Judicial Review in Canada

John D. Richard

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Judicial Review in Canada

Chief Justice John D. Richard

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* Chief Justice John D. Richard serves on the Federal Court of Appeal in Canada, and he wishes to acknowledge the thorough research assistance of his law clerk, Linda Lafond, in the preparation of this paper.
INTRODUCTION

I would like to thank Professor Barker for inviting me to participate in this seminar on Judicial Review in the Americas. It marks the third time I have been honored with an invitation to speak at conferences sponsored by the Duquesne University School of Law. Today, I will be speaking on judicial review in Canada and, more particularly, the important and often difficult role courts perform in judicially reviewing the decisions of administrative tribunals, boards and commissions. The Supreme Court of Canada commented on the increasingly important role that administrative tribunals play in Canadian society. As stated by Justice Cory:

Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospitals and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfill are legion.¹

It is in the context of this "regulated" world that judicial review has gained importance. Judicial review is the principal, and often the only, avenue available to individuals seeking recourse against state action.

Canadian courts have been grappling with judicial review of administrative action for the last quarter century. Over the years, the Supreme Court of Canada has written hundreds of pages of decisions outlining the principles of judicial review, but their application has been fraught with difficulties. In the last five years, however, the Supreme Court has rendered seminal decisions, enunciating rules in determining the appropriate standard of review. These decisions have provided much needed guidance to judges, legal practitioners and law students working in this area of the law.

The goal of this article is not to present the fine points of the law on judicial review in Canada. Rather, my goal is to discuss some of the underlying principles of judicial review and the legal rules that have thus emerged. To give context to my discussion, I will begin by providing a synopsis of the Canadian legal system, from the organization of our court structure to the constitutional division of legislative powers and to the establishment of administrative tribunals. I will then touch on some of the rules that have been established to determine the appropriate standard of review applicable to administrative action, and will finish with the legal test applicable to the appellate review of judicial decisions.

PART I: THE CANADIAN JUDICIAL SYSTEM

A. The Constitution and the Courts

Section 101 of the Constitution Act, 1867, authorizes the Federal Parliament to provide a “General Court of Appeal for Canada” and “any additional Courts for the better Administration of the Laws of Canada.” The government exercised this power in 1875 when it created the Supreme Court of Canada, which is now the ultimate appellate authority in Canada. The Federal Court of Appeal, the Federal Court and the Tax Court of Canada were also created under this section.

Section 92(14) of the Constitution Act, 1867, gives the provincial governments jurisdiction over “the administration of justice” in the provinces, which includes “the constitution, organization and maintenance” of the courts. The provincial governments have relied on this power to establish superior and appellate courts within their respective province. However, section 96 of the Constitution Act, 1867, gives the Federal Parliament the power to “appoint the Judges of the Superior, District, and County Courts in each Province.” While provinces have jurisdiction to establish su-
perior courts, it is the federal government that has the power to appoint judges to these courts. There are 1100 such judges in Canada. The provincial governments do, however, have jurisdiction to appoint judges to the lowest level of court (generally known as “provincial courts”).

B. The Organization of Courts in Canada

Canada’s system of justice is represented by a four-tiered structure. Within that structure, only certain courts have jurisdiction to entertain applications for judicial review.2

At the bottom of the tier are the provincial courts, which are generally divided within each province into various divisions, such as a Small Claims Division, a Family Division and a Criminal Division. These courts have very specific jurisdiction, which does not include judicial review of administrative action.

The tier above is comprised of the trial or first-level courts, including the Federal Court, the Tax Court of Canada and the provincial and territorial superior courts of general jurisdiction. The federal courts have judicial review jurisdiction over all federal administrative tribunals and the provincial superior courts over provincial administrative tribunals.

The next tier is comprised of various appellate courts, including the Federal Court of Appeal, the provincial courts of appeal, as well as the Court Martial Appeal Court, established under the National Defence Act.3 The Federal Court of Appeal has original judicial review jurisdiction over fourteen specified federal administrative tribunals. It also sits as an appellate court for appeals of all decisions of the Federal Court. Appeals from the provincial superior courts on judicial review application are heard by the provincial courts of appeal.

The Supreme Court of Canada is the top tier as Canada’s highest court. It is a general court of appeal from all other appellate courts of law and therefore has jurisdiction over disputes in all areas of law, including administrative and constitutional law. It hears appeals from both the federal court system, headed by the Federal Court of Appeal, and the provincial court systems, headed in each province by that province’s Court of Appeal. The Supreme Court of Canada therefore functions as a national court of last resort, not merely a federal court of appeal. Appeals are by leave

2. See Appendix.
and are granted only where the matter raises a serious question of general importance. As the highest court, the Supreme Court's decisions are binding on all of the courts in Canada.

Let me say a few more words about the federal courts. The Federal Court of Appeal, as well as the Federal Court, is a court of easy access. We place considerable importance on accessibility due to the national and itinerant nature of the Court. Easy access to the Court is essential as many of the litigants who appear before us are self-represented and often have no legal training.

