners of Police* (1987), 193 A.P.R. 365 (NSCA); *Sen v. College of Physicians & Surgeons (Saskatchewan)* (1969), 69 W.W.R. 201 (Sask. C.A.); *Gage v. Ontario (Attorney General)* (1992), 55 O.A.C. 47 (Ont. Div. Ct.).

[398] *People First of Ontario v. Regional Coroner of Niagara* (1992), 6 O.R. (3d) 289 (Ont. C.A.). **See also** *Gichuru v. Law Society of British Columbia* (2007), 79 B.C.L.R. (4th) 368 (BCSC) (prematurity claim dismissed); *P.S.A.C. v. Northwest Territories* (2000), 191 F.T.R. 266 (FCTD), aff'd (2001), 278 N.R. 187 (FCA). **Compare** *Nova Scotia (Securities Commission) v. Potter* (2006), 266 D.L.R. (4th) 147 (NSCA).

[399] *Douglas v. Canada (Attorney General)*, 2014 FC 299 at paras. 143-7.

[400] *College of Veterinarians of Ontario v. Mitelman*, 2015 ONSC 484 (Ont. Div. Ct.).

[401] *Universal Workers Union, Local 183 v. Ontario (Human Rights Commission)* (2006), 39 Admin. L.R. (4th) 285 (Ont. Div. Ct.).

[402] *Lethbridge Regional Police Service v. Lethbridge Police Assn.*, 2013 ABCA 47 at para. 21 (delay made reasons for awaiting completion of decision-making inapplicable).

[403] *Mzite v. British Columbia (Ministry of Public Safety & Solicitor General)*, 2013 BCSC 1116 at para. 18; aff'd 2014 BCCA 220. **See also** *Chan v. Haverkamp*, 2013 BCSC 942 at para. 61 (decision under review was gate-keeper decision and grounds were misapprehension of evidence).

[404] *Lim v. Manitoba (Health Services Commn.)* (1980), 17 Man. R. (2d) 312 (Man. Q.B.).

[405] *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401 (Ont. C.A.).

[406] *Sasso and Bank of Montreal, Re*, 2013 FC 584 at para. 16.

[407] *Paterson v. Skate Canada* (2004), 26 Admin. L.R. (4th) 147 (Alta. Q.B.).

[408] *Brenton v. Newfoundland and Labrador (Workplace Health, Safety and Compensation Review Division)*, 2013 NLTD(G) 81 at paras. 24-5.

[409] *U.F.C.W. Int. Union v. Rol-Land Farms Ltd.* (2008), 77 Admin. L.R. (4th) 306 (Ont. Div. Ct.); *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371 (Ont. Sup. Ct. J.); *Assie v. Institute of Chartered Accountants of Saskatchewan*, [2002] 1 W.W.R. 339 (Sask. Q.B.); *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 465 (FCTD); *Evans v. Milton* (1979), 24 O.R. (2d) 181 (Ont. C.A.), leave to appeal to SCC ref'd (1979), 28 N.R. 86(n); *MacBain v. Lederman* (1985), 22 D.L.R. (4th) 119 (FCA); **see also** ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3; **but see** *Wong v. Globe & Mail*, 2013 ONSC 2993 (Div. Ct.) at para. 41; *Sztern v. Canada (Superintendent of Bankruptcy)* (2008), 80 Admin. L.R. (4th) 147 (FC) (bias alleged; no special circumstances warranting judicial review of interlocutory decision); *Khalife v. Canada (Minister of*

cases in which the issues related to *res judicata* and abuse of process and the tribunal itself bifurcated its proceedings[110] and in which a decision on a question of law that would govern subsequent cases was desirable have led to immediate review.[111] Finally, a statute may expressly provide for an appeal to the courts concerning non-final rulings.[112]

3:4400 Jurisdictional Error

At one time, prohibition would lie to restrain administrative proceedings when the jurisdiction of the tribunal was challenged and the jurisdictional issue was perceived to be a clear point of law, and not to involve disputed facts.[113] In what was the leading case,[114] the Supreme Court of Canada issued an order of prohibition restraining a board of inquiry from conducting a hearing into a complaint that the respondent had refused to lease an apartment to the complainant on the ground of race. However, that decision resulted in extensive criticism and as a result of the changing approach of the courts, the Supreme Court overruled it.[115]

Citizenship and Immigration) (2002), 225 F.T.R. 200 (FCTD); *Zündel v. Canada (Human Rights Commission)*, [2000] 4 F.C. 255 (FCA); *Air Canada v. Lorenz*, [2000] 1 F.C. 494 (FCTD) (refusal to grant relief prior to tribunal's rendering of decision, despite allegation of bias); *Geneen v. Toronto (City)* (1999), 117 O.A.C. 305 (Ont. Div. Ct.); *Doyle v. Canada (Restrictive Trade Practices Commn.)*, [1983] 2 F.C. 867 (FCA); ***Ontario College of Art v. Ontario (Human Rights Commn.)*** (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.), foll'd *Toronto (City) v. Grange*, 2016 ONSC 869 (Ont. Div. Ct.) at para. 30; *Xanthoudakis v. Ontario Securities Commission* (2009), 252 O.A.C. 180 (Ont. Div. Ct.); *Turnbull v. Canadian Institute of Actuaries* (1995), 33 Admin. L.R. (2d) 191 (Man. C.A.), leave to appeal to SCC ref'd [1996] 2 W.W.R. lxxx(n); *Mondesir v. Manitoba Assn. of Optometrists* (1998), 163 D.L.R. (4th) 703 (Man. C.A.), rev'g (1997), 117 Man. R. (2d) 38 (Man. Q.B.).

[110] *Robertson v. British Columbia (Commissioner, Teachers Act)*, 2013 BCSC 1699 at paras. 39-41, rev'd in part on other grounds 2014 BCCA 331. See also *Wilson and Atomic Energy of Canada Ltd., Re*, 2013 FC 733 at para. 5 (arbitration award reviewed on merits where arbitrator reserved jurisdiction to deal with remedy), aff'd 2015 FCA 17.

[111] *Cape Breton Development Corp. v. Nova Scotia (Workers' Compensation Board)* (1995), 397 A.P.R. 369 (NSCA).

[112] *Dragun v. Law Society (Manitoba)*, [1998] 6 W.W.R. 305.

[113] As to the jurisdictional scope of prohibition, see topic 1:2000, *ante*.

[114] ***Bell v. Ontario (Human Rights Commn.)***, [1971] S.C.R. 756. It has been the subject of some criticism: see e.g. P.W. Hogg, "*Bell v. Ontario Human Rights Commn.*" (1971) 9 *Osgoode Hall L.J.* 203; D.J. Mullan, "*Bell v. Ontario Human Rights Commn.*" (1972) 10 *Osgoode Hall L.J.* 440; and P.C. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974) at pp. 139-44.

[115] ***Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)***, 2012 SCC 10 at para. 38.

This change came about because, in the interim, it became clear, as it was not at that time,[116] that decisions of human rights tribunals are subject to judicial surveillance either by way of an appeal or in judicial review proceedings.[117] Second, and more importantly, the concept of jurisdictional review had undergone a radical transformation since 1971.[118] Specifically, nowadays, courts are more sensitive to the desirability of interpreting statutory terms in light of the facts found by an agency, and of being *informed* by a reasoned decision of the tribunal.[119] As well, they are now more likely to defer to recognized administrative expertise.[120] In the result, courts have become extremely reluctant to intervene prior to the rendering of a reasoned decision by the administrative decision-maker.[121]

3:5000 DELAY

3:5100 Introduction

A court may dismiss proceedings for judicial review on the ground of untimeliness either because a specified timelimit was not complied with, or because the applicant was otherwise guilty of undue delay.[122] And in determining whether delay is "undue," courts consider

---

[116] See ***Bell v. Ontario (Human Rights Commn.)***, [1971] S.C.R. 756 at pp. 769-70, where it was doubted whether *certiorari* would lie either to quash the board's report to the Minister, or the Minister's decision to implement it.

[117] The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 contains no right of appeal, but decisions of the Canadian Human Rights Commission and Tribunal are reviewable in the Federal Court on relatively broad grounds; see *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1 [as am. S.C. 2002, c. 8] (App. Fed. 3); see also topic 14:4550, *post*.

[118] See generally topic 14:4340, *post*, on the narrower reconceptualization of "jurisdiction-defining" provisions.

[119] E.g. ***Volochay v. College of Massage Therapists of Ontario***, 2012 ONCA 541 at paras. 61-7; *Saskatoon Board of Police Commissioners v. Saskatoon Police Assn.* (2011), 371 Sask. R. 130 (Sask. C.A.) at para. 6; ***C.B. Powell Limited v. Canada (Border Services Agency)***, 2010 FCA 61 at para. 42; *McCutcheon v. Westhill Redevelopment Co.* (2009), 251 O.A.C. 150 (Ont. Div. Ct.) at para. 31; *Wal-Mart Canada Corp. v. U.F.C.W., Local 1400*, 2009 SKQB 290 (not clear whether issue was preliminary jurisdictional one or one of interpretation within board's mandate; application premature), aff'd (2010), 321 D.L.R. (4th) 397 (Sask. C.A.); ***Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*** (2009), 273 N.S.R. (2d) 258 (NSSC) at paras. 65, 76, rev'd on grounds tribunal should not have been prohibited from proceeding 2010 NSCA 8, aff'd 2012 SCC 10.

[120] See generally topic 14:2540, *post*.

[121] E.g. ***Black v. Canada (Attorney General)***, 2012 FC 1306 at para. 65, aff'd 2013 FCA 201. See also e.g. *Walters v. British Columbia (Provincial Agricultural Land Commission)*, 2016 BCSC 1618 at paras. 130-1 (whole administrative scheme would be circumvented).

[122] E.g. ***Baker v. Canada (Minister of Citizenship & Immigration)*** (1996), 207 N.R.

the length of the delay and any justification that the applicant offers for it, the prejudice arising from the delay,[123] as well as any impact on public administration and on the rights of third parties that setting aside the administrative action would have long after it has been taken. In addition, the nature of the illegality will be taken into consideration in the exercise of their discretion.[124]

Procedurally, challenges on the ground of delay to the court's exercise of its judicial review jurisdiction may be made by bringing a motion to quash, or having it dealt with as a preliminary point,[125] although one court has said that in order for it to be able fully to assess prejudice, the issue of delay should not be dealt with separately from the merits.[126] In addition, non- compliance with time limits for perfection of an application for judicial review can lead to dismissal of the proceeding.[126.1]

3:5200 Compliance with Time-Limits

Apart from Ontario, British Columbia and Manitoba, specific time-limits apply to the institution of judicial review proceedings.[127]

---

57 FCA), rev'd on other grounds (1999), 174 D.L.R. (4th) 193 (SCC); **see also** *Deep v. Ontario* (2010), 262 O.A.C. 201 (Ont. Div. Ct.); *Eli Lilly Canada Inc. v. Apotex Inc.*, 2009 FCA 65 (application for stay); *Gigliotti v. Conseil d'administration du Collège des Grands Lacs* (2005), 76 O.R. (3d) 561 (Ont. Div. Ct.); *Ontario Conference of Judges v. Ontario (Chair, Management Board)* (2004), 71 O.R. (3d) 528 (Ont. Div. Ct.); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.) (delay in initiating action respecting aboriginal title; *Int. Union of Bricklayers v. Ontario Prov. Conference of Int. Union of Bricklayers* (2000), 132 O.A.C. 87 (Ont. Div. Ct.). **Compare** *Canada Post Corp. v. G3 Worldwide (Canada) Inc.* (2007), 282 D.L.R. (4th) 244 (Ont. C.A.) (duty of compliance with statute cannot be extinguished by passage of time); *Taylor v. Alberta (Registrar, South Alberta Land Registration District)*, [2005] 10 W.W.R. 203 (Alta. C.A.).

[123] ***Lowe v. Diebolt,*** 2014 BCCA 280 at para. 71 (appellate court dismissed judicial review application where five years had elapsed with respondent under threat of disciplinary action).

[124] ***Immeubles Port Louis Ltée v. Lafontaine (Village),*** [1991] 1 S.C.R. 326.

[125] ***Lowe v. Diebolt,*** 2014 BCCA 280 (appellate court dismissed judicial review application where no prejudice to applicant, without commenting on merits).

[126] *MacLean v. University of British Columbia (Appeal Board)* (1993), 109 D.L.R. (4th) 569 (BCCA). **See also** *Maracle v. Six Nations of the Grand River Band of Indians* (1998), 146 F.T.R. 208 (FCTD).

[126.1] E.g. *Singh v. Toronto Police Services Board*, 2016 ONSC 6291 (Ont. Div. Ct.) (dismissal by Registrar for failure to perfect within one year upheld).

[127] See topic 5:1400, *post.* For the statutory provisions regulating proceedings against the Crown, **see** P.W. Hogg and P. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000) at pp. 42-44. **And see** *Smith v. New Brunswick (Human Rights Commission)* (1999), 179 D.L.R. (4th) 28 (NBCA) concerning a *Charter* challenge to the constitutionality of such time-limits, **as well as** *Prete v. Ontario* (1993), 16 O.R. (3d) 161

However, where such time-limits exist, they are usually accompanied by provisions for extending them.[128] But where there are no provisions for extending time, failure to comply will deprive the c ourt of jurisdiction to hear the judicial review application,[129] unless the time-limit is viewed as a preclusive clause.[130]

3:5300 Undue Delay

Apart from other factors, courts may, in an exercise of their discretion, decline to entertain an application for judicial review on the ground of undue delay.[131] However, in such circumstances courts must be satisfied that the lesser of two evils is to permit possibly unlawful administrative action to stand, rather than to cause harm or prejudice to both the public interest in good administration and to the rights of particular individuals.[132] Accordingly, in weighing these two considerations, courts take into account the length of the delay, the reasonableness of any explanation offered for it, and the extent of any

---

(Ont. C.A.) (limitation periods under *Public Authorities Protection Act* or *Proceedings Against the Crown Act* not applicable to relief claimed under *Charter*).

[128] See topic 5:1500, *post*.

[129] E.g. *Rea International Inc. v. Muntwyler* (2005), 33 Admin. L.R. (4th) 176 (Ont. C.A.) (*Arbitration Act*); *Dowd v. New Brunswick Dental Society* (1998), 526 A.P.R. 33 (NBQB), aff'd [1999] N.B.J. No. 109 (NBCA); *Cessland Corp. v. Fort Norman Explorations Inc.* (1979), 25 O.R. (2d) 69 (Ont. H.C.J.), where a provision of the Ontario *Mining Act* specifically prohibited an extension of the 30-day time-limit. **Compare** *Duong v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1808 (FCTD) (where it was impossible for court to meet deadline due to unavailability of judges, "shall" interpreted as directory only); *Whitechapel Estates Ltd. v. British Columbia (Ministry of Transportation and Highways)* (1998), 164 D.L.R. (4th) 311 (BCCA).

[130] ***Trecothic Marsh, Re*** (1905), 37 S.C.R. 79; *Johnston v. Law Society (Prince Edward Island)* (1991), 1 Admin. L.R. (2d) 265 (PEICA), leave to appeal to SCC ref'd (1991), 85 D.L.R. (4th) viii(n); **see also** *Mid-West By-Products Co. v. Manitoba (Clean Environment Commn.)*, [1979] 6 W.W.R. 46 (Man. Q.B.). As to preclusive clauses generally, see topics 5:1110 and 13:5000, *post*. As well, there is authority to the effect that where limitation periods exist for seeking relief against public authorities for unlawful actions, such periods will not bar a remedy if the authority acted outside the scope of its duties: ***Roncarelli v. Duplessis***, [1959] S.C.R. 121. **Compare**, however, ***Immeubles Port Louis Ltée v. Lafontaine (Village)***, [1991] 1 S.C.R. 326.

[131] *Asgedom v. Ontario (Minister of Community and Social Services)* (2010), 259 O.A.C. 144 (Ont. Div. Ct.); *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2010] 12 W.W.R. 599 (Man. C.A.) (grossly unreasonable delay); *Ransom v. Ontario* (2010), 263 O.A.C. 240 (Ont. Div. Ct.) (6-year delay particularly troubling in employment context); *Heynen v. Yukon Territory* (2007), 77 Admin. L.R. (4th) 89 (Yuk. Terr. S.C.). **And see discussion in** *Matheson v. Truro (Town)* (1999), 178 N.S.R. (2d) 18 (NSSC), concerning the doctrine of laches.

[132] *WUFA v. University of Windsor*, 2014 ONSC 1142 (Ont. Div. Ct.) (relitigation of workplace dispute after delay of more than 10 years would bring administration of justice into disrepute).

prejudice that the delay has caused to both the respondents and to the public interest.[433] As well, some courts add an overarching fourth consideration, namely whether the interests of justice nevertheless call for hearing or not hearing the application.[434]

3:5310 *The Length of the Delay*

Where an applicant's inaction can be seen as acquiescence in or acceptance of the impugned decision,[435] the delay in instituting judicial review proceedings in and of itself may lead a court to decline to exercise its jurisdiction.[436] As well, a court may dismiss an application for prohibition founded on undue delay[437] where it is of the view that the administrative tribunal itself ought to decide whether the matter should proceed.

However, notwithstanding that delays of four and a half years[438] and five years[439] have been held to be sufficient to bar relief without the need for any other evidence to support an inference of prejudice, the critical question is usually: what prejudice has the delay caused? As noted by one court, "the periods of delay which have caused the courts to exercise discretion against an applicant have varied widely."[440] In the result, delays of as little as two months have been

---

[433] E.g. *Kuffor v. First Bus Canada*, 2014 ONSC 2297 (Ont. Div. Ct.) at para. 10. **See also** *Shamaon v. British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 2119 at para. 51 (notwithstanding delay which was wholly due to the Superintendent's lack of resources, public interest in discipline of driving while intoxicated overrode individual prejudice).

[434] E.g. *Cole v. BCNU*,, 2014 BCCA 2 at para. 15.

[435] E.g. ***Pearlman v. Winnipeg (City)*** (1977), 74 D.L.R. (3d) 367 (Man. C.A.). **See also** *Housewise Construction Ltd. v. Whitgift Holdings Ltd.*, 2016 BCSC 2245 at para. 45 (delay of eight months in context of Small Claims proceeding with no explanation).