Several features enhance the accessibility of the federal courts. There is no need for a special call to appear before the Federal Court of Appeal in a province other than the one counsel was initially called in. Every person who is a barrister or a solicitor in a province may practice as a barrister or a solicitor in the Court and is an officer of the Court. The Federal Court of Appeal is easily accessible through its local offices. While the Court's principal office is located in Ottawa, the Court has sixteen local offices established throughout Canada.

The Federal Court of Appeal is accessible in both of Canada's official languages, English and French. Parties appearing before the Federal Court of Appeal are able to use either official language in their written and oral pleadings. When the Crown is a party, it is required to use the language of the other party. The court rules also require that simultaneous translation be available at the request of either party. Finally, the Court is bijural because it administers the two legal systems of the common law and the Quebec civil law.

C. Constitutional Division of Legislative Powers

Canada's Constitution provides for the division of legislative power between the Federal Parliament and the provincial legislatures. Both levels of government may only exercise powers that have been allocated to them under the Constitution.

Sections 91 and 92 of the Constitution Act, 1867, are the main provisions that delineate the sphere of competence for each level of government. Section 91 gives the Federal Parliament the exclusive power to make laws in relation to matters such as trade and commerce, national defence, unemployment insurance, navigation and shipping, criminal law, copyrights and patents, and the postal service.

Section 92 of the Constitution Act, 1867, provides exclusive jurisdiction to the legislature of each province to make laws in areas
such as education, property, civil rights, hospitals, municipalities and other matters of a local or private nature within the provinces.

Accordingly, in Canada we have federal administrative tribunals as well as provincial administrative tribunals. The federal-provincial division of powers affects the types of administrative tribunals that each government can create. Only those powers that properly fall within each government's respective sphere of jurisdiction can be delegated to an administrative tribunal.

PART II: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Before proceeding further with this analysis, it is important to appreciate the purpose of judicial review of administrative actions and its concomitance with judicial independence.

A. Defining Judicial Review

The term "judicial review" generally refers to a court's review of the decision of an administrative tribunal. That decision may be interlocutory or final.

1. The Purpose of Judicial Review

The purpose of judicial review is to respect the intent of the legislature while ensuring that the decisions of administrative tribunals comply with the rule of law. As the Supreme Court affirmed in Reference re Secession of Quebec, 4 "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action." 5

Judicial review therefore highlights the tension that exists between administrative autonomy and judicial oversight. On the one hand, the legislature has the power to create administrative tribunals to carry out statutory regimes but, on the other hand, courts have an overarching obligation to oversee the actions of administrative tribunals to ensure that they adhere to the rule of law. The courts have addressed this tension by undertaking a limited supervisory role vis-à-vis tribunals. That limited role is key

5. Id. at para. 70.
to understanding judicial review in Canada. A court will not automatically substitute its decision for that of the tribunal. Such intervention would be contrary to the will of the legislature. Rather, courts will show some deference to the tribunal’s decision and will intervene only in specified circumstances.

2. **Judicial Independence**

One of the fundamental principles of judicial review is the concept of judicial independence. Judicial independence is the “life-blood of constitutionalism in democratic societies.” An independent judiciary is necessary to “ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals.”

It is the principle of judicial independence that reflects the fundamental distinction between administrative tribunals and courts. In *Ocean Port Hotel Ltd.*, Chief Justice McLachlin, for the Supreme Court, discussed this distinction and noted that “[s]uperior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence.”

The purpose behind the principle of judicial independence in respect of courts is the ability of judges to hear and decide cases free of influence. In other words, “no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.” Over recent years, the principle of judicial independence has also expanded to include institutional independence, which refers to the court’s independence from the other branches of government.

The principle of judicial independence exists in Canada in numerous forms. The preamble to the *Constitution Act, 1867*, states that Canada is to have a Constitution “similar in Principle to that of the United Kingdom.” As noted by the Supreme Court, “[s]ince judicial independence has been for centuries an important princi-

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9. Id. at para. 23-24.
10. Id. at para. 21-22.
11. Id. at para. 20.
ple of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble.”  

In addition, judicial independence is explicitly referenced in sections 96 through 100 of the *Constitution Act, 1867*. For example, superior court judges in Canada enjoy a high degree of security of tenure in the constitutional guarantee of section 99 of the *Constitution Act, 1867*, which provides that they “shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.” Finally, section 11(d) of the *Charter* expressly entitles those arraigned before courts to “an independent and impartial tribunal.”

An independent judiciary has long been recognized as the foundation upon which a true democracy rests because it allows judges to make impartial decisions without fear of consequence. This is critical since public trust in the legal system and the judiciary depends upon society's confidence in the impartiality of individual decisions. Impartiality does not mean that judges have no sympathies or opinions, but rather that they are free to consider and act upon different points of view without interference from any source. The judiciary is increasingly at the center of many current debates about social change and social values. As a result, the public has attained a new awareness of the crucial need for judges who are free to make independent and impartial decisions, and to apply the law as they understand it, without fear or favour, and without regard to whether a decision is popular or not.

Independence of the judiciary, impartiality of the judges and access to justice are fundamental values in the eyes of all Canadians, representing the very essence of a free and democratic society. The public's acceptance and support of judicial decisions is dependent upon the public's confidence in the integrity and independence of the judges. It is therefore important that the Federal Court of Appeal and its judges be perceived as independent and impartial.

As a democratic society, Canada has undergone some very important changes in the relationship between individuals and the state. The judiciary in Canada must have the necessary knowledge and experience to contribute significantly to the maintenance and ongoing evolution of our free and democratic society. The role

13. *Id.*
of the courts as adjudicators of disputes, interpreters of the law, and defenders of the Constitution and the *Charter* requires that their powers and functions be completely separate from all other stakeholders in the legal system. Canada’s tradition of judicial independence ensures that the courts will continue to be accessible to everyone and that the proceedings remain public, transparent and free of interference from the government.

**B. Administrative Tribunals**

I will now provide some context to judicial review by giving an overview on the establishment of administrative tribunals and the scope of their administrative activities.

1. *The Creation of Administrative Tribunals (Federal and Provincial)*

Administrative tribunals are established by Parliament and legislatures for the purpose of implementing the government’s policy as it is expressed in a statute.\(^{14}\) As such, administrative tribunals act as an arm of government. While they are distinct from the judiciary, they are not clearly separate from government. The degree of independence of a particular tribunal is determined by the legislature in its enabling statute.

At the federal level, there are hundreds of administrative tribunals, each with their own structures and functions. Some tribunals consist simply of a public official exercising executive or administrative powers under a federal statute, while others are composed of a number of persons. For example, the Minister of Citizenship and Immigration has the power to facilitate a person’s admission to Canada when an application has been submitted for permanent residency on humanitarian and compassionate considerations.\(^{15}\) In practice, the Minister delegates this power to an immigration officer, and the administrative decision is made by that officer based on a set of pre-determined guidelines.

By contrast, some tribunals are created to adjudicate the rights of individuals in a quasi-judicial forum. The Canada Industrial Board has jurisdiction with regard to some one million employees engaged in the federally regulated industries. Its wide range of


\(^{15}\) IMMIGRATION ACT, R.S.C. 1985, c. I-2, s. 114(2); IMMIGRATION REGULATIONS, SOR/78-172, § 2.1
activities include certifying trade unions, investigating complaints of unfair labour practice and issuing cease and desist orders in cases of unlawful strikes and lockouts.

The Canadian International Trade Tribunal performs duties under many federal laws, such as the *Special Import Measures Act*\textsuperscript{16} and the *Customs Act*.\textsuperscript{17} Its mandate includes conducting inquiries into the effect of imports on domestic industries, hearing appeals of decisions of the Canada Customs and Revenue Agency and conducting inquiries into complaints by potential suppliers concerning procurement by the federal government.

The *Canada Transportation Accident Investigation and Safety Board Act*\textsuperscript{18} created a board that makes decisions on a wide range of economic matters involving federally-regulated modes of transportation (air, rail and marine).

There is, therefore, a wide spectrum of administrative tribunals in Canada. However, they are not courts of law. They are not presided over by "judges." Typically referred to as "chairperson," the head of a tribunal is appointed by the Executive as the chief executive officer of the tribunal. Chairpersons may be experts of the narrow legal field handled by the tribunal and are generally responsible for the assignment of members and for the management of the tribunal's work. Members of a tribunal come from a variety of educational backgrounds, careers and regions of the country, and may include experts, representatives of the government and, in some cases, members of the community.

Procedures of tribunals are often less formal than those of a court.\textsuperscript{19} Evidence that would be inadmissible in a court hearing may be allowed in a tribunal hearing. Many tribunals have far-reaching powers, such as the power to summon and enforce the appearance of persons before them, compel them to give oral or written evidence under oath and to produce such documents and things as the tribunal deems requisite; tribunals retain these powers to the same extent as a superior court of record. In many instances, the tribunal may also receive evidence and other information, whether or not that evidence or information is or would be admissible in a court of law.

\textsuperscript{17} R.S.C. 1985, c. 1 (2d Supp.).
\textsuperscript{18} S.C. 1989, c. 3.
\textsuperscript{19} GILLES PÉPIN & YVES OUELLETTE, PRINCIPES DE CONTENTIEUX ADMINISTRATIF 15-16 (2d ed. 1982).
However, no matter how court-like they may seem, administrative tribunals are not courts of law. The Canadian legal model makes a clear distinction between judicial courts and administrative tribunals. The terms are not interchangeable. While most administrative procedures are characterized by some sort of internal appeal mechanism, judicial courts retain the ultimate oversight function, be that by means of statutory right of appeal or application for judicial review. The oversight of tribunals falls to the same court system that is vested with the authority to hear private law disputes involving individual citizens.