[436] *Crommer v. Mesbur* (1992), 98 Sask. R. 213 (Sask. Q.B.); *Hawley v. Richmond (County) Municipal School Board* (1982), 106 A.P.R. 127 (NSCA); **see also** *Hayer v. Canada (Minster of Employment & Immigration)* (1987), 25 Admin. L.R. 136 (FCTD); *Starr v. Puslinch (Township)* (1978), 20 O.R. (2d) 313 (Ont. C.A.); **compare *Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3. **And see discussion in *Harelkin v. University of Regina***, [1979] 2 S.C.R. 561.

[437] E.g. *Latif v. Ontario (Human Rights Commn.)* (1992), 4 Admin. L.R. (2d) 227 (Ont. Div. Ct.); *Hancock v. Shreve* (1992), 8 Admin. L.R. (2d) 128 (Ont. Div. Ct.); *Ontario College of Art v. Ontario (Human Rights Commn.)* (1992), 11 O.R. (3d) 798 (Ont. Div. Ct.); *Gale v. Miracle Food Mart* (1993), 12 Admin. L.R. (2d) 267 (Ont. Div. Ct.); **see also** *Hughes v. College of Physicians & Surgeons (Ontario)* (1994), 112 D.L.R. (4th) 253 (Ont. Div. Ct.); **compare *Misra v. Council of College of Physicians & Surgeons (Saskatchewan)***, [1988] 5 W.W.R. 333 (Sask. C.A.), leave to appeal to SCC granted (1989), 79 Sask. R. 80(n).

[438] *Crommer v. Mesbur* (1992), 6 Admin. L.R. (2d) 78 (Sask. Q.B.).

[439] *Guillet v. Coteau (Rural Municipality No. 255)*, [1999] 4 W.W.R. 238 (Sask. Q.B.); *McPhee v. Barristers' Society of N.B.* (1983), 5 Admin. L.R. 240 (NBQB).

[440] *Ursaki, Re* (1960), 33 W.W.R. 261 at p. 268 (BCSC); in the circumstances, a four-year

found to have been too long,[441] as have delays of three months,[442] four months,[443] five months,[444] six months,[445] eight months,[446] eleven months,[447] one year,[448] thirteen months,[449] fifteen months,[450] seventeen months,[451] eighteen months,[452] twenty months,[453] two years,[454] twenty-six months,[455] twenty-nine months,[456] thirty months,[457] and longer.[458] On the other hand, delays of sixteen

---

delay was held not to have been unreasonable. **See also** *McColl, Re* (1973), 42 D.L.R. (3d) 763 (BCSC).

[441] *Wilkes v. Halifax School Bd.* (1978), 40 A.P.R. 628 (NSTD).

[442] *J.G. Morgan Development Corp. v. Canada (Minister of Public Works)* (1992), 8 Admin. L.R. (2d) 247 (FCTD).

[443] *Caron v. Beaupré* (1985), 17 Admin. L.R. 31 (Que. C.A.); *R. v. McRae* (1980), 23 B.C.L.R. 244 (BCSC); *Sidbec-Dosco Inc. v. Québec (Commn. de la santé & de la securité au travail)* (1986), 28 Admin. L.R. 70 (Que. Sup. Ct.).

[444] *Ontario Harness Horse Assn. v. Ontario Racing Commission* (2007), 229 O.A.C. 307 (Ont. Div. Ct.).

[445] *MacMillan Bloedel Industries Ltd. v. Anderson* (1982), 37 B.C.L.R. 192 (BCSC); *Palmer, Re* (1977), 23 A.P.R. 46 (NBQB).

[446] ***Pearlman v. Winnipeg (City)*** (1977), 74 D.L.R. (3d) 367 (Man. C.A.).

[447] *Young v. Manitoba (Attorney General)* (1960), 25 D.L.R. (2d) 352 (Man. C.A.).

[448] *Figueiras v. York Police Services Board*, 2013 ONSC 7419 (Ont. Div. Ct.) at para. 34; *Holmes v. White*, 2013 ONSC 4225 (Ont. Div. Ct.) at para. 13; *Masset Band Council v. Russ* (1977), 73 D.L.R. (3d) 154 (BCSC).

[449] *Ont. Prov. Conference of Int. Union of Bricklayers et al. v. Int. Union of Bricklayers* (2003), 172 O.A.C. 156 (Ont. Div. Ct.); *Breton v. Battlefords Union Hospital* (1992), 6 Admin. L.R. (2d) 11 (Sask. Q.B.); *Schorr v. Selkirk* (1977), 15 O.R. (2d) 37 (Ont. Div. Ct.).

[450] *South Eastern Regional Shopping Centre Ltd. v. Steinbach* (1983), 20 Man. R. (2d) 54 (Man. C.A.).

[451] *MAHCP v. Manitoba (Labour Board)*, 2016 MBQB 158 at para. 14; *Cherished Memories Funeral Services and Crematory Inc. v. Martensville (City)*, 2012 SKQB 134 at para. 19; *Green v. Ontario (Human Rights Commission)* (2010), 263 O.A.C. 270 (Ont. Div. Ct.).

[452] *Isabey v. Manitoba (Health Services Commn.)*, [1974] 2 W.W.R. 42 (Man. C.A.).

[453] *Piperno v. Canada (Minister of Employment & Immigration)* (1985), 16 Admin. L.R. 28 (FCTD), aff'd (1985), 16 Admin. L.R. 34 (FCA). **See also** *Dowd v. New Brunswick Dental Society* (1998), 526 A.P.R. 33 (NBQB), aff'd [1999] N.B.J. No. 109 (NBCA).

[454] ***P.P.G. Industries Canada Ltd. v. Canada (Attorney General)***, [1976] 2 S.C.R. 739; *Holowachuk v. Saskatchewan (Workers' Compensation Board)* (2009), 329 Sask. R. 131 (Sask. Q.B.); *Kane v. Lac Pelletier (Rural Municipality No. 107)*, 2009 SKQB 348; *Northwood Oaks Ltd. v. Winnipeg (City) Board of Revision* (1999), 135 Man. R. (2d) 1 (Man. Q.B.), rev'd on other grounds [1999] 11 W.W.R. 77 (Man. C.A.); *Sampson v. Kingston (City)* (1982), 39 O.R. (2d) 192 (Ont. C.A.).

[455] *Lancashire v. Canada (Treasury Board)* (1997), 220 N.R. 54 (FCA).

[456] *Gigliotti v. Conseil d'administration du Collège des Grands Lacs* (2005), 76 O.R. (3d) 561 (Ont. Div. Ct.).

[457] *Wadena School Division No. 46 v. Saskatchewan (Municipal Employees' Pension Commission)*, [2001] 11 W.W.R. 138 (Sask. Q.B.).

months,[459] two years,[460] six years,[461] eight years[462] and fifteen years have not precluded judicial review.[463]

3:5320 *Adequacy of the Explanation for the Delay*

Courts normally require a dilatory applicant to explain the delay, and the absence of an adequate explanation will often weigh heavily against judicial review of the administrative action in question.[464] However, where there is no fault on the part of the applicant,[465] or

---

[458] *Demings v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2012 BCSC 475 (28 years); *Canadian Chiropractic Assn. v. Lewis Inquest (Coroner of)* (2011), 285 O.A.C. 122 (Ont. Div. Ct.) (7 years); *Ransom v. Ontario* (2010), 263 O.A.C. 240 (Ont. Div. Ct.) (6 years); *Deep v. Ontario* (2010), 262 O.A.C. 201 (Ont. Div. Ct.) (ten years); *Zaki v. Ottawa Hospital (General Campus)* (2003), 169 O.A.C. 255 (Ont. Div. Ct.) (delays were 8, 7 and 3 years); *Port Enterprises Ltd. v. Newfoundland (Minister of Fisheries and Aquaculture)* (2001), 9 C.P.C. (5th) 143 (Nfld. S.C.); ***Henry v. Saskatchewan (Workers' Compensation Board)*** (1999), 172 D.L.R. (4th) 73 (Sask. C.A.); ***Immeubles Port Louis Ltée v. Lafontaine (Village)***, [1991] 1 S.C.R. 326.

[459] *Soliduwear Enterprises Ltd. v. Union of Needletrades, Local 219* (2006), 206 O.A.C. 370 (Ont. Div. Ct.).

[460] *Galger v. Saskatchewan (Workers' Compensation Board)*, 2009 SKQB 206.

[461] *Wilberforce (Township) v. Alice & Fraser (Township)* (1996), 97 O.A.C. 326 (Ont. Div. Ct.).

[462] *Wojcik v. British Columbia (Workers' Compensation Board)*, [1998] 4 W.W.R. 525 (BCSC).

[463] *McColl, Re* (1973), 42 D.L.R. (3d) 763 (BCSC).

[464] See ***P.P.G. Industries Canada Ltd. v. Canada (Attorney General)***, [1976] 2 S.C.R. 739 at p. 749, where the unexplained delay of two years was "foremost among the factors" causing the Court to refuse relief; **see also** *Major Partner Wind Energy Corp. v. Ontario Power Authority*, 2015 ONSC 6902 (Ont. Div. Ct.) (three-year delay not explained); *Stentsiotis v. Ontario (Social Benefits Tribunal)* (2011), 285 O.A.C. 381 (Ont. Div. Ct.); *Canadian Chiropractic Assn. v. Lewis Inquest (Coroner of)* (2011), 285 O.A.C. 122 (Ont. Div. Ct.) (inadequate explanation for inordinate delay); *Asgedom v. Ontario (Minister of Community and Social Services)* (2010), 259 O.A.C. 144 (Ont. Div. Ct.) (no adequate explanation for delay); *Deep v. Ontario* (2010), 262 O.A.C. 201 (Ont. Div. Ct.) (explanation unreasonable); *Green v. Ontario (Human Rights Commission)* (2010), 263 O.A.C. 270 (Ont. Div. Ct.); *Ont. Prov. Conference of Int. Union of Bricklayers et al. v. Int. Union of Bricklayers* (2003), 172 O.A.C. 156 (Ont. Div. Ct.); *Zaki v. Ottawa Hospital (General Campus)* (2003), 169 O.A.C. 255 (Ont. Div. Ct.) (no explanation given; judicial review refused); *Wadena School Division No. 46 v. Saskatchewan (Municipal Employees' Pension Commission)*, [2001] 11 W.W.R. 138 (Sask. Q.B.); *Lavoie v. Canada (Correctional Service)* (2000), 196 F.T.R. 96 (FCTD); *Haldorson v. Coquitlam (City)* (2000), 3 C.P.C. (5th) 225 (BCSC); *Int. Union of Bricklayers v. Ontario Prov. Conference of Int. Union of Bricklayers* (2000), 132 O.A.C. 87 (Ont. Div. Ct.); *Loewen v. Coquitlam (City)* (2000), 49 C.P.C. (4th) 50 (BCCA); **see also** *O.P.S.E.U. v. Ontario (Ministry of Labour)*, [2008] O.J. No. 4557 (Ont. Div. Ct.); *Ayangma v. Prince Edward Island (Department of Education)* (2002), 219 Nfld. & P.E.I.R. 78 (PEISC); *Angus v. R.* (1990), 72 D.L.R. (4th) 672 at pp. 677-79 (FCA) (*per* Décary J.A.); **compare** *Miljohns v. Scarborough (City) Board of Education* (1980), 29 O.R. (2d) 251 (Ont. Div. Ct.) (although one-year delay unexplained, there was no prejudice so the application was allowed).

even where the applicant was ignorant of the law,[166] the delay is more readily explained. Similarly, courts have not dismissed judicial review proceedings where the delay was attributable to the slowness of the administrative process[167] or the judicial system,[168] or where there are "barely satisfactory reasons" for the delay.[169]

3:5330 *Prejudice*

Notwithstanding the likelihood of prejudice that is implicit in any delay,[170] and the fact that the longer the delay the more likely it is to be prejudicial, a court will often hear the application where an applicant can demonstrate that the delay has caused little or no prejudice to either the respondents or to the public interest.[171] As the Supreme Court of Canada has said:

---

[165] E.g. *Paudash Shores Cottagers Assn. v. Ontario (Ministry of Natural Resources)*, 2012 ONSC 2839 (Ont. Div. Ct.) (delay explained by attempts to seek relief administratively and politically); **and see** *Judge v. Canadian Broadcasting Corp.* (2002), 17 C.C.E.L. (3d) 152 (FCTD) (errors committed by human rights commission should not deprive complainant of right to have complaint investigated). **Compare** *Khaiter v. Ontario (Labour Relations Board)*, 2013 ONSC 791 (Ont. Div. Ct.) (where applicant misused process to lengthen employment that warranted dismissal of judicial review proceedings).

[166] ***Carpenter v. Vancouver (City) Commissioners of Police***, [1987] 2 W.W.R. 97 (BCCA), leave to appeal to SCC ref'd (1987), 12 B.C.L.R. (2d) xxxvi; *Kinnaird (No. 2), Re* (1961), 36 W.W.R. 193 (BCSC), aff'd (1962), 39 W.W.R. 177 (BCCA), aff'd [1963] S.C.R. 239; **see also** *Lithe v. Manitoba (Workers' Compensation Board)*, [1993] 8 W.W.R. 487 (Man. Q.B.); **but see** *McGill v. Minister of National Revenue* (1985), 63 N.R. 29 (FCA); leave to appeal to SCC ref'd (1985), 64 N.R. 400(n) (ignorance of law irrelevant to relief from missed time-limit concerning objection in tax court to assessment).

[167] *Ursaki, Re* (1960), 33 W.W.R. 261 (BCSC); *McPhee v. Barristers' Society of N.B.* (1983), 5 Admin. L.R. 240 (NBQB); **see also** *Mazhero v. Canada (Industrial Relations Board)* (2004), 320 N.R. 1 (FCA) (cause of delays "not so egregious" as to warrant remedy); *T.E. Quinn Truck Lines Ltd v. Ontario (Minister of Transportation & Communications)*, [1981] 2 S.C.R. 657, reversing (1980), 27 O.R. (2d) 764 (Ont. C.A.); *Alvero-Rautert v. Canada (Minister of Employment & Immigration)*, [1988] 3 F.C. 163 (FCTD) (policy of telexing not followed).

[168] *Eliot, Re* (1980), 78 A.P.R. 154 (NBCA).

[169] *Strykiwsky v. Mills*, [2000] F.C.J. No. 1404 (FCTD).

[170] *Breton v. Battlefords Union Hospital* (1992), 6 Admin. L.R. (2d) 11 (Sask. Q.B.); **and see** *McPhee v. Barristers' Society of N.B.* (1983), 5 Admin. L.R. 240 (NBQB), where it was seen as manifestly unfair for a tribunal to proceed after a delay of five years.

[171] *Ottawa-Carleton District School Board v. O.S.S.T.F., District 12* (2010), 268 O.A.C. 61 (Ont. Div. Ct.) at para. 15; *Galger v. Saskatchewan (Workers' Compensation Board)*, 2009 SKQB 206 at para. 20; *Valleycroft Textiles Inc. v. U.N.I.T.E., Local 219* (2006), 23 C.B.R. (5th) 257 (Ont. Div. Ct.); *Solidwear Enterprises Ltd. v. Union of Needletrades, Local 219* (2006), 206 O.A.C. 370 (Ont. Div. Ct.) (no actual prejudice to union from further delay); *Western Grocers, div. of Westfair Foods Ltd. v. U.F.C.W., Local 1400* (2006), 282 Sask. R. 124 (Sask. Q.B.) (no evidence of substantial prejudice); *Zenner v. Prince Edward Island College of Optometrists* (2004), 15 Admin. L.R. (4th) 241 (PEICA), rev'd in part on other grounds

> I can find no evidence that Alberta has suffered any prejudice from any delay in taking this action; there is no indication whatever that the province was prepared to accede to an environmental impact assessment under the *Guidelines Order* until it had exhausted all legal avenues including an appeal to this court. The motions judge did not weigh these considerations adequately or at all. Accordingly, the Court of Appeal was justified in interfering with the exercise of his discretion on this point.[472]

Conversely, where a respondent can point to prejudice either to itself,[473] or others,[474] a court will be much more disposed to dismiss an untimely or delayed application for relief.

3:6000 WAIVER

Waiver,[475] acquiescence in the alleged error,[476] and estoppel by conduct[477] in relation to procedural rights can all give rise to a

---

(2005), 260 D.L.R. (4th) 577 (SCC); *O.P.S.E.U. v. Seneca College of Applied Arts and Technology* (2003), 177 O.A.C. 193 (Ont. Div. Ct.), aff'd [2004] O.J. No. 1475.

[472] ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3 at pp. 79-80.

[473] ***Lowe v. Diebolt***, 2014 BCCA 280 at para. 71 (appellate court dismissed judicial review application where five years had elapsed with respondent under threat of disciplinary action).

[474] E.g. *MacLennan v. Ontario Judicial Council*, 2013 ONSC 7043 (Ont. Div. Ct.) at para. 12 (delays of 69 and 41 months in challenging dismissals of complaints prejudicial to judge's function); *New Brunswick (Minister of Transportation and Infrastructure) v. LeBlanc*, 2013 NBCA 9 (prejudice to students, teachers, contractors resulting from late application to challenge school closing); *Lansdowne Park Conservancy v. Ottawa (City)*, 2012 ONSC 1975 (Ont. Div. Ct.) at paras. 31-4; *Canadian Chiropractic Assn. v. Lewis Inquest (Coroner of)* (2011), 285 O.A.C. 122 (Ont. Div. Ct.) (in addition to prejudice to parties, there would be "prejudice to public interest purpose at the centre of a coroner's inquiry" to allow judicial review after inordinate delay) at para. 63; *Ransom v. Ontario* (2010), 263 O.A.C. 240 (Ont. Div. Ct.); *Deep v. Ontario* (2010), 262 O.A.C. 201 (Ont. Div. Ct.); *Asgedom v. Ontario (Minister of Community and Social Services)* (2010), 259 O.A.C. 144 (Ont. Div. Ct.) at para. 16; *O.P.S.E.U. v. Ontario (Ministry of Labour)*, [2008] O.J. No. 4557 (Ont. Div. Ct.) at para. 5; *Ontario Harness Horse Assn. v. Ontario Racing Commission* (2007), 229 O.A.C. 307 (Ont. Div. Ct.); *Gigliotti v. Conseil d'administration du Collège des Grands Lacs* (2005), 76 O.R. (3d) 561 (Ont. Div. Ct.) ("to grant the remedies sought by the applicants would create havoc for the very persons the applicants claim to speak for" at p. 574); *Zaki v. Ottawa Hospital (General Campus)* (2003), 169 O.A.C. 255 (Ont. Div. Ct.) (prejudice found to both employer and union); *Ayangma v. Prince Edward Island (Department of Education)* (2002), 219 Nfld. & P.E.I.R. 78 (PEISC).