2. The Scope of Administrative Activity

a. Procedural Fairness

Administrative tribunals perform a number of functions, ranging from the purely administrative, to implementing regulatory regimes, to adjudicating the rights of individuals. All administrative bodies, no matter what their function, have a duty of fairness. The existence of a duty of fairness, however, does not determine what will be required in a given set of circumstances. The concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case. The content of these rules is determined by reference to all the circumstances under which the tribunal operates. As stated by the Supreme Court of Canada:

Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of

procedural fairness, including a higher requirement of independence.\footnote{Bell Can. v. Canadian Tel. Employees Ass'n, [2003] 1 S.C.R. 884, 2003 SCC 36 at para. 21.}

What are these factors? The Supreme Court of Canada summarized them as follows:

- the nature of the statutory scheme and the “terms of the statute pursuant to which the body operates”;\footnote{Id. at para. 24.}
- the importance of the decision to the individual or individuals affected;\footnote{Id. at para. 25.}
- the legitimate expectations of the person challenging the decision;\footnote{Id. at para. 26.}
- the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the tribunal has an expertise in determining what procedures are appropriate under the circumstances.\footnote{Id. at para. 27.}

These five factors are non-exhaustive and other factors may be important in determining the requisite level of procedural fairness in a given set of circumstances. In making such a determination, it is necessary to keep in mind the values underlying the duty of fairness which is:

\begin{quote}

to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decisions being made in its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward
\end{quote}
their views and evidence fully and have them considered by the decision-maker.\textsuperscript{29}

In short, procedural fairness seeks to ensure that decisions affecting the rights, interests and privileges of persons be made using a fair, impartial, and open process.\textsuperscript{30}

In this context, I would like to discuss judicial review in relation to Aboriginal law. Section 35 of the \textit{Constitution Act, 1982}, constitutionalized "the existing aboriginal and treaty rights of the aboriginal peoples of Canada." As such, courts may be called upon to determine on judicial review whether there has been an infringement of a constitutionally-protected treaty right. Over recent years, the Supreme Court of Canada addressed the specific issue of the duty of government to consult with Aboriginal peoples and accommodate their interests when Aboriginal title or rights are at issue.

In \textit{Haida Nation v. British Columbia (Minister of Forests)}\textsuperscript{31} the question was whether the government is required to consult with First Nation peoples about decisions to harvest certain forests and to accommodate their concerns about the proposed harvest before they have proven their title to land and their Aboriginal rights.

Similarly, in \textit{Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)},\textsuperscript{32} the issue also centered on the duty to consult, this time with the Taku River Tlingit First Nation in making a decision to reopen an old mine and build a road through a portion of the Taku Tlingit First Nation’s traditional territory.

Finally, the case \textit{Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)}\textsuperscript{33} addressed the question of whether certain treaty rights were infringed when the Minister decided to permit the construction of a winter road through Wood Buffalo National Park.

The Supreme Court concluded that the government has a legal duty to consult with, and accommodate the interests of, Aboriginal peoples. That duty arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or

\begin{footnotesize}
30. \textit{Id.} at para. 28.
\end{footnotesize}
title and contemplates conduct that might adversely affect it.”34 However, the content of the duty varies with the circumstances.35 “The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.”36 In all cases, the government is required to provide meaningful consultation,37 but there is no duty to agree.38

Good faith consultation may, in turn, require a duty to accommodate the interests of the First Nation peoples. More specifically:

Where a strong prima facie case exists for the claim, and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.39

On the duty to accommodate, Professor Mullan highlighted the difficulty courts face in determining on judicial review whether the government fulfilled its obligation of accommodation. As he stated, “[t]he really problematic aspect of the accommodation concept, however, is that of identifying the criteria by which the courts should review a failed attempt or one that did not achieve agreement.”40 The question then becomes: “In what circumstances is a court entitled to say that the government (or its agencies and tribunals) did not go far enough in its willingness to accommodate the concerns of the affected First Nations?”41
b. Charter of Rights and Freedoms

Since its inception in 1982, Canada’s Charter of Rights and Freedoms (hereinafter “Charter”) has also had a significant impact on administrative law. The Charter has become a staple in Canadian society. Its preamble states that “Canada is founded upon principles that recognize the supremacy of God and the rule of law” and sets out those rights and freedoms which are guaranteed. Sections 2 through 14 protect fundamental freedoms and rights, including freedom of speech, freedom of conscience and religion; freedom of peaceful assembly, freedom of association; the right of citizens to enter, remain in, and leave Canada; the right to life, liberty and security of the person; protection from unreasonable search and seizure; and protection from arbitrary detention or imprisonment.