[475] E.g. *Kawartha Pine Ridge District School Board v. Grant* (2010), 101 O.R. (3d) 252 (Ont. Div. Ct.) (holding of *de novo* hearing) at para. 33; *Keranda v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 125 (composition of panel) at para. 23; *Ayaichia v. Canada (Minister of Citizenship and Immigration)* (2007), 309 F.T.R. 251 (FC); *Vasanthakumar v. Canada (Minister of Citizenship and Immigration)* (2006), 298 F.T.R. 277 (FC); *R. v. Marshall* (202), 208 N.S.R. (2d) 259 (NSSC); *Henderson v. Zachariadis* (1979), 9 B.C.L.R.

discretionary refusal to grant relief,[178] notwithstanding that jurisdiction cannot be conferred on a statutory decision-maker by consent of the parties,[179] nor may some aspects of the decision-making process be waived.[180]

For example, courts have declined to exercise their judicial review jurisdiction where no objection was taken to a refusal to appoint a board of reference and an affirmative step was subsequently taken,[181] where no objection as to bias was raised,[182] where no

---

363 (BCSC); **see also** *Nejad v. Canada (Minister of Citizenship and Immigration)* (1999), 175 F.T.R. 159 (FCTD): no effective waiver of right to fair hearing.

[176] E.g. *R. v. Campbell*, [1969] 2 O.R. 126 (Ont. H.C.J.).

[177] *Sherman v. Canada (Customs and Revenue Agency)* (2005), 269 F.T.R. 294 (FC); *Lidder v. Canada (Minister of Employment and Immigration)* (1992), 136 N.R. 254 (FCA); *Addy v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces in Somalia)*, [1997] 3 F.C. 784 (FCTD); *Noranda Metal Industries Ltd., Fergus Division v. I.B.E.W., Local 2345* (1982), 40 O.R. (2d) 502 (Ont. Div. Ct.), rev'd on other grounds (1983), 44 O.R. (2d) 529 (Ont. C.A.). **Compare** *St. Anthony Seafoods Ltd. Partnership v. Nfld. & Lab. (Minister of Fisheries and Aquaculture)* (2003), 677 A.P.R. 310 (Nfld. & Lab. S.C.) (broad discretion; elements necessary for estoppel not met), rev'd on another point (2004), 245 D.L.R. (4th) 597 (Nfld. & Lab. C.A.) (estoppel in public law area rare); *McCague v. Canada (Minister of National Defence)* (2001), 203 D.L.R. (4th) 619 (FCA) (Crown cannot be estopped from applying proper interpretation of statute), foll'g *Canada (Minister of Employment and Immigration) v. Lidder*, [1992] 2 F.C. 621 (FCA); *Granger v. Canada (Employment and Immigration Commission)*, [1986] 3 F.C. 70 (FCA); *Greenwood v. Alberta (Workers' Compensation Board)*, [2001] 4 W.W.R. 145 (Alta. Q.B.) and cases cited therein: estoppel cannot operate to defeat a clear and peremptory statutory provision. **And see particularly discussion in *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)***, [2001] 2 S.C.R. 281.

[178] E.g. *Singh v. Canada (Minister of Employment & Immigration)* (1983), 3 D.L.R. (4th) 452 (FCA); **see also** *Rally v. Telus Communications Inc.*, 2013 FC 858 at para. 19 (applicant cannot claim procedural unfairness where opportunity was afforded to make opening statement and was declined); **compare** *Wassilyn v. Ontario Racing Commn.* (1993), 10 Admin. L.R. (2d) 157 (Ont. Gen. Div.); *Hueper v. Board of Naturopathic Physicians* (1976), 66 D.L.R. (3d) 727 (BCCA).

[179] E g. *Seshia v. Health Sciences Centre*, 2001 MBCA 151, rev'g in part (2001), 155 Man. R. (2d) 82 (Man. Q.B.); *Canada v. Krahenbil* (2000), 258 N.R. 87 (FCA); *Hueper v. Board of Naturopathic Physicians* (1976), 66 D.L.R. (3d) 727 (BCCA); *Branigan v. Yukon Medical Council* (1986), 21 Admin. L.R. 149 (Yuk. S.C.); **see also** *CUPE v. Air Canada*, 2013 FC 184 at paras. 38-9; *Rossignol v. New Brunswick Dental Society* (2000), 583 A.P.R. 69 (NBCA); *Newfoundland (Minister of Justice) v. Hanlon* (2000), 183 D.L.R. (4th) 725 (Nfld. C.A.) (parties could not confer jurisdiction on court). **But see** *Hunter Rose Co. Ltd. v. Graphic Arts International Union, Local 28B* (1979), 24 O.R. (2d) 608 (Ont. C.A.).

[180] E.g. *Wassilyn v. Ontario Racing Commn.* (1993), 10 Admin. L.R. (2d) 157 (Ont. Gen. Div.), where the court held that a public hearing was something that had to be held and could not be dispensed with by the conduct or actions of the parties. **See also** *Amerato v. Ontario (Registrar Motor Vehicle Dealers Act)* (2004), 246 D.L.R. (4th) 707 (Ont. Div. Ct.) (right to hearing could not be waived), aff'd (2005), 257 D.L.R. 146 (Ont. C.A.).

[181] *Campbell v. Stephenson* (1984), 6 Admin. L.R. 97 (Ont. Div. Ct.); **see also** *Seaside Real Estate Ltd. v. Halifax-Dartmouth Real Estate Bd.* (1964), 44 D.L.R. (2d) 248 (NSCA), where one of the alternate grounds was a failure to object to a lack of notice of one of the

objection was taken to the quality of interpretation,[183] where the objection was unclear,[184] where no objection was taken to procedures adopted,[185] to a lack of notice,[186] or where there was delay in objecting,[187] or no objection was taken to delay publishing an arbitration award.[188] Likewise, a collateral attack in the context of enforcement proceedings may be precluded where an appeal of an order has not been taken.[189]

However, relief will not be refused on the ground of waiver unless the party opposing the application establishes that the applicant was fully informed of the facts, and that the waiver was truly voluntary.[190] Thus, where there was no knowledge of the relevant facts, failure to object did not amount to waiver.[191] And since a tribunal is not obliged

---

charges; as well as *Emerson v. Law Society of Upper Canada* (1983), 44 O.R. (2d) 729 (Ont. H.C.J.).

[182] E.g. *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56 at paras. 101*ff*.

[183] E.g. *Mowloughi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 662; *Marma v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 777. **See also** *Shi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1059.

[184] E.g. *Mental Health Hospital Board, Edmonton v. Adjudication Board* (1985), 65 A.R. 208 (Alta. Q.B.) (review of an arbitrator's award holding that the employer had waived the late filing of a grievance)

[185] *Bowater Mersey Paper Co. v. C.E.P., Local 141* (2010), 289 N.S.R. (2d) 351 (NSCA) (employer's failure to raise objection or request surrebuttal fatal); *Ciulla v. Toronto (City)* (2008), 77 Admin. L.R. (4th) 6 (Ont. Div. Ct.); *Obidigbo v. Canada (Minister of Citizenship and Immigration)* (2008), 329 F.T.R. 205 (FC) (no request for translation of reasons from French to English, so no breach found); *Mulliqi v. Canada (Minister of Citizenship and Immigration)* (2006), 291 F.T.R. 313 (FC); **see also** *Onesimo v. Canada (Minister of Citizenship and Immigration)* (1999), 174 F.T.R. 262 (FCTD) (applicant had effectively waived right to object to incomplete record and to raise certain arguments). **Compare** *Diamond Construction (1961) Ltd. v. Construction & General Labourers* (1973), 39 D.L.R. (3d) 318 (NBCA). **And see** topic 11:5500, *post*.

[186] *Seaside Real Estate Ltd. v. Halifax-Dartmouth Real Estate Bd.* (1964), 44 D.L.R. (2d) 248 (NSCA). **See also** *Maritime Broadcasting System Ltd. v. Canadian Media Guild*, 2014 FCA 59 at para. 67.

[187] *F. Zormann & Co. Real Estate Ltd. v. Toronto Real Estate Board* (1982), 36 O.R. (2d) 724 (Ont. Div. Ct.); *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 371 (FCTD), aff'd [2001] 4 F.C. 85 (FCA).

[188] *Finlay Forest Industries v. I.W.A., Local 1-424* (1975), 60 D.L.R. (3d) 556 (BCCA); **and see** *Metroplitan Toronto (Municipality) Commissioners of Police v. Police Assn. (Metropolitan Toronto)* (1978), 20 O.R. (2d) 774 (Ont. H.C.J.); *Sturgeon Creek School Division No. 24 v. A.T.A.* (1985), 64 A.R. 229 (Alta. C.A.); *Edmonton Mental Health Hospital v. A.U.P.E., Adjudication Board* (1985), 65 A.R. 208 (Alta. Q.B.) (waiver of time-limits on institution of arbitration proceedings).

[189] E.g. *St. Clements (Rural Municipality) v. Zucawich*, 2013 MBCA 65. **See further** topic 5:0300, *infra*.

[190] *Kvelashvili v. Canada (Minister of Citizenship and Immigration)* (2000), 180 F.T.R. 128 (FCTD); *Conroy v. R.* (1983), 42 O.R. (2d) 342 (Ont. H.C.J.). **See also** *Nejad v. Canada (Minister of Citizenship and Immigration)* (1999), 175 F.T.R. 159 (FCTD).

to adjourn if a party has withdrawn, a court will not treat the failure of a party to withdraw after having objected to an aspect of a proceeding as a waiver.[492] Nor will an applicant who fails to raise a jurisdictional challenge before the tribunal necessarily be held to have waived the right subsequently to seek judicial review on the ground that the tribunal lacked jurisdiction over the matter.[493]

3:7000 OTHER DISQUALIFYING CONDUCT

3:7100 Introduction

The "clean hands" doctrine has been applied in judicial review proceedings,[494] and, it is well-established that a reviewing court may

---

[491] *U.N.A., Local 1 v. Calgary General Hospital* (1989), 39 Admin. L.R. 244 (Alta. S.C.), aff'd (1990), 46 Admin. L.R. 245 (Alta. C.A.); *McGuire v. Royal College of Dental Surgeons (Ontario)* (1991), 49 Admin. L.R. 293 (Ont. Div. Ct.); *Ghirardosi v. British Columbia (Minister of Highways)*, [1966] S.C.R. 367. **See also** *Donas v. British Columbia (Securities Commission)* (1997), 147 D.L.R. (4th) 668 (BCCA); *Mitchell v. Institute of Chartered Accountants (Manitoba)*, [1994] 3 W.W.R. 704 (Man. Q.B.), aff'd [1994], 10 W.W.R. 768 (Man. C.A.); *Radio Iberville Ltée v. Canada (Board of Broadcast Governors)*, [1965] 2 Ex. C.R. 43 (Ex. C.R.).

[492] E.g. *Millward v. Canada (Public Service Commn.)* (1974), 49 D.L.R. (3d) 295 (FCTD); *Pierre v. Canada (Minister of Manpower & Immigration)*, [1978] 2 F.C. 849 (FCA); *Garrow v. Vanton* (1994), 25 Admin. L.R. (2d) 253 (BCSC).

[493] *Glace Bay Community Hospital v. C.B.R.T. & G.W., Local 607* (1992), 332 A.P.R. 89 (NSCA). **See also** *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)* (2001), 204 F.T.R. 161 (FCTD).

[494] E.g. *Khasria v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 773 at para. 23 (failure to meet immigration authorities); *Stone v. Canada (Attorney General)*, 2012 FC 81 at para. 6; *Mjia v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1256 at para. 3; *Mutabunga v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1052 at para. 17, ref'g to *Poveda Mayorga v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1180 at para. 18 (Court has discretion to refuse judicial review when applicant does not have clean hands); *K.M.P. v. Canada (Minister of Citizenship and Immigration)* (2011), 384 F.T.R. 15 (FC) (applicants' subsequent repair of misconduct led court not to apply "clean hands" doctrine); *Jaouadi v. Canada (Minister of Citizenship and Immigration)* (2003), 257 F.T.R. 161 (FC) (petitioner's lack of "clean hands" sufficient to dismiss application); *Zemp v. Norris Point (Town)* (2004), 706 A.P.R. 299 (Nfld. & Lab. S.C.) (*mandamus* refused); *Sault v. LaForme*, [1989] 2 F.C. 701 (FCTD); **compare** ***P.P.G. Industries Canada Ltd. v. Canada (Attorney General)***, [1976] 2 S.C.R. 739; *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)* (2006), 263 D.L.R. (4th) 51 (FCA), **foll'd** *Walia v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1203; *Kandhai v. Canada (Minister of Citizenship and Immigration)* (2009), 81 Imm. L.R. (3d) 144 (FC) (misrepresentations by applicant not sufficient to warrant dismissing application on this basis); **see also** ***Toronto (City) v. Polai***, [1970] 1 O.R. 483 at pp. 492-94 (Ont. C.A.), aff'd in the result [1973] S.C.R. 38, where it was held that the clean hands doctrine ought not to have the same application where the applicant is the Attorney General, foll'd *Vancouver (City) v. Maurice* (2002), 28 C.P.C. (5th) 124 (BCSC). **And see discussion** in *International Forest Products Ltd. v. Kern* (2000), 45 C.P.C. (4th) 92 (BCSC).

deny relief in the exercise of its discretion as a mark of disapproval of the applicant's conduct.[195] Thus, relief has been refused where the applicant had engaged in illegal conduct, had not acted in good faith, or had been less than candid. Furthermore, an applicant's conduct may similarly affect the particular form of relief awarded.[196]

Of course, any evidence of misconduct should be placed before the court by affidavit, although it may also be obtained from the

(Continued on page 3 - 85)

[195] E.g. *D'Souza v. Canada (Minister of Public Safety and Emergency)* (2007), 328 F.T.R. 109 (FC); *Balouch v. Canada (Minister of Citizenship and Immigration)* (2004), 18 Admin. L.R. (4th) 174 (FC) (false affidavit before court); *Khalil v. Canada (Secretary of State)* (1999), 16 Admin. L.R. (3d) 193 (FCA) ("clean hands" relevant to grant of *mandamus*); **see also** *Wayzhushk Onigum Nation v. Kakeway* (2002), 35 Admin. L.R. (3d) 1 (FCTD) (lack of appearance at hearing due to Band's own mismanagement); *Forfar v. East Gwillimbury (Township)*, [1971] 3 O.R. 337 (Ont. C.A.), aff'd (1972), 28 D.L.R. (3d) 512(n) (SCC).

[196] E.g. *Bellechasse Hospital Corp. v. Pilotte*, [1975] 2 S.C.R. 454 (relevant for *mandamus*, but not for claim for damages for breach of contract).

administrative record.[497]

3:7200 Illegal Conduct

Relief that would otherwise have been granted may be refused where the applicant has acted illegally or contrary to law. For example, a remedy has been denied: where an inmate sought judicial review of a decision by the parole board, but then escaped and remained illegally at large;[498] where a collective agreement was procured as a result of an illegal strike;[499] and where an applicant for permanent residence in Canada acted dishonestly and illegally.[500]

On the other hand, a less serious infraction may not bar an applicant from obtaining relief. For example, courts have issued an order of *mandamus* to applicants who operated a body rub parlour without a licence while they were seeking to obtain one,[501] and to applicants who constructed a building after initially being denied a building permit.[502] As well, a breach of an undertaking not to seek judicial review was held not to constitute disqualifying conduct, on the ground that there were other public interests involved.[503]

3:7300 Lack of Candour and Bad Faith

A lack of candour or good faith in connection with either the judicial review proceeding or the impugned administrative process can result in denial of relief. For example, a lack of frankness and resort to "checkerboarding" to avoid a zoning bylaw were held to be relevant to the exercise of a court's discretion in relation to an application to quash

---

[497] E.g. *Novak v. Law Society (British Columbia)*, [1972] 6 W.W.R. 274 (BCSC); **see also** *Gage v. Ontario (Attorney General)* (1992), 55 O.A.C. 47 (Ont. Div. Ct.). As to evidence in judicial review proceedings, see topic 6:5000, *post*.

[498] *Myers v. Canada (National Parole Board)* (1981), 39 N.R. 521 (FCA).

[499] *I.U.O.E., Local 793 v. Traugott Ltd.* (1984), 4 Admin. L.R. 98 (Ont. Div. Ct.).

[500] *Singh v. Canada (Minister of Employment & Immigration)* (1986), 6 F.T.R. 15 (FCTD); **see also** *Jhammat v. Canada (Minister of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 166 (FCTD).

[501] *Tomaro v. Vanier (City)* (1978), 89 D.L.R. (3d) 265 (Ont. C.A.); **but see** *Pellizzon v. Etobicoke (Borough)* (1970), 10 D.L.R. (3d) 313 (Ont. C.A.).

[502] *Slau Ltd. v. Ottawa (City)* (1976), 14 O.R. (2d) 514 (Ont. Div. Ct.).