It should be noted, however, that these guaranteed rights and freedoms can be limited by law in accordance with section 1 of the Charter. Section 1 subjects the rights and freedoms guaranteed by the Charter to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The Charter has had two significant impacts on the scope of administrative activity. First, the Charter applies to tribunals exercising statutory powers or implementing a government policy or program, even if the tribunal is otherwise independent of government. In this regard, tribunals must comply with the principles of fundamental justice in respect of the conduct of its proceed-


[N]otwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the Human Rights Code. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for Charter scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the Charter. These entities are subject to Charter scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the Charter by establishing statutory bodies that are immune to Charter scrutiny. The above analysis leads inexorably to the conclusion that the Charter applies to the actions of the Commission.

ings. Second, the powers exercised by a tribunal may be challenged on the ground that a provision of its enabling statute or regulations violates the Charter. This brings me to a brief explanation of the remedies available under the Charter.

c. Section 52 of the Constitution

Subsection 52(1) of the Constitution Act, 1982, provides that Canada's Constitution is the "supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." In other words, the laws of Canada must respect the Constitution, including the rights and freedoms guaranteed under the Charter. Where a statutory provision is determined to be inconsistent with the Charter, the courts may make a declaration of unconstitutionality and strike down the offending provision. Administrative tribunals do not have the power to make declarations of unconstitutionality, although they have the authority to refuse to apply a provision of their enabling statute found to be inconsistent with the Charter. This power is given to tribunals which have been conferred the authority to interpret the law.

The first question one must ask is whether the enabling statute explicitly or implicitly grants to the tribunal jurisdiction to interpret or decide any question of law. An express grant of authority to consider or decide questions of law arising under a legislative provision is presumed to extend to determining the constitutional validity of that provision. Absent an explicit grant, it becomes necessary to consider whether the legislature intended to confer upon the tribunal implied jurisdiction to decide questions of law under the challenged provision. Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include:

- the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively;

46. Id.
47. Id. at para. 41.
48. Id.
Judicial Review in Canada

- the interaction of the tribunal in question with other elements of the administrative system;
- whether the tribunal is adjudicative in nature; and
- practical consideration including the tribunal's capacity to consider questions of law.49

The result is significant. Administrative tribunals that have the power by statute to determine questions of law will have the concomitant jurisdiction to determine the constitutional validity of a provision before it. There is, however, an important limitation on the scope of an administrative tribunal's jurisdiction with respect to Charter issues: administrative bodies do not have the power to make general declarations of invalidity. As explained by the Supreme Court:

A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the Charter is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide Charter issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.50

Accordingly, a tribunal that can decide questions of law may interpret the relevant Charter right, apply it to the impugned provision and, if it finds a breach and concludes that the provision is not saved under section 1, it may disregard the provision on constitutional grounds and rule on the party's claim as if the impugned provision were not in force. The tribunal does not, however, have the authority to make a declaration of unconstitutionality and strike down the offending provision. The tribunal's decision will be binding only on the parties to the particular proceeding in which the issue was raised and is subject to judicial review by the courts.

49. Id.
d. **Section 24 of the Charter**

The second remedy available under the *Charter* is found in section 24. Subsection 24(1) provides that "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." The question remains: what is a "court of competent jurisdiction" pursuant to subsection 24(1)?

The Supreme Court of Canada has considered the attributes of a "court of competent jurisdiction" on a number of occasions. A "court of competent jurisdiction" is one that possesses (1) jurisdiction over the person; (2) jurisdiction over the subject matter; and (3) jurisdiction to grant the remedy.\(^{51}\) A court or tribunal must possess these three attributes to be considered a "court of competent jurisdiction" for the purpose of providing relief under *Charter* subsection 24(1).

The question of whether a court or tribunal enjoys the "power to grant the remedy sought" is a matter of discerning the intention of Parliament or the legislature. "The governing question in every case is whether the legislator endowed the court or tribunal with the power to pronounce on Charter rights and to grant the remedy sought for the breach of these rights."\(^{52}\) Accordingly, the power of a tribunal to grant the remedy sought must emanate from its enabling statute.

A legislative grant of remedial power under section 24(1) may be either express or implied. Whether a legislative grant is implied requires a "functional and structural" analysis. In the decision of *R. v. 974649 Ontario Inc.*,\(^ {53}\) the Supreme Court stated the test as, "whether the legislature or Parliament has furnished the court or tribunal with the tools necessary to fashion the remedy sought under [section] 24 in a just, fair and consistent manner without impeding its ability to perform its intended function."\(^ {54}\)

If a tribunal does have "the power to grant the remedy sought," and if the tribunal also has jurisdiction over the parties and the subject matter, the tribunal will have the power to grant remedies under section 24.

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54. *Id.* 598.
One final point regarding the scope of administrative activity relates to the enforcement of tribunals’ orders. Tribunals often possess significant powers enabling them to carry out their statutory mandates, such as powers of search and seizure of documents, subpoena and investigation. Yet, they do not possess the power to punish for disregard of their orders. Unlike the European continental system, which enables administrative courts to enforce their own orders, Canadian tribunals must ultimately rely on the apparatus of the courts for enforcement. The statute by which a tribunal is created will indicate whether its orders can be filed with the court for enforcement.  