[503] *Hueper v. Board of Naturopathic Physicians* (1976), 66 D.L.R. (3d) 727 (BCCA).

the bylaw.[504] Similarly, the Ontario Divisional Court refused to compel the issue of a building permit because the applicant's overall development scheme was designed to circumvent the purposes of the *Planning Act*.[505]

As well, relief has been denied in the exercise of the court's discretion where there had been: a lack of candour[506] or misrepresentation[507] before the administrative tribunal in question; delay in implementing a previous court order;[508] deceptive and uncooperative behaviour;[509] condonation of misconduct;[510] a failure to make a full and candid customs disclosure;[511] an attempt to take advantage of a technical mistake;[512] reliance on an absence of evidence before the administrative agency which was within the applicant's power to adduce;[513] and an earlier imposition of an "unauthorized punishment by a tribunal."[514] Courts have also exercised their discretion to deny relief where the purpose of the order sought was to further an

---

[504] ***Homex Realty & Development Co. v. Wyoming (Village)***, [1980] 2 S.C.R. 1011.

[505] *George Stinson Construction Inc. v. Ameliasburgh (Township)* (1977), 15 O.R. (2d) 547 (Ont. Div. Ct.).

[506] *Khalil v. Canada (Secretary of State)* (1999), 176 D.L.R. (4th) 191 (FCA); *Falconbridge Nickel Mines Ltd. v. U.S.W.A.*, [1972] 2 O.R. 709 (Ont. H.C.J.), rev'd [1973] 1 O.R. 136 (Ont. C.A.); *Singh v. Canada (Minister of Employment & Immigration)* (1986), 6 F.T.R. 15 (FCTD); **compare** *R. v. Sadiq* (1990), 39 F.T.R. 200 (FCTD).

[507] *Cock v. British Columbia (Labour Relations Board)* (1960), 26 D.L.R. (2d) 127 (BCCA). **See also** *Cosman Realty Ltd. v. Winnipeg (City)* (2001), 157 Man. R. (2d) 117 (Man. Q.B.), aff'd on other grounds 2001 MBCA 159 (improper financial purpose).

[508] *Johnson v. Milton (Town) (No. 2)* (1981), 34 O.R. (2d) 292 (Ont. H.C.J.), aff'd (1983), 41 O.R. (2d) 456 (Ont. C.A.).

[509] *Balouch v. Canada (Minister of Citizenship and Immigration)* (2004), 18 Admin. L.R. (4th) 174 (FC) (false affidavit before court); *Mauger v. Canada (Minister of Employment & Immigration)* (1980), 36 N.R. 91 (FCA); **see also** *Naskapi-Montagnais Innu Assn. v. Canada (Minister of National Defence)* (1990), 35 F.T.R. 161 (FCTD), add'l reasons (1990), 5 C.E.L.R. 287 at p. 313. **But see** *Heisler v. Saskatchewan (Minister of Environment and Resource Management)* (1999), 16 Admin. L.R. (3d) 215 (Sask. Q.B.) (adoption of strong position in negotiations not bad faith).

[510] *Frito-Lay Canada Ltd. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Union, Local No. 647* (1976), 77 C.L.L.C. 14,061 (Ont. C.A.).

[511] *PAC Stainless Ltd. v. Minister of National Revenue* (1989), 31 F.T.R. 104 (FCTD).

[512] *Burgin v. King*, [1973] 3 O.R. 174 (Ont. Div. Ct.).

[513] *Dunluce Steak House & Pizza Ltd. v. Alberta (Liquor Control Board)* (1992), 7 Admin. L.R. (2d) 31 (Alta. Q.B.).

[514] *R. v. McRae* (1980), 23 B.C.L.R. 244 (BCSC).

applicant's own political objectives,[515] to enable a union to take an unintended advantage of amendments to the *Labour Relations Act*,[516] and where the applicant's bad language and threats had caused his suspension.[517]

3:8000 TECHNICAL DEFECTS AND NON-MATERIAL ERRORS

3:8100 Generally

Where the impugned decision or alleged error does not cause a significant miscarriage of justice,[518] or it is otherwise of a *de minimis* character,[519] courts may decline to grant relief in the exercise of their

---

[515] *Morgan v. Chappell*, [1980] 4 W.W.R. 482 (Sask. Q.B.); **see also** *Smythe v. Anderson* (1970), 11 D.L.R. (3d) 503 (Sask. C.A.).

[516] *Carpenters' District Council of Lake Ontario v. Hugh Murray (1974) Ltd.* (1980), 33 O.R. (2d) 670 (Ont. Div. Ct.).

[517] *Bellechasse Hospital Corp. v. Pilotte*, [1975] 2 S.C.R. 454.

[518] *McDougall v. Canada (Attorney General)* (2011), 419 N.R. 304 (FCA) at para. 51; *Nova Scotia (Department of Community Services) v. Boudreau* (2011), 302 N.S.R. (2d) 50 (NSSC) (notwithstanding that tribunal applied wrong statute, result would have been same under proper statute) at para. 83; *Whitelaw v. Vancouver (City) Commissioners of Police* (1973), 35 D.L.R. (3d) 466 (BCCA).

[519] *Zhan v. Canada (Minister of Citizenship and Immigration)* (2010), 322 D.L.R. (4th) 699 (FC) at paras. 49-54; *Certainteed Gypsum Canada Inc. v. New Brunswick (Workplace Health, Safety and Comp. Comm'n)* (2011), 335 D.L.R. (4th) 239 (NBCA) (inadvertent failure to administer oath to witness did not result in prejudice) at para. 14; *Stubicar v. Alberta (Office of the Information and Privacy Commissioner)* (2008), 81 Admin. L.R. (4th) 151 (Alta. C.A.) at para. 16; *Fountain v. British Columbia College of Teachers* (2007), 67 Admin. L.R. (4th) 268 (BCSC); *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 63 Admin. L.R. (4th) 161 (FC), aff'd in the result (2008), 297 D.L.R. (4th) 651 (FCA); *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co.* (2006), 359 N.R. 84 (FCA); *R.K. Heli-Ski Panaorama Inc. v. Jumbo Glacier Resort Project* (2007), 54 Admin. L.R. (4th) 291 (BCCA); *Lennon v. Ontario (Superintendent of Financial Services)* (2007), 87 O.R. (3d) 736 (Ont. Div. Ct.); *Sinclair v. Conservative Party of Canada* (2004), 23 Admin. L.R. (4th) 86 (FC), aff'd 2005 FCA 383; *Chopra v. Canada (Treasury Board)*, [2006] 1 F.C.R. 105 (FC), aff'd (2006), 354 N.R. 48 (FCA), leave to appeal to SCC ref'd [2006] S.C.C.A. No. 437; *Hechter v. Winnipeg (City)* (2004), 245 D.L.R. (4th) 264 (Man. C.A.); *Cartier v. Canada (Attorney General)* (2002), 2 Admin. L.R. (4th) 247 (FCA); *Ross v. Canada* (2001), 215 F.T.R. 92 (FCTD), aff'd (2003), 308 N.R. 144 (FCA); *Cosman Realty Ltd. v. Winnipeg (City)*, 2001 MBCA 159, aff'g (2001), 157 Man. R. (2d) 117 (Man. C.A.); *Wight Milling Ltd. v. Bloomfield (Village)* (2001), 149 O.A.C. 293 (Ont. C.A); *Park v. Canada (Minister of Citizenship and Immigration)* (1998), 143 F.T.R. 35 (FCTD), aff'd (2001), 272 N.R. 181 (FCA); *Dubé v. Lepage* (1997), 3 Admin. L.R. (3d) 99 (FCTD), and cases cited therein; *Ebo v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 810 (FCTD), aff'd (1998), 223 N.R. 91 (FCA). **Compare** *Yu v. Canada (Attorney*

discretion.[520]

Not unexpectedly, this ground for refusing relief has arisen most frequently where the applicant has alleged a breach of the duty of fairness. As noted,[521] while courts generally do not permit a respondent to argue that the procedural impropriety made no difference to the decision, they are also alert to the danger of trivializing the duty of fairness by setting aside decisions where the result could not be different regardless of the procedural rights afforded. Accordingly, where any prejudice has been cured by subsequent administrative proceedings,[522] or where there was no possibility of prejudice to either the applicant or a third party, courts sometimes will conclude that a minor deviation from the participatory rights to which the applicant was entitled did not constitute a breach of procedural fairness.[523] Similarly, one court refused to quash a labour arbitration award which contained a finding of fact that was supported by no evidence, because the arbitrator's conclusion was otherwise amply justified.[524] Conversely, where the decision is discretionary and it is impossible to conclude that the discretion would not have been exercised differently, relief will not be withheld.[525]

General) (2009), 356 F.T.R. 312 (FC) at para. 28, rev'd on grounds losses not inconsequential 2011 FCA 42.

[520] *Sheckter v. Alberta (Racing Commn.)* (1983), 43 A.R. 313 (Alta. C.A.), leave to appeal to SCC ref'd (1983), 45 A.R. 160.

[521] See topic 3:3300, *ante.*

[522] E.g. *Hnatiuk v. Society of Management Accountants of Manitoba*, 2013 MBCA 31; *Cape Breton (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2013 NSSC 193 at para. 85 (procedural unfairness in relation to referral not material where hearing would follow),

[523] *Pla v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 560 at paras. 16-7, ref'g to ***(Canada (Citizenship and Immigration) v Khosa***, 2009 SCC 12 at para. 43. **And see e.g.** *Pinilla v. Calgary (City) (Subdivision and Development Appeal Board)*, 2013 ABCA 291 at paras. 16-17 (failure to deliver reasons within statutory time limit); *N'Sungani v. Canada (Minister of Citizenship and Immigration)* (2004), 22 Admin. L.R. (4th) 225 (FC) (board's reliance on own specialized knowledge did not affect credibility findings; new hearing not warranted); *Oliver v. Canada (Customs and Revenue Agency)* (2004), 23 Admin. L.R. (4th) 44 (FC) (wrongful admission of documents had no impact on decision); *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2001 FCT 1123 (notwithstanding lack of timely disclosure by department, minimal prejudice to applicant), aff'd (2003), 1 Admin. L.R. (4th) 103 (FCA).

[524] ***Keeprite Workers' Independent Union v. Keeprite Products Ltd.*** (1980), 114 D.L.R. (3d) 162 (Ont. C.A.); **see also** *Sturgeon (Municipal District No. 90) v. Alberta (Assessment Appeal Board)*, [1971] 4 W.W.R. 584 (Alta. C.A.) (an immaterial error of law), aff'd [1972] 3 W.W.R. 455 (SCC).

[525] E.g. *PSAC v. Canada (Attorney General)*, 2013 FC 918 at para. 69.

3:8200 Non-compliance with Procedural or Formal Statutory Provisions

3:8210 *Generally*

A court may in its discretion decide not to set aside administrative action that was taken without complete compliance with procedural or formal requirements, provided that there was substantial compliance and no prejudice resulted from the breach.[526]

However, the exercise of the courts' discretion in this area is bound up with interpretation of the statutory provisions in question. Thus, in determining whether to set aside the administrative action on the ground that it violates a procedural or formal requirement imposed by statute, courts must consider whether it is reasonable to impute to the legislature an intention that non-compliance would normally result in a declaration of invalidity or some similar remedy.

Accordingly, where the public authority has not acted in flagrant disregard of the law, and no prejudice has been sustained by those affected by the action, the adverse effect of judicial intervention on the operation of the statutory scheme may indicate that judicial restraint is appropriate. For example, in the absence of evidence that any prejudice had resulted from the delay, one court declined to set aside the award of an arbitrator on the ground that it had not been delivered within the stipulated period.[527] Similarly, an application for judicial review was

---

[526] E.g. *Seymour v. Aanishinaabeg of Naongashiing*, [2009] 2 C.N.L.R. 353 (FC) (result probably would have been same if procedural requirements followed; application dismissed); *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co.* (2006), 61 Admin. L.R. (4th) 47 (FCA) (flaws inconsequential); *Hazelbrook (Municipality) v. Prince Edward Island* (2004), 13 Admin. L.R. (4th) 110 (PEISC) (lack of written application for permit; however, defect judged technical under P.E.I. *Judicial Review Act*; permit not quashed), rev'd (2005), 699 A.P.R. 183 (PEICA) (defects too significant); *Save the Eaton's Building Coalition v. Winnipeg (City)* (2002), 214 D.L.R. (4th) 348 (Man. Q.B.), aff'd (2002), 170 Man. R. (2d) 33 (Man. C.A.); *Wight Milling Ltd. v. Bloomfield (Village)* (2001), 149 O.A.C. 293 (Ont. C.A). Of course, where the non-compliance also amounts to a breach of the duty of fairness, a remedy will be awarded: see **e.g.** ***Wiswell v. Winnipeg (City)***, [1965] S.C.R. 512. **See also** *Mohammadian v. Canada (Minister of Citizenship and Immigration*, [2000]32 F.C. 371 (FCTD): existence of prejudice immaterial when constitutional right to interpretation denied, aff'd [2001] 4 F.C. 85 (FCA). **See further** topic 9:3330, *post*. **See also** *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 18 (App. BC. 8).

[527] *Metropolitan Toronto (Municipality) Commissioners of Police v. Police Assn. (Metropolitan Toronto), Unit B* (1973), 37 D.L.R. (3d) 487 (Ont. Div. Ct.); it would, however, have been open to the applicant, before the award was delivered, to have sought an order requiring the arbitrator to perform his legal duty. On the failure to comply with time-

dismissed where there was no evidence of prejudice from failure fully to comply with statutory requirements prescribing the content of the notice to be given before a statutory power was exercised.[528]

On the other hand, if a court interprets a statute as requiring compliance to the letter with its procedural or formal requirements, because of the importance of the statutory provision for either the efficacy of the administrative scheme or the protection of individual rights, it may be reluctant to grant relief on the ground that the decision-maker complied in substance.[529]

3:8220 *Judicial Review Statutes*

The *Judicial Review Procedure Acts* in both British Columbia[530] and Ontario[531] expressly provide that the court may refuse relief:

> [o]n an application for judicial review of a statutory power of decision, where the sole ground for relief established is a defect in form or a technical irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred.[532]

Similarly-worded provisions are also found in the Prince Edward Island

---

limits as a ground of judicial review, see topic 9:8000, *post*.

[528] *Polgrain v. Ivanhoe Corp.* (1976), 71 D.L.R. (3d) 348 (Ont. Div. Ct.); see also *Marshall v. Ontario (Child & Family Services Review Board)* (1994), 31 Admin. L.R. (2d) 52 (Ont. Div. Ct.).

[529] E.g. *Dunton v. Etobicoke (Borough)*, [1964] 1 O.R. 14 (Ont. H.C.J.); and *Costello v. Calgary (City)*, [1983] 1 S.C.R. 14 (notice provisions); *Vialoux v. Registered Psychiatric Nurses Assn. (Manitoba)* (1983), 2 D.L.R. (4th) 187 (Man. C.A.) (time-limit for the institution of discipline proceedings). See also *Canadian Tire Corp. v. Regina (City) Board of Revision* (2001), 212 Sask. R. 142 (Sask. Q.B.) (opportunity to appeal lost if lack of compliance with statutory requirements held fatal). But see *Weatherill v. Canada (Attorney General)*, [1999] 4 F.C. 107 (FCTD); *Dexter Construction Co. Ltd. v. Fredericton (City)* (1981), 35 N.B.R. (2d) 217 (NBCA) (failure to comply with notice provisions did not invalidate bylaw in absence of prejudice).

[530] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 9 (App. BC. 4), cited in *R.K. Heli-Ski Panaorama Inc. v. Jumbo Glacier Resort Project* (2007), 54 Admin. L.R. (4th) 291 (BCCA).

[531] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 3 (App. Ont. 3).

[532] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 9. The relevant section in each of the four judicial review statutes also authorizes the court to issue an order validating the administrative decision in question: e.g. *Polgrain v. Ivanhoe Corp.* (1976), 71 D.L.R. (3d) 348 (Ont. Div. Ct.); contrast the pre-*Judicial Review Procedure Act* case of *Dunton v. Etobicoke (Borough)*, [1964] 1 O.R 14 (Ont. H.C.J.).

Judicial Review Act,[533] the Northwest Territories Rules of Court,[534] and in the *Federal Courts Act*.[535] However, these provisions will apply to any administrative action that can be the subject of an application for judicial review, whereas the corresponding provisions in the Ontario and British Columbia statutes apply only to the review of the exercise of a statutory power of decision.[536]

3:9000 BALANCE OF CONVENIENCE

In one sense, whenever the court exercises its discretion to deny relief, balance of convenience considerations are involved.[537] As with the courts' discretion to grant an interlocutory injunction,[538] the public interest and the interests of third parties must always be considered in the balance.

Accordingly, relief has been denied where a lawyer sought to compel a law society to provide written responses to a complainant, but the confusion and difficulty that would result in the administration of the legislation outweighed the benefits,[539] as did the disruption that would ensue from quashing an Indian Band election result,[540] or the effect on the health care system of issuing a declaration that statutory

---

[533] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 6(1) (App. PEI. 1), apld in *Hazelbrook (Municipality) v. Prince Edward Island* (2004), 13 Admin. L.R. (4th) 110 (PEISC), revd on grounds defects too significant (2005), 699 A.P.R. 183 (PEICA).

[534] Northwest Territories Rules of Court, r. 602 (App. NWT. 4).

[535] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(5) [as am. S.C. 2002, c. 8] (App. Fed. 3).

[536] See topic 2:2300, *ante*.

[537] E.g. *Coquitlam (City) v. New Westminster (City)* (2003), 44 C.P.C. (5th) 11 (BCCA); *Berg v. British Columbia (Attorney General)* (1991), 48 Admin. L.R. 82 (BCSC), where an application to quash an approval of logging designed to stop an infestation was denied because its impact on the applicants was minimal, and the damage to the respondents substantial if the relief sought was granted; *Mossman v. Nova Scotia (Attorney General)* (1995), 140 N.S.R. (2d) 321 (NSTD). **Compare** *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (FCA), aff'd [1994] 3 S.C.R. 1100. **And see discussion in** *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)* (1996), 7 C.P.C. (4th) 151 (Ont. Div. Ct.).

[538] See ***Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832***, [1987] 1 S.C.R. 110; **see also** topics 1:8520, *ante*; 6:2120, *post*.

[539] *Greenhorn v. Law Society (Saskatchewan)* (1991), 92 Sask. R. 72 (Sask. Q.B.); **see also** *Cara Operations Ltd. v. Canada (Registrar of Trade Marks)* (1985), 10 Admin. L.R. 27 (FCTD).

[540] *Sparvier v. Cowessess Indian Band No. 73* (1993), 13 Admin. L.R. (2d) 266 (FCTD).

procedural requirements had been violated.[541] A similar conclusion was reached in relation to ordering the issuance of licences on the basis of previously applicable criteria, because it would lead to "confusion and disorder" in the potash industry.[542] As well, where two hundred members out of a membership of twenty-five thousand petitioned a board of directors to hold a meeting to discuss a strike by the co-operative employees and the petition was refused, *mandamus* was denied because of the negative effect it could have on negotiations.[543] And courts have on occasion declined to order reinstatement of persons dismissed from employment, in the exercise of their discretion.[544] Furthermore, the fact that a program which was already established and in full operation was weighed in the exercise of a court's discretion, in deciding whether to restrain it.[545] Moreover, the absence of any objection by the parties to a decision of a tribunal was a factor in denying relief when it was sought by the Attorney-General.[546] However, it has also been held that the financial impact on a tribunal facing a financial crisis did not outweigh the right of the applicants to a remedy,[547] nor did the fact that many others were in the same position, and that it might open the floodgates if relief were granted.[548] Finally, considerations of convenience or

---

[541] *H.E.U. v. Northern Health Authority* (2003), 2 Admin. L.R. (4th) 99 (BCSC).

[542] *Central Canada Potash Co. v. Saskatchewan (Minister of Mineral Resources)*, [1973] 1 W.W.R. 193 (Sask. C.A.).

[543] *Smythe v. Anderson* (1970), 11 D.L.R. (3d) 503 (Sask. C.A.).

[544] E.g. *Bellechasse Hospital Corp. v. Pilotte*, [1975] 2 S.C.R. 454; *Hewat v. Ontario* (1997), 32 O.R. (3d) 622 (Ont. Div. Ct.), aff'd with variation (1998) 37 O.R. (3d) 161 (Ont. C.A.); *Dewar v. Ontario* (1996), 30 O.R. (3d) 334 (Ont. Div. Ct.), aff'd (1998) 37 O.R. (3d) 170 (Ont. C.A.). **See also** *Simmons v. Longworth* (1981), 127 D.L.R. (3d) 443 (Sask. Q.B.) (impossibility of enforcement). **See further** topic 5:2400, *post*.

[545] *Damus v. St. Boniface (City) School Division No. 4* (1979), 108 D.L.R. (3d) 530 (Man. Q.B.); **see also** *Naskapi-Montagnais Innu Assn. v. Canada (Minister of National Defence)* (1990), 35 F.T.R. 161 (FCTD), add'l reasons (1990), 5 C.E.L.R. (N.S.) 287 at p. 313.

[546] ***P.P.G. Industries Canada Ltd. v. Canada (Attorney General)***, [1976] 2 S.C.R. 739.

[547] *Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 8 Admin. L.R. (2d) 29 (Ont. Div. Ct.).

[548] *Padda v. Canada (Minister of Employment & Immigration)* (1988), 20 F.T.R. 180 (FCTD).

fairness may persuade a court to postpone the implementation of relief, or to grant it prospectively only,[549] or to issue a declaration alone, instead of ordering an environmental assessment to be redone.[550]

---

[549] E.g. *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C. 212 (FCA); *Sparvier v. Cowessess Indian Band No. 73* (1993), 13 Admin. L.R. (2d) 266 (FCTD); *Sentes v. Saskatchewan (Minister of Finance)* (1991), 7 Admin. L.R. 140 (Sask. Q.B.) (Regulation *ultra vires* its enabling statute); *Union of Northern Workers v. Northwest Territories (Minister of Mining Safety)* (1991), 49 Admin. L.R. 280 (NWTSC); *Mossman v. Nova Scotia (Attorney General)* (1995), 32 Admin. L.R. (2d) 109 (NSTD). **See also** *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721; *Pacific Press Ltd. v. Canada (Minster of Employment & Immigration)*, [1991] 2 F.C. 327 (FCA) (legislation held unconstitutional). **And see** topic 1:7100, *ante*.

[550] *Mining Watch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 S.C.R. 6 (SCC) at para. 52. **See also** *David Suzuki Foundation v. British Columbia (Minister of Environment)*, 2013 BCSC 874 at paras. 51-3.

provided for standing to "any person who considers himself aggrieved" but limited it to those whose grievance was reasonable, standing was granted to an incorporated public interest group formed to oppose development in a park.[84] On the other hand, a statutory provision authorizing a court to avoid a contract with a municipal corporation for conflict of interest at the instance of the municipality did not enable an elector to seek this remedy.[85] And where a complaint before a human rights tribunal has been withdrawn, a human rights commissioner did not have standing to compel the tribunal to proceed to hear the complaint.[86] Likewise, where an individual had a settlement reached on his behalf by his union, he could no longer be considered a person aggrieved for purposes of Ombudsman-like legislation.[87] Finally, in the absence of legislation to the contrary, a decision-maker has no standing to seek judicial review of its own decision.[88]

4:3412 *Judicial Review Legislation*

Statutes of more general application may also define who is entitled to make an application for judicial review. For example, section 18.1(1) of the *Federal Courts Act*[89] provides that an application for judicial review may be made by the Attorney General of Canada "or anyone

---

(Minister of Fisheries and Aquaculture) (2011), 307 N.S.R. (2d) 142 (NSSC); *Nordale Community Club v. Prince Albert (City)*, [2000] 7 W.W.R. 525 (Sask. Q.B.) ("sufficient interest"); *Royal Commission on the Northern Environment, Re* (1983), 144 D.L.R. (3d) 416 (Ont. Div. Ct.). A statutory right of appeal may also define who may exercise it: e.g. *Friends of the Athabasca Environmental Assn. v. Alberta (Public Health Advisory & Appeal Board)* (1996), 34 Admin. L.R. (2d) 167 (Alta. C.A.) ("directly affected").

[84] *Friends of McNichol Park v. Burlington (City)* (1996), 31 O.R. (3d) 405 (Ont. Div. Ct.).

[85] *Sims v. Sault Ste. Marie (City)* (1997), 34 O.R. (3d) 232 (Ont. Gen. Div.). However, the plaintiffs were held to have standing to seek the statutory motion to quash the relevant bylaws.

[86] *British Columbia (Human Rights Commission) v. British Columbia (Human Rights Tribunal)* (2001), 9 C.C.E.L. (3d) 150 (BCSC).

[87] *Newfoundland and Labrador Office of the Citizens' Rep.) v. Nfld. and Lab. Housing Corp.* (2009), 98 Admin. L.R. (4th) 296 (Nfld. & Lab. S.C.).

[88] *Watson v. Catney* (2007), 84 O.R. (3d) 374 (Ont. C.A.). See also *Bahcheli v. Alberta Securities Commission* (2007), 409 A.R. 388 (Alta. C.A) ("person or company directly affected"; tribunal held not to be able to appeal own decision).

[89] *Federal Courts Act*, R.S.C. 1985, c. F-7, as am. S.C. 2002, c. 8 (App. Fed. 3).

directly affected by the matter in respect of which the relief is sought."[90] And although this definition was enacted after *Finlay*[91] was decided, it has not been construed as preserving the pre-*Finlay* standing requirements. Rather, the phrase has been interpreted as allowing a court discretion to grant standing "when it is convinced that the particular circumstances of the case justify status being granted."[92]

---

[90] E.g. *Teva Canada Ltd. v Canada (Minister of Health)*, 2012 FCA 106 at paras. 48-56; *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)* (2010), 17 Admin. L.R. (5th) 1 (FC); *Fond du Lac Denesuline First Nation v. Canada (Attorney General)* (2010), 377 F.T.R. 50 (FC) (applicants had no standing to challenge uranium mine licence renewal) at paras. 164-80, aff'd 2012 FCA 73; *Canadian Generic Pharmaceutical Assn. v. Canada (Minister of Health)* (2011), 378 F.T.R. 314 (FC) (association of generic drug manufacturers had no standing to challenge decision to list drug), aff'd 2011 FC 465, add'l reasons 2011 FC 1345; aff'd 2011 FCA 357; *Douze v. Canada (Minister of Citizenship and Immigration)* (2010), 382 F.T.R. 81 (FC) (sponsor wife of applicant could not seek judicial review); *Island Timberlands LP v. Canada (Minister of Foreign Affairs)*, 2009 FC 258 (applicant had no status to challenge minister's decision, since only commercial interests affected) at para. 18, aff'd 2009 FCA 353; *League for Human Rights of B'Nai Brith Canada v. Canada* (2008) FC 732, rev'g (2008), 79 Admin. L.R. (4th) 161 (FC) (B'Nai Brith granted standing); *Biro v. Canada (Minister of Citizenship and Immigration)* (2006), 293 F.T.R. 297 (FC) (counsel for applicant); *Pason Systems Corp. v. Canada (Commissioner of Patents)* (2006), 295 F.T.R. 1 (FC); *Moresby Explorers Ltd. v. Canada (Attorney General)* (2006), 350 N.R. 101 (FCA) (licence-holder had standing to challenge policy); *Ontario Harness Horse Assn. v. Canada (Pari-Mutuel Agency)* (2005), 281 F.T.R. 120 (FC) (Ontario Harness Horse Assn. did not have standing before Canadian Pari-Mutuel Agency); *Nunavut Territory (Attorney General) v. Canada (Attorney General)* (2005), 23 Admin. L.R. (4th) 288 (FC) (Attorney General did not have standing); *Dicaire v. Aéroports de Montréal* (2004), 267 F.T.R. 155 (FC) (insufficient interest); *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)* (2003), 227 F.T.R. 96 (FCTD) (Chief failed to show Tribe directly affected by issue of licence by Minister), aff'd 2003 FCA 484; *Canada (Attorney General) v. Canada (Information Commissioner)* (2002), 18 C.P.R. (4th) 110 (FCTD) (federal Attorney General has standing to bring application as of right); *P.S.A.C. v. Canada (Treasury Board)* (2001), 205 F.T.R. 270 (FCTD) (union not directly affected by dispute); *Northwest Territories v. P.S.A.C.* (2001), 27 Admin. L.R. (3d) 259 (FCA) (government of Northwest Territories has standing to challenge provisions of *Canadian Human Rights Act*).

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

[92] *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229 at p. 283 (FCTD), rev'd in part (1995), 131 D.L.R. (4th) 285; **see also** *Strickland v. Canada (Attorney General)*, 2013 FC 475 at para. 61 (since provincial courts usual forum for *Divorce Act* proceedings standing denied to challenge guidelines in Federal Court), aff'd 2014 FCA 33, aff'd 2015 SCC 37; *McGahey v. Joyceville Penitentiary* (2002), 223 F.T.R. 206 (FCTD) (family member has standing to challenge refusal as visitor to inmate); *Canadian Jewish Congress v. Chosen People Ministries, Inc.* (2002), 19 C.P.R. (4th) 186 (FCTD); *Canada (Attorney General) v. Canada (Information Commissioner)* (2002), 18 C.P.R. (4th) 110 (FCTD); *Sierra Club of Canada v. Canada (Minister of Finance)* (1998), 13 Admin. L.R. (3d) 280 (FCTD); *Alberta v. Canada (Canadian Wheat Board)* (1998), 234 N.R. 74 (FCA); *Henry Global Immigration Services v. Canada (Citizenship and Immigration)* (1998), 158 F.T.R. 110 (FCTD); **and compare** the narrow interpretation of the words "directly affected" in a statutory right of appeal in Alberta to an appellate tribunal: *Kostuch v.*

4:3412

Since the *Judicial Review Procedure Acts* in Ontario[93] and in British Columbia[94] are silent on the standing requirement for an applicant for judicial review, the courts in those jurisdictions continue to determine the standing of an applicant according to common law. And while it is unlikely that the requirements will be significantly affected by the form of relief sought, a court may show more reluctance to make an order mandating action to be taken in the performance of a public legal duty at the instance of a person who is not affected in a material way by the failure to perform.[95]

By way of contrast, Prince Edward Island's *Judicial Review Act* provides that an application for judicial review may be dismissed on the ground that "the applicant is not a person who is, or would be, adversely affected by the exercise of, or failure to exercise, the authority conferred on the tribunal."[96] However, if this section is interpreted in the same broad and liberal manner as section 18.1(1) of the *Federal Courts Act*, it will still permit a court to grant standing to a public interest litigant in its discretion, even though the person is not "adversely affected" by the administrative action in question.[97]

As well, the applicable Rules of Practice may also define standing. For example, Rule 3-56(1) of the Saskatchewan Rules of Court provides that an application for judicial review may be made "by any person having such interest as the court considers sufficient in the matter to which the application relates."[98]

Alberta (Director, Air & Water Approvals Division, Environmental Protection) (1996), 35 Admin. L.R. (2d) 160 (Alta. Q.B.); *Court v. Alberta (Environmental Appeal Board)* (2003), 2 Admin. L.R. (4th) 71 (Alta. Q.B.). **And see** A. Desjardins, "Review of Administrative Action in the Federal Court of Canada: The New Style in a Pluralist Setting" in *Administrative Law: Principles, Practice & Pluralism* (Special Lectures of the Law Society of Upper Canada) (Scarborough, Ont.: Carswell, 1992) 405 at pp. 428-29.

[93] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3).

[94] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (App. BC. 4).

[95] Compare H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review*, 6th ed. (London: Sweet and Maxwell, 2007), c. 2; **but see** ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607 at pp. 634-35, where Le Dain J. denied that there were any differences in the standing requirements for declarations and injunctions.

[96] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 5 and 5(b) (App. PEI. 1).

[97] But see *Concerned Citizens Committee of Borden & Carleton Siding v. Prince Edward Island (Minister of Environmental Resources)* (1994), 24 Admin. L.R. (2d) 149 (PEITD).

[98] Saskatchewan Rules of Court, r. 3-56(1). **See also** *Alberta (Attorney General) v. U.F.C.W., Local No. 401*, [2011] 1 W.W.R. 128 (Alta. Q.B.) ("affected by the proceedings"), rev'd on basis application for standing out of time 2011 ABCA 93; *Smyth v. Edmonton*

as a Geophysical Operations Authorization granted by the National Energy Board,[284] and a person who was subject to threats by Revenue Canada in relation to political contributions,[285] as well as a taxpayer who sought to challenge a Revenue Canada policy on behalf of himself and other taxpayers,[286] individuals who had a family member's death investigated by the Special Investigations Unit,[287] and an abortion-provider who wished to challenge the constitutionality of certain abortion legislation and Regulations.[288] Conversely, one individual was held not to have a genuine interest where the minister's approval in question did not have "some direct impact on her."[289] Another individual was denied public interest standing to challenge the bestowal of the Order of Canada on Dr. Morgantaler.[290] Neither did two university professors have a sufficient interest in a university resolution respecting reorganization to qualify for public interest standing, especially when the body they purported to represent had not chosen to intervene.[291]

Nevertheless, a person may have a genuine interest, even if it is not different in kind from the interest of others, since an interest that is shared with others may still be "genuine" for the purpose of granting public interest standing,[292] which distinguishes it from the "special interest" test for private interest standing.

---

[284] *Clyde River (Hamlet) of Clyde River v. TGS-NOPEC Geophysical Co. ASA (TGS)*, 2015 FCA 179.

[285] *Longley v. Minister of National Revenue*, [1992] 4 W.W.R. 213 (BCCA).

[286] *Harris v. Canada*, [1999] 2 F.C. 392 (FCTD), aff'd [2000] F.C.J. No. 729 (FCA).

[287] *Schaeffer v. Wood* (2011), 107 O.R. (3d) 721 (Ont. C.A.).

[288] *Morgentaler v. New Brunswick* (2009), 306 D.L.R. (4th) 679 (NBCA).

[289] *Shiell v. Amok Ltd.* (1987), 58 Sask. R. 141 at p. 147 (Sask. Q.B.). **See also** *Talbot v. Northwest Territories (Commissioner)* (1997), 5 Admin. L.R. (3d) 102 (NWTSC); *Shiell v. Atomic Energy Control Board* (1995), 33 Admin. L.R. (2d) 122 (FCTD). **And see discussion in** *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 (Ont. Sup. Ct. J.) (individual had standing to challenge only some aspects of adoption legislation).

[290] *Chauvin v. Canada* (2009), 35 F.T.R. 200 (FC).

[291] *Kulchyski v. Trent University* (2001), 204 D.L.R. (4th) 364 (Ont. C.A.). **See also** *Camara v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1309 (public interest standing denied where issue moot and applicant's presence in Canada would last only while judicial review outstanding); *Lukács v. Doering* (2011), 340 D.L.R. (4th) 533 (Man. Q.B.) (university professor did not have public interest standing to challenge *process* of university's accommodation of disabled student) at para. 41.

[292] *Reese v. Alberta* (1992), 87 D.L.R. (4th) 1 (Alta. Q.B.). **See also** *MacDonald v. University of British Columbia* (2004), 45 C.P.C. (5th) 251 (BCSC) and cases cited therein.

4:3532 *"Genuine Interest" and Public Interest Groups*

Courts have often been reluctant to recognize the standing of corporations as representing the personal interests of those affected by administrative action.[293] However, groups claiming to represent either the public interest or a particular professional or economic interest have readily been held to have a genuine interest in a matter for the purpose of public interest standing.[294] That is so, in part, due to reasons of cost and convenience. Specifically, a single proceeding instituted by a representative applicant with the expertise and resources to present a well-prepared and argued case is likely to be more efficient than a number of separate challenges made by individuals, as and when they become "persons aggrieved," and in circumstances that may be much less conducive to a carefully considered and comprehensive disposition of the issues.[295]

Thus, the Saskatoon Criminal Defence Lawyers' Association was found to have a genuine interest in challenging the reduction in the number of judges in the Saskatoon courts,[296] as was an association of francophone lawyers respecting enforcement of the *Official Languages Act*,[297] an association of justices of the peace challenging the constitutionality of the scheme providing for remuneration of its members,[298] a federation of law societies to challenge legislation potentially affecting solicitor-client disclosure,[299] the Certified General Accountants Assn. of Canada to challenge certain matters affecting the

---

[293] E.g. topic 4:3443, *ante*.