3. The Path to Judicial Review

I will now examine judicial review in the context of federal tribunals. While there are differences in procedures in other jurisdictions, the basic principles apply universally in Canada. Judicial review may be accomplished by way of both applications for judicial review and statutory rights of appeal. Anyone directly affected by the decision of an administrative tribunal may apply for judicial review as of right pursuant to subsection 18.1(1) of the Federal Courts Act. By contrast, a statutory right of appeal may be limited; the appeal provision may require that leave be obtained, may limit the appeal to questions of law or jurisdiction or may require the certification of a question by a trial judge, as is the case for refugee claims. For example, the Competition Tribunal Act provides that leave is required for the Federal Court of Appeal to hear an appeal from the Competition Tribunal on a question of fact.

Section 18.5 of the Federal Courts Act precludes judicial review in respect of a decision or order of an administrative tribunal where there already exists a statutory right of appeal to one of the courts or bodies listed in section 18.5.

a. Collateral Attacks

A party who seeks to challenge the decision of a federal administrative tribunal’s decision is not free to chose between a judicial

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review proceeding and an action for damages. To have the decision of a federal administrative tribunal invalidated, a party is required to proceed by way of judicial review. Section 18.1 of the Federal Courts Act provides that the Federal Court has exclusive original jurisdiction to review the lawfulness of the decisions made by any federal board, commission or other tribunal. In *Grenier v. Canada*, Justice Létourneau, on behalf of the Federal Court of Appeal, stated two important developments. First, it is not possible to circumvent section 18.1 by way of declaratory action and to thereby seek to obtain extraordinary remedies. Second, the Federal Courts, as well as superior courts, must not allow actions for relief against the Crown until applicable mechanisms for judicial review have been exhausted. Judicial review should be viewed as a precondition to proceeding against the Crown by way of action, so as to prevent collateral attacks on decisions. A decision rendered by an administrative federal body continues to have judicial effect so long as it is not invalidated.

As Justice Décary explained in *Prentice v. Canada (Royal Canadian Mounted Police)*, “the fact that a decision of a federal administrative tribunal is lawful forecloses a finding of negligence in respect of the decision.” In addition, “even a finding that such a decision was unlawful does not necessarily entail a finding of fault or negligence and would not necessarily result in a finding of liability.”

b. Jurisdiction of the Courts

As mentioned earlier, administrative law is unified into our single legal system. As such, administrative tribunals are subject to judicial review by ordinary judicial courts. That being said, jurisdiction to consider an application for judicial review does not fall upon any court. It is the source of an administrative tribunal's authority that is the primary determinant in deciding which court has jurisdiction to entertain an application for judicial review of the tribunal’s decision or order. As a general rule, if an administrative tribunal is empowered by federal legislation, it will fall within the jurisdiction of the federal courts. If it is empowered by

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58. *Id.* at para. 33.
59. *Id.* at para. 18.
61. *Id.* at para. 32.
62. *Id.*
provincial statute, jurisdiction will belong to the respective pro-
vincial superior court.

In the federal context, judicial review is governed by the Federal Courts Act. In most cases, judicial review will originate in the Federal Court. However, the Federal Court of Appeal has juris-
diction to hear and determine applications for judicial review made in respect of the tribunals listed in subsection 28(1) of the Federal Courts Act, including:

- the Canadian Radio-television and Telecommunications Commission;
- the Canadian International Trade Tribunal;
- the National Energy Board;
- the Canada Industrial Relations Board;
- the Public Service Labour Relations Board;
- the Copyright Board; and
- the Competition Tribunal.

The Federal Court of Appeal may also be granted original judi-
cial review jurisdiction by statute. The Federal Court of Appeal therefore plays a dual role. It has exclusive and original judicial review jurisdiction over some federal administrative tribunals and it hears appeals from the decisions of the Federal Court on judicial review applications. This distinction is significant because, de-
pending on whether the Federal Court of Appeal is hearing an ap-
plication for judicial review or hearing an appeal of a judicial deci-
sion of the Federal Court, the applicable legal tests will differ.

The exclusive judicial review jurisdiction of the federal courts over federal tribunals is subject to two limitations. First, the Federal Courts Act does not confer on the federal courts jurisdiction to issue habeas corpus ad subjiciendum, except in relation to mem-
bers of the Canadian Forces serving outside Canada. The pro-
vincial superior courts retain jurisdiction to issue this writ against federal tribunals. Second, the question of constitutional limitation of the tribunal may be raised in provincial and superior courts.

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4. Special Procedures for Judicial Review

All proceedings before the Federal Court and the Federal Court of Appeal are conducted in accordance with the Federal Courts Rules. Applications for judicial review are specifically addressed under rule 300.

The Federal Courts Act attempts to codify the federal common law on judicial review. Subsection 18.1(4) of the Federal Courts Act sets out the grounds which an applicant must establish to succeed on an application for judicial review. The Federal Court may grant relief if it is satisfied that the federal board, commission or other tribunal:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

These grounds for review also apply to administrative action that is reviewable by the Federal Court of Appeal.

On judicial review, the parties are generally restricted to introducing material that was before the tribunal when it made its decision. However, extrinsic evidence may be allowed where the evidence is relevant to an allegation that the tribunal breached procedural fairness, committed jurisdictional error or where the material provides general background.

a. Standing (of Administrative Tribunals)

Subsection 18(1) of the Federal Courts Act specifies that the Attorney General of Canada or "anyone directly affected" by the matter in respect of which relief is sought has standing to apply for

67. SOR/98-106.
68. FEDERAL COURTS ACT, R.S.C., 1985 c. F-7, § 28(2).
judicial review. The term "anyone directly affected" has been given broad interpretation by the courts and generally refers to anyone whose interests or rights will be impacted by the administrative tribunal's decision or activity. It also includes public interest standing.\textsuperscript{70}

Administrative tribunals themselves play no role in judicial review proceedings unless their constituting statute stipulates, or the court grants the tribunal power to intervene. The role of a tribunal whose decision is at issue before the court is limited to explaining the record before the tribunal and to making representations with respect to jurisdiction.

\textbf{b. Time Limits to Bring an Application for Judicial Review}

Subsection 18.1(2) of the \textit{Federal Courts Act} provides that an application for judicial review must be commenced in the prescribed manner within thirty days after the time the decision or order was first communicated by the administrative tribunal to the Attorney General or to the party directly affected by it. A judge may allow further time before or after the expiration of the thirty days; however, the applicant must justify the delay and establish a reasonable chance of success on the merits.\textsuperscript{71}

\textbf{5. Scope of Judicial Review}

In exercising their power of judicial review, courts must respect the choices made by legislatures. This is \textit{why} the scope of judicial review is generally narrow; it does not have the same status as an appeal. Courts will not retry a matter that was decided by the tribunal.

Canadian courts are called upon to decide a range of issues that may have a significant impact on the lives of those involved and, more generally, on Canadian life. In the context of the \textit{Charter}, the judiciary has adopted the role of protector of the constitutional rights and freedoms of Canadians. To fulfill this role, judges are called upon to determine a vast array of complex and divisive issues. The resolution of these disputes often embraces social and moral questions that are of profound importance to society.

\textsuperscript{70} Sunshine Village Corp. v. Superintendent of Banff Nat'l Park (1966), 44 Admin. L.R. (2d) 201 (F.C.A.).

\textsuperscript{71} \textit{FEDERAL COURTS ACT}, R.S.C., 1985 c. F-7, § 18.1(2).
In *Canada (Attorney General) v. Mossop*, the employer could prohibit an employee from taking bereavement leave following the death of his same-sex partner's father. To resolve this question, the Court was required to determine whether a same-sex couple constituted a "family" under the *Canadian Human Rights Act*.

In *Sauvé v. Canada (Chief Electoral Officer)*, the Federal Court of Appeal was asked to determine the scope of a prisoner's fundamental democratic right to vote in a federal election.

In *Friends of the Island, Inc. v. Canada (Minister of Public Works)*, the Court was asked to review the environmental assessment of the Confederation Bridge Project joining PEI and New Brunswick. The Court was also asked to determine whether the project was constitutional.

In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, an environmental group sought to compel the federal government to conduct environmental assessment with respect to a dam constructed on the Oldman River by the province of Alberta. The Federal Court of Appeal was required to determine the constitutional and statutory validity of guidelines used by the federal government in carrying out its duties.

The enactment of Canada's *Anti-terrorism Act* in 2001 in the aftermath of September 11 has also significantly impacted the scope of judicial review in relation to matters of national security. The *Anti-terrorism Act* amended sixteen statutes and implemented two separate United Nations Conventions concerning the financing of terrorism and the suppression of terrorist bombings. The Preamble to the *Anti-terrorism Act* speaks to "taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*." The substantive provisions of the Act deal with a multitude of matters related to judicial investigative hearings, procedures, seizures, arrests, recognizance, detention, etc.