[294] Indeed, an English court has said that the principles of public interest standing are particularly useful for enabling courts to permit the participation of public interest groups in litigation to which they may make a valuable contribution: *R. v. Inspectorate of Pollution, Ex p. Greenpeace Ltd.*, [1994] 4 All E.R. 329 at pp. 350-52 (Q.B.D.).

[295] E.g. *Unishare Investments Ltd. v. R.* (1994), 18 O.R. (3d) 603 (Ont. Gen. Div.), where a corporation which supplied street vendors was granted standing to attack a bylaw on the ground that it was directly affected and, in any event, the individual street vendors were not likely to have the resources to mount a challenge.

[296] *Criminal Defence Lawyers Assn. (Saskatoon) v. Saskatchewan*, [1984] 3 W.W.R. 707 (Sask. Q.B.).

[297] *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)* (2001), 194 F.T.R. 181 (FCTD).

[298] *Nova Scotia Presiding Justices of the Peace Assn. v. Nova Scotia*, 2013 NSSC 40.

[299] *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 207 D.L.R. (4th) 740 (Ont. Sup. Ct. J.).

profession,[300] an alliance of business groups to counter a challenge to the introduction of the H.S.T. in British Columbia,[301] the Canadian Federation of Students to challenge a Research Council's refusal to proceed with a complaint against a university,[302] a council representing psychiatric patients,[303] and a trade union in respect of the privatization of a Crown corporation that employed its members,[304] a trade union representing members who were affected by decisions of officers of Human Resources and Skills Development,[305] and another trade union in respect of a Cabinet decision to grant unpaid leave to a group of public employees.[306] So too were employees of the CBC who sought to have the Corporation carry out its restructuring in accordance with its constitutive legislation,[307] and a municipality with respect to the proposed location of a hospital.[308] And a group of property owners was granted standing to challenge the issuance of development permits to a developer.[309] Furthermore, two doctors employed by a corporation which performed abortions were given standing to challenge the *vires* of a regulation restricting payment for abortions to the level of payment for those performed in public hospitals.[310] In another case, the Western Canada Wilderness Association, which was made up of "concerned

---

[300] *Certified General Accountants Assn. of Canada v. Canadian Public Accountability Bd.* (2008), 77 Admin. L.R. (4th) 262 (Ont. Div. Ct.).

[301] *Allan v. British Columbia (Chief Electoral Officer)* (2010), 322 D.L.R. (4th) 219 (BCSC).

[302] *Canadian Federation of Students v. Natural Sciences and Engineering Research Council of Canada* (2008), 329 F.T.R. 31 (FC).

[303] *Thompson v. Ontario (Attorney General)* (2011), 106 O.R. (3d) 176 (Ont. Sup. Ct. J.) (however, standing granted on terms).

[304] *Bury v. Saskatchewan Government Insurance*, [1991] 4 W.W.R. 1 (Sask. C.A.).

[305] *Construction and Specialized Workers' Union, Local 1611 v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1353.

[306] *P.E.I.N.U. v. Prince Edward Island (Lieutenant Governor in Council)* (1995), 393 A.P.R. 345 (PEITD).

[307] *C.U.P.E. v. Canadian Broadcasting Corp.* (1991), 50 Admin. L.R. 237 (FCTD).

[308] *Fogo (Town) v. Newfoundland* (2000), 23 Admin. L.R. (3d) 138 (Nfld. S.C.).

[309] *Mountain Ash Court Property Owners Assn. v. Dartmouth (City)* (1994), 376 A.P.R. 74 (NSCA).

[310] *Lexogest Inc. v. Manitoba (Attorney-General)* (1993), 101 D.L.R. (4th) 523 (Man. C.A.) where, however, it was held that neither the corporation nor the doctors could raise *Charter* issues, on the ground that they would be dealt with more effectively by a patient. See also *Morgentaler v. Prince Edward Island (Minister of Health & Social Services)* (1994), 365 A.P.R. 181 (PEITD).

individual members, an organization may still be afforded standing.[319] And in a different context, public interest standing was conferred to permit a challenge to the propriety of a tax ruling made in favour of another by a person who was a member of a public interest group concerned with issues of social justice, including fair taxation.[320] As well, in those circumstances where there is no immediate impact on the public interest applicant, the courts will sometimes consider a group's past record in applying the "genuine interest" criterion. For example, the Canadian Council of Churches was said to have a "genuine interest" in the problems of refugees and immigrants, based on its past record of having demonstrated a "real and continuing" interest.[321] Similarly, the Elizabeth Fry Society was granted standing to challenge the imposition of conditions for legal aid recipients,[322] as was B'Nai Brith in challenging an order-in-council declining to revoke an individual's Canadian citizenship for suppressing wartime activities.[323]

---

[319] E.g. *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* (1993), 103 D.L.R. (4th) 409 (NSTD), rev'd on the ground that it was premature (1993), 108 D.L.R. (4th) 145 (NSCA), leave to appeal to SCC ref'd (1994), 108 D.L.R. (4th) vii(n). **Compare** *Preserve Mapleton Inc. v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2115 (Ont. Div. Ct.) (public interest standing denied where, *inter alia*, the individual members would be able to bring application).

[320] *Harris v. Canada*, [2000] F.C.J. No. 729 (FCA).

[321] ***Canadian Council of Churches v. R.***, [1992] 1 S.C.R. 236 at p. 254. However, in this case standing was denied as there were others more directly involved who could bring the matter before the courts, although the Court also said that the Council would be permitted to intervene in any proceedings brought by rejected claimants for refugee status. As to intervenors, **see generally** topic 4:5000, *post*. **See also** *Ontario Harness Horse Assn. v. Canada (Pari-Mutuel Agency)* (2005), 281 F.T.R. 120 (FC) (standing refused on all branches of test); *Energy Probe v. Canada (Atomic Energy Control Board)* (1985), 11 Admin. L.R. 287 (FCA), leave to appeal to SCC ref'd (1985), 15 D.L.R. (4th) 48(n), a pre-*Finlay* case where Energy Probe was accorded standing because of a long-standing interest in energy-related matters. **And see** *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General)* (1990), 43 Admin. L.R. 134 (NSCA), leave to appeal to SCC ref'd (1990), 100 N.S.R. (2d) 90(n), where CARAL was held to have a genuine interest in the issue of abortion, but was nevertheless denied standing because others were in a superior position to challenge the legislation. Finally, **see** *Vriend v. Alberta*, [1998] 1 S.C.R. 493, where several groups representing same-sex interests were granted standing because of their "direct interest" in the issue of exclusion of sexual orientation from all forms of discrimination.

[322] *Elizabeth Fry Society of Saskatchewan Inc. v. Saskatchewan (Legal Aid Commn.)*, [1989] 2 W.W.R. 168 (Sask. C.A.).

[323] *League for Human Rights of B'Nai Brith Canada v. Canada*, 2009 FC 647 at para. 14, aff'd (2010), 409 N.R. 298 (FCA).

4:3540 *The Requirement of "a Justiciable Issue"*

The requirement that a judicial review proceeding present a "justiciable issue" is one of general application in public law, and has two aspects to it.[324] The first is that the issue should be presented in a form which is readily susceptible to resolution by adjudication. Specifically, it must be amenable to the adversary process, be sufficiently grounded in basic facts, and not involve a hypothetical question.[325] The second is that the issue must be appropriate for determination by the courts, rather than by Parliament or by a provincial legislature.[326] For example, where the issue in question was an alleged breach of statute, or whether a bylaw was *ultra vires* a body's statutory authority,[327] it was readily held to be justiciable.[328] Conversely, where the attack was on consultations leading to a policy opinion, it was held not to raise a justiciable issue.[329] Likewise, a challenge to the development of the Lower Churchill/Muskrat Falls HydroElectric Project was held as being speculative and entirely a political matter and to be non-justiciable.[330]

---

[324] See also topics 3:3400, *ante*; 15:2120, *post*.

[325] *Thompson v. Ontario (Attorney General)* (2011), 106 O.R. (3d) 176 (Ont. Sup. Ct. J.) (sufficient adjudicative facts available); *Ratepayers of Calgary (City) v. Canada*, [2000] 4 W.W.R. 274 (Alta. Q.B.) (matter not justiciable), aff'd (2001), 286 A.R. 128 (Alta. C.A.); *Criminal Defence Lawyers Assn. (Saskatoon) v. Saskatchewan*, [1984] 3 W.W.R. 707 (Sask. Q.B.); *Energy Probe v. Canada (Attorney General)* (1989), 37 Admin. L.R. 1 (Ont. C.A.), leave to appeal to SCC ref'd (1989), 102 N.R. 399(n); **compare** *S. (H.S.) v. Manitoba (Director of Child & Family Services)*, [1987] 5 W.W.R. 309 (Man. Q.B.); **see also** ***Canadian Council of Churches v. R.***, [1992] 1 S.C.R. 236; *Victoria Waterfront Enhancement Society v. Victoria (City)* (1980), 117 D.L.R. (3d) 77 (BCSC), rev'd on other grounds (1981), 131 D.L.R. (3d) 509 (BCCA).

[326] *Schaeffer v. Wood* (2011), 107 O.R. (3d) 721 (Ont. C.A.) at paras. 42-3; *Pim v. Ontario (Minister of the Environment)* (1978), 23 O.R. (2d) 45 (Ont. Div. Ct.) (standing refused on the ground that Cabinet was under no obligation to enact regulations). **And see** *Canadian Assn. of the Deaf v. Canada* (2006), 272 D.L.R. (4th) 55 (FC); *Fogo (Town) v. Newfoundland* (2000), 23 Admin. L.R. (3d) 138 (Nfld. S.C.).

[327] *Urban Development Institute v. Rocky View (Municipal District No. 44)*, [2003] 2 W.W.R. 140 (Alta. Q.B.).

[328] *Greater Victoria Concerned Citizens Assn. v. British Columbia (Provincial Capital Commn.)* (1990), 46 Admin. L.R. 74 (BCSC).

[329] *USW v. British Columbia (Ministry of Energy and Mines)*, 2014 BCSC 1403 at paras. 35*ff*.

[330] *Cabana v. Newfoundland and Labrador*, 2015 NLTD(G) 158 at paras. 37-8, aff'd 2016 NLCA 39.

CHAPTER 5

COMMENCEMENT OF JUDICIAL REVIEW PROCEEDINGS

5:0000 OVERVIEW

5:0100 Generally

Proceedings for the judicial review of administrative action can be initiated in three ways. Most commonly, they are commenced by the issuance of an application for judicial review[1] or an originating notice of motion or application for relief "in the nature of" the prerogative writs.[2] A second means is pursuant to a specific statutory provision providing for review either by way of an appeal,[3] a judicial hearing *de novo*,[4] a reference,[5] or a stated case.[6] And third, in some circumstances judicial review can take place in the context of an ordinary action or a criminal proceeding, either directly,[7] or collaterally.[8]

---

[1] E.g. *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3 .

[2] Alberta, the Northwest Territories, Saskatchewan, Manitoba, Newfoundland and Nova Scotia. In Alberta and New Brunswick, while the proceedings are commenced by an application for judicial review, the relief available is that available pursuant to the prerogative writs. And in the Yukon, a request for remedies is commenced by petition, but the relief is that provided by the prerogative writs. In Quebec, judicial review proceedings are governed by the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 834-61.

[3] E.g. *Securities Act*, R.S.O. 1990, c. S.5.

[4] E.g. *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1.

[5] E.g. *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 18.3(1) and 18.3(2) [as am. S.C. 2002, c.8] contemplate the referral of a question of law by the tribunal, or the referral of a constitutional question by the Attorney General of Canada to the Federal Court for hearing and determination during the currency of administrative proceedings.

[6] E.g. Ontario *Municipal Board Act*, R.S.O. 1990, c. O.28, s. 94.

[7] E.g. *Ainsley Financial Corp. v. Ontario (Securities Commn.)* (1994), 21 O.R. (3d) 104 (Ont. C.A.), where the proceeding was commenced by way of a statement of claim and a motion was brought for summary judgment. See also *365089 BC Ltd. v. View Royal (Town)*, 2014 BCSC 1779 (petition seeking declaration was not application for judicial review); *Campbell Soup Co. Ltd. v. Farm Products Marketing Board* (1976), 10 O.R. (2d) 405 (Ont. H.C.J.), where the usefulness of discovery before trial, and the examination and cross-examination of witnesses at trial, was acknowledged. For the procedural considerations as to seeking review by action, see generally G.D. Watson and M. McGowan, *Ontario Civil Practice 2014* (Scarborough, Ont.: Carswell, 2013); J. Carthy, D.

5:0200 Judicial Review Proceedings

In Ontario[9] and Prince Edward Island,[10] judicial review proceedings are commenced by an originating application entitled "Notice of Application for Judicial Review." Similarly, under the *Federal Courts Act*, the application for judicial review is commenced by an originating notice of application.[11] In British Columbia, they are commenced by a petition.[12] The other common law provinces[13] and Quebec[14] have similar rules. Of course, in all jurisdictions it is necessary that the court have jurisdiction over the parties,[15] that such proceedings not be premature,[16] and that there be compliance with any limitation periods.[17] And where a constitutional issue is raised, the appropriate notice to the Attorneys

---

Millar and J. Cowan, *Ontario Annual Practice 2014* (Scarborough, Ont.: Carswell, 2013). Under the *Federal Courts Act*, R.S.C. 1985, c. F-7, as am. S.C. 2002, c.8, judicial review cannot be by way of an action unless so ordered by a judge, which will be done only in the clearest of circumstances: *Zubi v. R.* (1993), 21 Admin. L.R. (2d) 291 (FCTD). As to the procedure in connection with an action in the Federal Court, **see generally** B. Saunders *et al., Federal Courts Practice 2013* (Scarborough, Ont.: Carswell, annual).

[8] See topic 5:0300, *post.*

[9] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1).

[10] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3.

[11] Federal Courts Rules, 1998, r. 301, and Forms 66 and 301. **See further** topic 2:4120, *ante.*

[12] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(1).

[13] See topics 5:3200 (Manitoba), 5:5000 (Alberta and the Northwest Territories), 5:6000 (Saskatchewan), 5:7000 (New Brunswick), 5:8000 (Nova Scotia and Newfoundland), *post.*

[14] The *Code of Civil Procedure*, R.S.Q. 1977, c. C-25 deals with the other prerogative remedies and evocation in arts. 834-61, and those proceedings are instituted by notice of motion. **See generally** R. Dussault & L. Borgeat, *Administrative Law: A Treatise*, 2d ed., trans. M. Rankin (Toronto: Carswell, 1985).

[15] Typically, judicial review proceedings are commenced in the jurisdiction where the administrative action or decision is rendered. Where the Federal Court has jurisdiction, they may be commenced in any office of the Federal Court. On occasion, however, an issue may arise as to which provincial court has jurisdiction over the proceedings, which will engage the general law of *forum conveniens*: **e.g.** *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (the "natural forum" is the one with the closest and most natural connection with the proceedings). As to *forum conveniens* generally, **see** G.D. Watson and M. McGowan, *Ontario Civil Practice 2014* (Scarborough, Ont.: Carswell, 2013).

[16] As to prematurity, **see generally** topic 3:4000, *ante.*

[17] See topic 5:1000, *post.*

5:2200 Quashing or Setting Aside an Administrative Decision

Where an administrative decision, other than an exercise of power of a legislative nature,[178] has been successfully impugned in proceedings for *certiorari* or its statutory equivalent, the usual judicial order is to quash or set aside the decision. However, a court may refuse to quash a decision where to do so would be inappropriate as, for example, where the error is a failure to provide reasons,[179] or the wrong party had assumed standing,[180] or where the remedy sought

---

Health Service Corp. v. Alberta (Office of the Information and Privacy Comm'r) (2006), 52 Admin. L.R. (4th) 231 (Alta. Q.B.); *Hartwig v. Saskatchewan (Inquiry into Death of Stonechild, Commissioner)* (2007), 284 D.L.R. (4th) 268 (Sask. C.A.); *Vong v. Canada (Minister of Citizenship and Immigration)* (2006), 306 F.T.R. 175 (FC) (evidence refused); *Wannamaker v. Canada (Attorney General)* (2006), 289 F.T.R. 298 (FC), rev'd on other grounds (2007), 361 N.R. 266 (FCA); *United States of America v. Taylor* (2005), 258 D.L.R. (4th) 119 (BCCA) (evidence sought to be admitted not "fresh"); *Canadian Zinc Corp. v. Mackenzie Valley Land and Water Board*, [2005] 8 W.W.R. 161 (NWTSC) (new evidence not admissible); *McGregor v. Rival Developments Inc.* (2004), 193 O.A.C. 153 (Ont. Div. Ct.); *King v. Yukon Medical Council* (2003), 14 Admin. L.R. (4th) 273 (Yuk. Terr. S.C.), citing *K.C. v. College of Physical Therapists*, [1999] A.J. No. 973 (Alta. C.A.); *Wood v. Canada (Attorney General)* (2001), 199 F.T.R. 133 (FCTD) and cases cited therein. **See also** *Songhees Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (2005), 288 F.T.R. 294 (FC); *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)* (2002), 213 D.L.R. (4th) 285 (FCA) (new evidence at refugee vacation hearing not allowed), foll'd *Annalingam v. Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 586 (FCA). **Compare** *Dado v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 430 (fresh evidence of "blood feud" admitted); *Audmax Inc. v. Ontario (Human Rights Tribunal)* (2011), 328 D.L.R. (4th) 506 (Ont. Div. Ct.) (fresh evidence admitted on judicial review since addressed natural justice issues) at para. 15; *Scarlett v. Canada (Minister of Citizenship and Immigration)* (2008), 75 Imm. L.R. (3d) 26 (FC) (stale information had been relied on by tribunal; new information could be adduced) at paras. 8 and 9; *Singh v. Canada (Minister of Citizenship and Immigration)* (2007), 308 F.T.R. 27 (FC) (highly relevant new evidence admitted); *United States of America v. Shulman* (2001), 197 D.L.R. (4th) 69 (SCC) (evidence of abuse of process admissible). **See further** topic 6:5300, *post.*

[178] "Quashing" is still unavailable in respect of the exercise of a power of a legislative nature. In those circumstances, a declaration of invalidity is the normal form of relief: **e.g.** *Western Canada Wilderness Committee v. Canada (Minister of Fisheries and Oceans)*, 2014 FC 148 (declaration as to validity of Ministers' actions); *2211266 Ontario Inc. (c.o.b. Gentlemen's Club) v. Brantford (City)*, 2012 ONSC 5830 (invalid portions severed and declaration delayed for six months to permit City to remedy bylaw); **see also** *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136 at para. 89 (declaration only); **and see** topics 1: 2220, 1:7300, 2:2420, *ante.*

[179] E.g. *Papa Joe's Pizza v. Ontario (Human Rights Commission)* (2007), 59 C.C.E.L. (3d) 98 (Ont. Div. Ct.) (court itself addressed issue); *Cook v. Alberta (Minister of Environmental Protection)* (2001), 207 D.L.R. (4th) 668 (Alta. C.A.); *Jefford v. Pollard* (1985), 10 O.A.C. 239 (Ont. C.A.). Indeed, the most appropriate order may be simply to order that reasons be given or to temporarily prohibit any action being taken until reasons are provided: *Temple v. Ontario (Liquor Licence Board)* (1982), 145 D.L.R. (3d) 480 (Ont. Div. Ct.). However, some courts have quashed decisions for failure to send reasons to the participants as required: **e.g.** *Powell v. Ontario (Attorney General)* (1980), 31 O.R. (2d) 111 (Ont. Div. Ct.); ***Future***

decision.[205] In one unusual case, where a provincial government rejected a commission's report without giving "rational reasons" for doing so, the court ordered the report to be made binding on the government.[206] Having found the reasons given by the government for rejecting recommendations on judges' remuneration to be constitutionally inadequate, the court saw little point in remitting the matter to give the government an opportunity to produce other

(Continued on page 5 - 37)

---

[203] E.g. ***Giguère v. Chambre des notaires du Québec***, [2004] 1 S.C.R. 3, at para. 66; *Goddard v. Dixon*, 2012 BCSC 161 at para. 216.

[204] E.g. *Cruden and Canadian International Development Agency, Re*, 2013 FC 520 at para. 85 (only possible finding was to dismiss the complaint), aff'd 2014 FCA 131; *Beverly Corners Liquor Store Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2012 BCSC 1851 (clear error of law made result obvious). See also *K. (N.) v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1040 at para. 24; *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 at para.120.

[205] E.g. *Sussman v. College of Alberta Psychologists* (2010), 16 Admin. L.R. (5th) 211 (Alta. C.A.); *Alberta (Human Rights and Citizenship Commission) v. Federated Co-operatives Ltd.*(2005), 43 C.C.E.L. (3d) 157 (Alta. Q.B.) (remission to parties would cause needless expense; court made appropriate order); ***Giguère v. Chambre des notaires du Québec*** (2004), 235 D.L.R. (4th) 422 (SCC); *Al-Bakkal v. de Vries* (2003), 176 Man. R. (2d) 127 (Man. Q.B.) (natural justice errors precluded remission to university; court could adequately deal with matter); *N.A.P.E. v. Newfoundland*, [1996] 2 S.C.R. 3. See also *Canada (Attorney General) v. Long Plain First Nation*, 2015 FCA 177 at para. 154 (quashing decision to convey the Barracks property to the Canada Lands Company together with the reasons is a sufficient remedy); *Public Service Alliance of Canada v. Canada (Attorney General)*, 2013 FC 918 at paras. 90-3 (vote order set aside and not remitted as to do so would be inappropriate given the state of negotiations); *Brar v. Manitoba (Taxicab Board)*, 2013 MBCA 103 (inadequate reasons resulted in quashing suspension of licence); *Rathé v. Ontario (Health Professions Appeal and Review Board)* (2002), 166 O.A.C. 161 (Ont. Div. Ct.); *McCarthy v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (2001), 9 C.C.E.L. (3d) 28 (NSCA) (court exercised discretion to make decision Workers' Compensation Appeals Tribunal should have made). As to delay generally, see topic 3:5000, *ante*.

[206] *Alberta Provincial Judges' Assn. v. Alberta* (1999), 177 D.L.R. (4th) 418 (Alta. C.A.). See also *Manitoba Provincial Judges' Assn. v.* Manitoba (2001), 202 D.L.R. (4th) 698 (Man. Q.B.); *Conférence des Juges du Québec v. Québec (Procureure Générale)* (2000), 196 D.L.R. (4th) 533 (Que. C.A.); *Norgard v. Anmore (Village) (Approving Officer)*, 2009 BCSC 823 (part of order sought was made by court directly) at paras. 45*ff*; *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (2000), 191 D.L.R. (4th) 225 (Nfld. C.A.).

reasons that might pass constitutional muster.[207] And in another instance, where the Senate of a university did not accept one of its committees' decision, the court ordered it to do so.[208]

However, in the absence of an order that the matter not be remitted, simply quashing a decision may only put the matter back to the stage of the administrative proceedings prior to the error, leaving the administrative decision-maker free to recommence from that point.[209] Accordingly, where the relief sought is to have a decision quashed and the administrative proceedings ended, the relief requested and, ultimately, the order of the court should expressly so state,[210] or it should give directions akin to a directed verdict.[211] In one unusual situation, the court directed that a protested game be replayed or, if that was not possible, it declared a winner.[212]

5:2230 *Remitting with Directions*

As a further alternative, a court may order that a matter be remitted to a tribunal for redetermination, subject to such directions as it deems warranted. This power to give directions is expressly provided for by the *Federal Courts Act*,[213] Prince Edward Island's *Judicial Review*

---

[207] *Alberta Provincial Judges' Assn. v. Alberta* (1999), 177 D.L.R. (4th) 418 (Alta. C.A.).

[208] *Dunne v. Memorial University of Newfoundland*, 2012 NLTD(G) 41.

[209] ***Chandler v. Assn. of Architects (Alberta)***, [1989] 2 S.C.R. 848; *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)* (1995), 34 Admin. L.R. (2d) 110 (BCSC), aff'd (1996) 38 Admin. L.R. (2d) 116 (BCCA); *Trizec Equities Ltd. v. Burnaby-New Westminster Area Assessor* (1983), 147 D.L.R. (3d) 637 (BCSC). **See also** *Goddard v. Dixon*, 2012 BCSC 161 at para. Of course, if the review is in the context of an appeal, then quashing the decision will not revive the jurisdiction of the administrative decision-maker. Rather, in those circumstances, the decision-maker will be *functus*, unless there is an express power of redetermination. As to the doctrine of *functus officio*, see topic 12:6210, *post*. As to the power to redetermine a matter following a court order, see topic 12:6300, *post*.

[210] E.g. ***United States of America v. Leonard***, 2012 ONCA 622 at paras. 95 and 99 (majority quashed surrender decision and expressly determined that it not be remitted).

[211] *Doyle v. Canada (Attorney General)*, 2012 FC 408 (directed verdict only appropriate in exceptional circumstances);**and see discussion in** *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1500, var'd 2013 FCA 55.

[212] *West Toronto United Football Club v. Ontario Soccer Assn.*, 2014 ONSC 5881 (Ont. Div. Ct.) at para. 35.

[213] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(3)(b) [as am. S.C. 2002, c.8] provides that the court may, inter alia, "set aside and refer back for determination in accordance with such directions as it considers to be appropriate." **See also** *Carroll v. Canada (Attorney General)*, 2015 FC 287 at para. 136 (direction not to dismiss as being vexatious);

Act,[214] and British Columbia's *Judicial Review Procedure Act*.[215] As well, the Alberta,[216] Northwest Territories[217] and New Brunswick Rules[218] provide for remitting with directions. In Nova Scotia, the courts' remedial power is cast broadly and should encompass remitting a matter with directions.[219] And while Ontario's *Judicial Review Procedure Act*

Cekaj v. Canada (Minister of Citizenship and Immigration), 2014 FC 661 at paras. 18-19 (directions amounting to a "directed verdict" should only be given in exceptional circumstances); *Benhmuda v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1222 (elaborate directions as to when and by whom redetermination to be made); *White v. Canada (Minister of Citizenship and Immigration)* (2011), 340 D.L.R. (4th) 546 (FC); *Select Brand Distributors Inc. v. Canada (Attorney General)* (2009), 75 C.P.R. (4th) 344 (FC) (directions issued), rev'd on other grounds 2010 FCA 3; *De Sousa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 753 (*Federal Courts Act* s. 18.1(3)(b) permits only directions to minister, not "order" to exercise discretion) at para. 8; *Johnson v. Canada (Minister of Citizenship and Immigration)* (2005), 275 F.T.R. 316 (FC) (remedy should be used only in exceptional circumstances); *M.A.O. v. Canada (Minister of Citizenship and Immigration)* (2003), 242 F.T.R. 248 (FC) (improper DNA evidence to form no part of decision); *Rafuse v. Canada (Pension Appeals Board)* (2002), 286 N.R. 385 (FCA); *Wihksne v. Canada (Attorney General)*, 2002 FCA 356; *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2003), 300 N.R. 104 (FCA); *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2001), 11 C.P.R. (4th) 289 (FCA); compare *Sidhu v. Canada (Attorney General)*, 2014 FC 624 (directed verdict of not guilty ordered).

[214] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 3(3)(e) provides that a judge may "refer a matter back to a tribunal for further consideration either generally or in accordance with specific findings of the judge".

[215] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 5(1) provides the court may direct a tribunal to "reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates." And, in giving such a direction, the court shall:

> (a) advise the tribunal of its reasons; and
> (b) give it such directions as it thinks appropriate as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

See e.g. *Garnett v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCSC 1395 (direction that certain evidence be excluded from rehearing); *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)* (2011), 20 B.C.L.R. (5th) 356 (BCSC); *Kikals v. British Columbia (Residential Tenancy Act, Dispute Resolution Officers)*, 2009 BCSC 1642; *Dennis v. British Columbia (Superintendent of Motor Vehicles)* (2000), 82 B.C.L.R. (3d) 31 (BCCA); *British Columbia (Legislative Assembly Resolution on Judicial Compensation) (Re)* (1998), 160 D.L.R. (4th) 477 (BCCA).

[216] Alberta Rules of Court, r. 3.24(2)(c), appl'd in *L.E. v. Alberta (Child, Youth and Family Enhancement Act, Appeal Panel)*, 2013 ABQB 161 at para. 53 (matter remitted to Director and not to Appeal Panel).

[217] Northwest Territories Rules of Court, r. 601.

[218] New Brunswick Rules of Court, r. 69.13.

[219] Nova Scotia Rules of Civil Procedure, r. 7.11.

does not contain an express power to remit with directions, it has been a long-standing practice for a court to remit a matter to a statutory tribunal for redetermination in accordance with the judgment or reasons of the court.[220]

Sometimes, such directions involve clarification of a procedural[221] or substantive legal question,[222] or they merely seek to isolate a single issue that should be determined.[223] In that circumstance, the terms of the remission will define the jurisdiction of the subsequent reviewing court.[224] Moreover, whether the directions have been heeded is reviewable by the standard of correctness.[225] Of course, when the decision ought to be made by the administrative agency, the directions should not be so specific as to dictate the result.[226] Conversely and

---

[220] E.g. *Watt v. Law Society of Upper Canada* (2005), 255 D.L.R. (4th) 701 (Ont. Div. Ct.) (disbarred lawyer to be re-admitted; law society to devise conditions), suppl. reasons [2005] O.J. No. 5220; *Toronto Housing Co. v. Sabrie* (2003), 168 O.A.C. 363 (Ont. Div. Ct.) (tribunal ordered to extend time for appeal). **See also** *Ontario Federation of Justices of the Peace Assns. v. Ontario (Attorney General)* (1999), 43 O.R. (3d) 541 (Ont. Div. Ct.); *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535 (Ont. C.A.), where the direction was to hold an oral hearing.

[221] E.g. *Umane v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 1127at para. 44 (direction to make redetermination without regard to certain evidence); *Caressant Care Nursing Home of Canada Ltd. v. London and District S.W.U., Local 220* (2005), 32 Admin. L.R. (4th) 129 (Ont. Div. Ct.) (issue of "public sector employer" remitted to different body), suppl. reasons [2005] O.J. No. 5009; *Kaur v. Canada (Minister of Employment & Immigration)*, [1990] 2 F.C. 209 (FCA), where the court clarified that the adjudicator had jurisdiction to reopen to correct procedural error.

[222] E.g. *Klippert v. British Columbia (Gold Commissioner)* (2005), 39 Admin. L.R. (4th) 115 (BCCA) (survey ordered; Gold Commissioner to apply it to disputed lands); *Lucas v. Canada (Public Service Commn. Appeal Board)*, [1987] 3 F.C. 354 (FCA), where the court directed the Appeal Board to view an "assignment" as an "appointment" and take jurisdiction; **and see** *N.A.P.E. v. Newfoundland*, [1996] 2 S.C.R. 3 where, but for the delay, the question of construction of the collective agreement would have been remitted.

[223] E.g. *MacKinnon v. Nova Scotia (Department of Justice)*, 2012 NSSC 302; *J.B. v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 679 (same officer directed to redetermine matter taking into account specific evidence); *Ozdemir v. Canada (Minister of Citizenship and Immigration)* (2004), 256 F.T.R. 154 (FC); **see also** *First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 18 at paras. 166-8 (remission to a particular stage of the decisional process); *R.G. Facilities (Victoria) Ltd. v. British Columbia (G.M., Liquor Control and Licensing Branch)*, 2009 BCSC 630 at para. 128.

[224] *Bernard v. Canada (Attorney General)*, 2012 FCA 92 at para. 31, aff'd 2014 SCC 13.

[225] ***Kelly (Trustee of) c. Québec (Régie des rentes)***, 2013 SCC 46 at para. 46 (administrative decision-maker obligated to follow such directions as long as they remain good law); *Canada (Attorney General) v. Burden*, 2012 FC 383 at para. 23.

[226] E.g. *Ali v. Canada (Minister of Employment & Immigration)*, [1994] 3 F.C. 73 (FCTD), where the court held that it had the power to give specific directions but declined to do so; **compare** *Bageerathan v. Canada (Minister of Citizenship and Immigration)*, 2009

exceptionally, it has been held that where the result is inevitable, a matter may be remitted with a direction to the tribunal on the decision to be made.[227]

The power to remit with directions has been exercised in many contexts, including decisions of assessment boards;[228] marketing boards;[229] human rights tribunals;[230] veterans' appeal boards;[231]

FC 513 ("directed decision" made, due to delays and obstinacy of officials) at paras. 35*ff*; *Turanskaya v. Canada (Minister of Citizenship and Immigration)* (1997), 145 D.L.R. (4th) 259 (FCA), where the Refugee Division was ordered to declare an individual a Convention refugee. **See also** *De Sousa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 753 (*Federal Courts Act* s. 18.1(3)(b) permits only directions to minister, not "order" to exercise discretion) at para. 8; *Rafuse v. Canada (Pension Appeals Board)* (2002), 286 N.R. 385 (FCA).

[227] E.g. *Zimmerman v. Canada (Attorney General)* (2011), 415 N.R. 13 (FCA) at para. 29; *Wihksne v. Canada (Attorney General)*, 2002 FCA 356. **See also** *Provincial Judges' Assn. of Manitoba v. Manitoba*, 2013 MBCA 74 at paras. 155-162 (order requiring government to implement report upheld); *Freeman v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 1065 at paras. 78-80 (such directions not appropriate where issue turns on facts); *Abetew v. Manitoba (Taxicab Board)*, 2013 MBCA 19 at para. 16 (direction that licence be reinstated); *Lloyd v. Alberta (Transportation Safety Board)*, 2012 ABQB 443 at paras. 61-2; *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1500, var'd 2013 FCA 55; *Bageerathan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 513 (excessive delays and obstinacy justified such an extraordinary order) at paras. 35*ff*; *Provincial Court Judges' Assn. of New Brunswick v. N.B. (Minister of Justice and Consumer Affairs)* (2009), 347 N.B.R. (2d) 296 (NBCA) (government ordered to implement report concerning judges' salaries); *Kerr v. Canada (Revenue Agency)* (2008), 334 F.T.R. 249 (FC) at para. 55.

[228] *New Brunswick (Executive Director of Assessment) v. Ganong Bros. Ltd.* (2004), 240 D.L.R. (4th) 687 (NBCA) (board in better position to evaluate evidence); *Newfoundland (Attorney General) v. Newfoundland Colonization & Mining Co.* (1983), 130 A.P.R. 150 (Nfld. C.A.).

[229] *SK Mushroom Farm Ltd. v. British Columbia Mushroom Marketing Board* (1998), 166 D.L.R. (4th) 577 (BCCA).

[230] E.g. *Mitchell v. Newfoundland (Human Rights Commission)* (2004), 40 C.C.E.L. (3d) 124 (Nfld. & Lab. S.C.) (tribunal to consider crucial psychological report which had been overlooked); *Stringer v. Newfoundland (Human Rights Commission)* (2003), 666 A.P.R. 350 (Nfld. & Lab. S.C.) (human rights commission to reconsider whether complaint should be referred to board of inquiry); *Canada (Attorney General) v. McKenna*, [1999] 1 F.C. 401 (FCA); *Zutter v. British Columbia (Council of Human Rights)* (1993), 18 Admin. L.R. (2d) 228 (BCSC), aff'd (1995), 122 D.L.R. (4th) 665 (BCCA), leave to appeal to SCC ref'd (1995), 13 B.C.L.R. (3d) xxxiii(n).

[231] *Danakas v. War Veteran's Allowance Board (Canada)* (1985), 10 Admin. L.R. 110 (FCA).

professional disciplinary bodies;[232] professional accreditation bodies;[233] a Registrar of drivers' licences;[234] civil service appeal boards;[235] a workers' compensation board;[236] immigration tribunals;[237] the Canadian International Trade Tribunal,[238] the Competition Tribunal;[239] a freedom of information and privacy commission;[240] an unemployment insurance tribunal;[241] a film censorship board;[242] an interest arbitration board;[243] a pension board;[244] an arbitration board;[245] a municipal council;[246] a

---

[232] E.g. *Wakeford v. College of Physicians & Surgeons (British Columbia)* (1993), 105 D.L.R. (4th) 543 (BCCA).

[233] *Tchou-San-Da v. Assn. of Professional Engineers and Geoscientists of B.C.* (2007), 64 C.L.R. (3d) 52 (BCSC) (bylaw to be amended).

[234] *Delaney v. Nfld. & Lab. (Driver's Licence Suspension Review Board)* (2004), 20 Admin. L.R. (4th) 118 (Nfld. & Lab. S.C.); *Cluney v. Nova Scotia (Registrar of Motor Vehicles)* (1975), 5 A.P.R. 246 (NSCA). See also *Dennis v. British Columbia (Superintendent of Motor Vehicles)* (2000), 82 B.C.L.R. (3d) 31 (BCCA).

[235] *Lucas v. Canada (Public Service Commn. Appeal Board)*, [1987] 3 F.C. 354 (FCA); *Barton v. Canada (Attorney General)* (1993), 17 Admin. L.R. (2d) 207 (FCTD); *Keenan v. Canada (Public Service Commn.)*, [1989] 3 F.C. 643 (FCA).

[236] *Radhak v. British Columbia (Workers' Compensation Board)* (1990), 45 B.C.L.R. (2d) 94 (BCSC).

[237] E.g. *Ngo v. Canada (Minister of Citizenship and Immigration)* (2007), 67 Admin. L.R. (4th) 155 (FC); *Qin v. Canada (Minister of Citizenship and Immigration)* (2002), 225 F.T.R. 136 (FCTD); *Turanskaya v. Canada (Minister of Citizenship and Immigration)* (1997), 145 D.L.R. (4th) 259 (FCA); see also *Bageerathan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 513 (different officer directed to make "directed decision").

[238] *Seprotech Systems Inc. v. Peacock Inc.* (2003), 300 N.R. 277 (FCA) (remedial discretion to be exercised in accordance with law and reasons provided); *Canada (Attorney General) v. Polaris Inflatable Boats (Canada) Ltd.*, 2001 FCA 283 (matter remitted solely to rephrase tribunal's determination).

[239] *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2003), 300 N.R. 104 (FCA); *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2001), 11 C.P.R. (4th) 289 (FCA).

[240] *Ontario (Attorney General) v. Ontario (Office of the Information & Privacy Commissioner, Inquiry Officer)* (1994), 19 O.R. (3d) 197 (Ont. Div. Ct.).

[241] *Canada (Attorney General) v. Purcell*, [1996] 1 F.C. 644 (FCA).

[242] *Ontario Film & Video Appreciation Society v. Ontario (Film Review Board)* (1986), 57 O.R. (2d) 339 (Ont. Div. Ct.).

[243] *Lethbridge Community College v. Alberta (Public Service Employee Relations Board)* (1990), 72 D.L.R. (4th) 600 (Alta. C.A.), leave to appeal to SCC ref'd (1991), 77 D.L.R. (4th) vii(n).

[244] *Metropolitan Toronto (Municipality) Police Services Board v. Ontario Municipal Employees Retirement System* (1994), 20 O.R. (3d) 210 (Ont. Div. Ct.). And see *Rafuse v. Canada (Pension Appeals Board)* (2002), 286 N.R. 385 (FCA) and *Wihksne v. Canada (Attorney General)*, 2002 FCA 356 (Pension Appeals Board decisions respecting grant of

provincial government;[247] a petroleum board;[248] and a labour standards tribunal.[249]

5:2240 *Remission to a Differently-Constituted Body*

Although referrals may be made to the same authorities who decided the matter originally,[250] a court may order that the matter be remitted to a differently-constituted panel or to a different decision-maker.[251] Indeed, this is the usual order following a finding of bias.[252]

---

leave to appeal).

[245] E.g. ***Greater Toronto Airports Authority v. P.S.A.C., Local 0004*** (2011), 329 D.L.R..(4th) 256 (Ont. Div. Ct.) (arbitrator directed to redetermine mental distress and punitive damages amounts); *Geauvreau-Turner Estate v. Ojibways of Onigaming First Nation* (2007), 60.C.C.E.L. (3d) 159 (FCA) (*Canada Labour Code* adjudication).

[246] *Trans-West Developments Ltd. v. Nanaimo (City),* [1980] 3 W.W.R. 385 (BCSC).

[247] *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)* (2011), 20 B.C.L.R. (5th) 356 (BCSC) (lieutenant-governor-in-council ordered to fulfill aboriginal consultation obligations) at para. 201.

[248] *Petro-Canada v. Canada-Newfoundland Offshore Petroleum Board* (1995), 127 D.L.R. (4th) 483 (Nfld. S.C.) (remission with direction to give reasons).

[249] *Murphy v. Nova Scotia (Labour Standards Tribunal)* (1995), 139 N.S.R. (2d) 204 (NSCA).

[250] E.g. *Fitzpatrick v. Newfoundland (Workplace Health, Safety and Compensation Commission)* (2001), 620 A.P.R. 272 (Nfld. S.C.); *Nanda v. Canada (Public Service Commn. Appeal Board)* (1972), 34 D.L.R. (3d) 51 (FCA).

[251] E.g. *Ezokola v. Canada (Minister of Citizenship and Immigration)* (2011), 335 D.L.R. (4th) 164 (FCA), rev'd 2013 SCC 40 (original panel had also applied wrong test; new panel warranted) at para. 78; *Elk Valley Coal Corp. v. U.M.W. of America Local 1656,* 2009 ABCA 407; *Ngo v. Canada (Minister of Citizenship and Immigration)* (2007), 67 Admin. L.R. (4th) 155 (FC) (same fundamental error made twice); *Chowdhury v. Canada (Minister of Citizenship and Immigration)* (2003), 6 Admin. L.R. (4th) 198 (FC) (appropriate remedy for error of law by tribunal was redetermination by another panel); *Newfoundland & Labrador Teachers' Assn. v. Avalon East School District No. 10* (2003), 661 A.P.R. 348 (Nfld. & Lab. S.C.) (following second judicial review of arbitration decision, remission to different body warranted); see also ***Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières v. Université du Québec à Trois-Rivières,*** [1993] 1 S.C.R. 471; *Punniamoorthy v. Canada (Minister of Employment & Immigration)* (1994), 133 D.L.R. (4th) 663 (FCA).

[252] E.g. *Canadian College of Business and Computers Inc. v. Ontario (Priv. Career Colleges Act, Superintendent)* (2010), 17 Admin. L.R. (5th) 245 (Ont. C.A.) at para. 72; *Alberta (Employment and Immigration) v. Alberta Federation of Labour,* 2009 ABQB 574; *Kerr v. Canada (Revenue Agency)* (2008), 334 F.T.R. 249 (FC) (as well, directed judgement ordered) at paras. 55-6; *Chaudhry v. Canada (Minister of Citizenship and Immigration)* (2006), 56 Admin. L.R. (4th) 114 (FC); *James Richardson Int. Ltd. v. Canada,* [2005] 2 F.C.R. 534 (FC), var'd 2006 FCA 180; *Yusuf v. Canada (Minister of Employment & Immigration)* (1991), 7 Admin. L.R. (2d) 86 (FCA). **Compare** *Fong v. Winnipeg Regional*

Similarly, where the error is an erroneous finding of fact[253] or a natural justice error,[254] or the conclusion is such that it indicates a risk of prejudgment,[255] remission to a different decision-maker is appropriate and will usually be ordered, as it will if any other appearance of unfairness would result from having the matter redetermined by the same persons,[256] including an unlawful refusal to give reasons for the decision.[257]

Health Authority, [2005] 2 W.W.R. 173 (Man. Q.B.) (quorum not available, so court decided issue); *Chipman Wood Products (1973) Ltd. v. Thompson* (1996), 460 A.P.R. 386 (NBCA), where the court noted that remission to a differently-constituted panel would not remove the apprehension of bias, and *Grochowski v. Assn. of Architects (Alberta)* (1996), 38 Admin. L.R. (2d) 132 (Alta. C.A.), where it was noted that an untainted hearing panel would be difficult to obtain.

[253] E.g. *Hefnawi v. Health Care Practitioners Special Committee for Audit Hearings*, 2016 BCSC 226 at para. 85 (circumstances surrounding refusal to admit an affidavit); *Foothills Provincial General Hospital v. U.N.A., Local 115* (1993), 140 A.R. 321 (Alta. S.C.), add'l reasons (1994), 150 A.R. 81 (finding made without evidence); *Girvin v. Consumers' Gas Co.* (1973), 40 D.L.R. (3d) 509 (Ont. Div. Ct.).

[254] E.g. *R.G. Facilities (Victoria) Ltd. v. British Columbia (G.M., Liquor Control and Licensing Branch)*, 2009 BCSC 630 (one issue to be determined) at para. 128; *Beier v. Vermilion River (County) Subdivision and Development Appeal Board*, 2009 ABCA 338; *McNaught v. Toronto Transit Commission* (2003), 233 D.L.R. (4th) 80 (Ont. Div. Ct.) (reprisal complaint should not have been consolidated with contempt complaint before same tribunal), quashed on basis consolidation reasonable (2005), 249 D.L.R. (4th) 334 (Ont. C.A.), leave to appeal to SCC ref'd [2005] S.C.C.A. No. 133; *Manpel v. Greenwin Property Management* (2005), 200 O.A.C. 301 (Ont. Div. Ct.), suppl. reasons [2005] O.J. No. 5077; *Qin v. Canada (Minister of Citizenship and Immigration)* (2002), 225 F.T.R. 136 (FCTD) (matter remitted to another visa officer; order made that redetermination to be made before specific date); *Crundwell & Associates v. Manitoba (Taxicab Board)* (2001), 156 Man. R. (2d) 247 (Man. C.A.); *Canadian Broadcasting Corp. v. Paul* (2001), 198 D.L.R. (4th) 633 (FCA). But see *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535 (Ont. C.A.) where the court refused specific relief and remitted the matter back to the Examinations Committee with directions that it conduct an oral hearing.

[255] *Dayco (Can.) Ltd. v. C.A.W.* (1990), 73 D.L.R. (4th) 718 (Ont. C.A.), aff'd [1993] 2 S.C.R. 230; see also e.g. *Fitzpatrick v. Newfoundland (Workplace Health, Safety and Compensation Commission)* (2001), 620 A.P.R. 272 (Nfld. S.C.).

[256] E.g. *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 574; *Beier v. Vermilion River (County) Subdivision and Development Appeal Board*, 2009 ABCA 338; *Elk Valley Coal Corp. v. U.M.W. of America Local 1656*, 2009 ABCA 407. Compare *Walton v. Alberta (Securities Commission)*, 2014 ABCA 446 at paras. 8-12 (sanctions determination remitted, with panel to be selected in usual way and none of the prior members to be disqualified).

[257] *Canada (Minister of Citizenship and Immigration) v. Ryjkov* (2005), 39 Admin. L.R. (4th) 148 (FC); *Canada (Minister of Human Resources Development) v. Chhabu* (2005), 35 Admin. L.R. (4th) 193 (FC); *Via Rail Canada Inc. v. Lemonde* (2000), 193 D.L.R. (4th) 357 (FCA); ***Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)*** (1997), 160 N.S.R. (2d) 241 (NSCA), where "to the greatest extent possible" the matter was to be heard by different members of the board.

5:2240

When such a remission is made, however, a complete rehearing will be required,[258] unless the matter requiring redetermination does not require a complete rehearing.[259]

5:2250 *Partial Quashing and Severance*

5:2251 *Generally*

The question of whether administrative action can be quashed or declared invalid in part, allowing the remainder to stand, has arisen in connection with adjudicative decisions,[260] with exercises of administrative discretion,[261] and with subordinate legislation.[262] Nevertheless, in each context the question is the same: is there too much inter-connectedness between the offending portion and the remainder[263] to permit severance? Where there is not, severance can be an appropriate remedial option.[264] However, severance of only the offending

---

[258] *Floris v. Nova Scotia (Director of Livestock Services)* (1987), 191 A.P.R. 419 (NSTD), add'l reasons to (1986), 189 A.P.R. 320 (NSTD). As to the scope and procedure of redeterminations generally, see topic 12:6320, *post.*

[259] *Sea-Scape Landscaping v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (2004), 244 D.L.R. (4th) 624 (NBCA); see also *Grain Workers Union, Local 333 v. Prince Rupert Grain Ltd.* (1987), 77 N.R. 310 (FCA).

[260] E.g. ***Attis v. New Brunswick District No. 15 Board of Education***, [1996] 1 S.C.R. 825 (permanent ban severed as exceeded minimal impairment test under s. 1 of *Charter*); see also *National Bank of Canada v. R.C.I.U.*, [1984] 1 S.C.R. 269; ***Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)***, [1984] 2 S.C.R. 412.

[261] E.g. *Morton v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 575 (severance of conditions of a licence); *Mid-West By-Products Co. v. Manitoba (Clean Environment Commn.)*, [1979] 6 W.W.R. 46 (Man. Q.B.) (environmental order); *Florence v. Canada (Air Transport Committee)* (1988), 34 Admin. L.R. 36 (FCTD) (grant of exemptions); *S. (M.) v. Alberta (Crimes Compensation Board)* (1998), 160 D.L.R. (4th) 567 (Alta. C.A.) (compensation award). See further The Honourable John M. Evans, *View From the Top: Administrative Law in the Supreme Court of Canada*, 2014-2015 at pp. 2015VT-14-5*ff.*

[262] E.g. ***Arcade Amusements Inc. v. Montréal (Ville)***, [1985] 1 S.C.R. 368; *356226 British Columbia Ltd. v. Vancouver (City)* (1998), 161 D.L.R. (4th) 696 (BCCA); *356226 British Columbia Ltd. v. Vancouver (City)* (1993), 15 M.P.L.R. (2d) 183 (BCSC) (bylaws); ***McNeil v. Nova Scotia (Board of Censors)***, [1978] 2 S.C.R. 662 (Regulation).

[263] ***Attis v. New Brunswick District No. 15 Board of Education***, [1996] 1 S.C.R. 825; see also *Canada (Human Rights Commission) v. Kerr* (1990), 72 D.L.R. (4th) 574 (FCTD); *Oxbow School Board v. Eamer* (1972), 30 D.L.R. (3d) 426 (Sask. Q.B.); *Simpson-Sears Ltd. v. Department Store Organizing Committee, Local 1004* (1956), 3 D.L.R. (2d) 517 (Sask. C.A.).

[264] ***Agrium Vanscoy Potash Operations v. USW, Local 7552***, 2014 SKCA 79 at para. 23. And see e.g. to excise a portion that is retroactive: *United Automart Ltd. v.*

portions of reasons for a decision, while leaving the decision intact, is generally not permitted.[265]

5:2252 *Subordinate Legislation*

Frequently, severability issues arise in connection with subordinate legislation, and when they do they raise the question: is the offending portion of the subordinate legislation separate,[266] or is it an integral part of the whole instrument[267] and so inextricably bound up with the remainder that to sever it would amount to rewriting the instrument?[268] Expressed otherwise in terms of the burden of proof:

> Before there can be severance of the exercise of a statutory power, it must be shown that the persons who exercised it...would have adopted by itself the remainder.[269]

5:2300 Monetary Relief

Generally speaking, apart from section 24 of the *Charter*[270] or a

---

Kamloops (City) (1981), 16 M.P.L.R. 178 (BCSC), rev'd on other grounds (1983), 144 D.L.R. (3d) 566 (BCCA); or uncertain: *Labatt Brewing Co. v. Winnipeg (City) Tax Collector* (1994), 96 Man. R. (2d) 241 (Man. Q.B.).

[265] *Libby, McNeill & Libby of Canada Ltd. v. U.A.W.* (1978), 21 O.R. (2d) 362 (Ont. C.A.); *Alberta v. Alberta (Public Service Employee Relations Board)* (1985), 14 Admin. L.R. 277 (Alta. Q.B.); but see *Cornwall, Re* (1965), 51 W.W.R. 117 (BCSC). See also *Hurd v. Hewitt* (1991), 13 Admin. L.R. (2d) 223 (Ont. Gen. Div.), rev'd on other grounds (1994), 20 O.R. (3d) 639 (Ont. C.A.), where the court made a declaration that certain findings of fact having no effect on the outcome had been made in breach of the rules of natural justice.

[266] ***McNeil v. Nova Scotia (Board of Censors)***, [1978] 2 S.C.R. 662; *Citipark Inc. v. Hamilton (City)* (2000), 8 C.L.R. (3d) 178 (Ont. Sup. Ct. J.); *356226 British Columbia Ltd. v. Vancouver (City)* (1998), 161 D.L.R. (4th) 696 (BCCA); *Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; ***Arcade Amusements Inc. v. Montreal***, [1985] 1 S.C.R. 368.

[267] *Jaukovic v. The Blue Mountains (Town)* (2002), 58 O.R. (3d) 394 (Ont. Sup. Ct. J.); *Saint John (City) v. Crowe's Place Ltd.* (2000), 604 A.P.R. 110 (N.B. Prov. Ct.); *Reid's Heritage Homes Ltd. v. Guelph (City)* (2000), 189 D.L.R. (4th) 561 (Ont. Sup. Ct. J.). And see particularly *R. v. Wonderland Gifts Ltd.* (1996), 45 Admin. L.R. (2d) 188 (Nfld. C.A.) (statute itself could not be declared inoperative).

[268] *Swan City Foods Ltd. v. R.* (1983), 27 Alta. L.R. (2d) 261 (Alta. S.C.). See also *British Columbia Ferry Corp. v. Canada (Minister of National Revenue)*, [2001] 4 F.C. 3 (FCA).

[269] *Save Richmond Farmland Society Western Canada Wilderness Committee v. Richmond (Township)* (1988), 36 Admin. L.R. 45 at p. 58 (BCSC).

[270] ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929 (arbitrator has jurisdiction to award damages for *Charter* breach); *Auton (Guardian ad litem of) v. British Columbia (Minister*