As noted by Professor Mullan:

While Parliament did not go as far as to include a provision in that Act stating that it or various of its provisions applied

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76. 2001 S.C., c. 41.
notwithstanding the protections afforded by the Charter, the substantive provisions of the body of that legislation as well as the amendments it makes to the provisions of other legislation have significant impact on the normal principles of administrative law.\(^77\)

In the case of \textit{In re Application Under § 83.28 of the Criminal Code},\(^78\) the Supreme Court of Canada stated that, "although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law."\(^79\) In that case, the Supreme Court of Canada considered for the first time questions about the constitutional validity of provisions of the \textit{Anti-terrorim Act}, which were adopted as amendments to Canada's \textit{Criminal Code}.\(^80\) The Supreme Court explained that:

\begin{quote}
[T]he challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.\(^81\)
\end{quote}

The role of the judiciary as "resolver of disputes, interpreter of the law and defender of the Constitution"\(^82\) remains unchanged in times of crisis. What is changing, however, are the tools and resources that judges can draw upon when they are interpreting and applying the law. The events of September 11 and the response of the world, including the enactment of anti-terrorim legislation by various governments such as Canada's \textit{Anti-terrorim Act}, have created a new environment for judicial decision-making. Within this new climate, judges must adopt a global perspective in performing their role. The Canadian judiciary must be aware of and take into account the various declarations, resolutions and con-

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\(^79\) \textit{Id.} at para. 6.
ventions made by non-adjudicative bodies with international standing, as well as the decisions of international tribunals. A complete understanding of the legislation under review and the Charter requires consideration of the international perspective.  

Examples of cases involving judicial review in the context of national security include the following. In Suresh, the Court was asked to determine whether a refugee who, in the opinion of the Minister of Immigration, posed a danger to the security of Canada could be removed from Canada to a country where he faced torture.

In Poshteh v. Canada (Minister of Citizenship and Immigration), the Federal Court of Appeal had to determine whether there were reasonable grounds to believe that the appellant, who was a minor at the time, was a member of a terrorist organization for purposes of determining whether he was inadmissible to Canada on security grounds under the Immigration Refugee and Protection Act.

In Harkat v. Canada (Minister of Citizenship and Immigration), the Federal Court of Appeal was required to evaluate the extent and likelihood of the threat to national security if the detained person was released, as well as the likelihood and extent to which the conditions of release would negate or contain that threat or risk of threat.

6. Standard of Review

In every case, the reviewing court must begin by determining the appropriate standard of review. The term “standard of review” generally refers to the level of intensity with which the judiciary will review the decision of an administrative tribunal. It is the amount of deference that will be accorded to the administrative action.

The Supreme Court of Canada recently confirmed in Law Society of New Brunswick v. Ryan that there are only three standards of review for judicial review of administrative action: correctness, reasonableness and patent unreasonableness. The test to de-
termine the standard of review is referred to as the pragmatic and functional analysis and was established in a long line of cases from the Supreme Court of Canada.\textsuperscript{89}

The pragmatic and functional approach determines the standard of review in relation to four contextual factors:

1) the presence or absence of a privative clause or statutory right of appeal;
2) the expertise of the tribunal relative to the reviewing court on the issue in question;
3) the purposes of the legislation and the provision in particular; and
4) the nature of the question — law, fact, or mixed law and fact.\textsuperscript{90}

A highly technical or mechanistic approach is to be avoided. It is the interplay among the four factors that will determine the level of deference owed to the administrative decision itself.\textsuperscript{91}

The first factor requires an examination of the enabling statute to determine the presence or absence of a privative clause or statutory right of appeal. A statutory right of appeal indicates that the legislature intended for the tribunal’s decisions to be subject to court review and therefore suggests less deference.\textsuperscript{92} A privative clause refers to a clause “that declares that the decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded.”\textsuperscript{93} A privative clause indicates a legislative intention to restrict a court’s review of a tribunal’s decision. The presence of a “full” privative clause is compelling evidence that the court ought to show deference to the tribunal’s decision, unless other factors strongly indicate the contrary with regard to the particular determination in question.\textsuperscript{94}

The second factor — the relative expertise of the tribunal — is viewed as the most important facet of the analysis.\textsuperscript{95}
is whether the decision-making body has greater expertise than
the reviewing court with respect to the question under review.96
There are three dimensions to this evaluation: the court must
characterize the expertise of the tribunal in question; it must con-
sider its own expertise relative to that of the tribunal; and it must
identify the nature of the specific issue before the administrative
decision-maker relative to this expertise.97 As a general rule, if a
tribunal has been constituted with a particular expertise with re-
spect to achieving the aims of an act, a higher degree of deference
will be given.98 On the other hand, a lack of expertise on the part
of the tribunal regarding the particular issue before it will be
grounds for less deference.99
The third factor requires consideration of the purpose of the leg-
islation and the provision in question. As a general rule, greater
deerence will be afforded when legislation is intended to resolve
and balance competing policy objectives or the interests of various
constituencies.100 Also, “[a] legislative purpose that deviates sub-
stantially from the normal role of the courts suggests that the leg-
islature intended to leave the issue to the discretion of the admin-
istrative decision-maker and, therefore, militates in favour of
greater deference.”101 By contrast, where an administrative struc-
ture more closely resembles that of a court, less deference will be
owed.102
The fourth and final factor — the nature of the problem — re-
quires identification of the question under review. In general,
pure questions of fact of administrative bodies are afforded greater
deerence than are questions of law. Where the question is one of
mixed fact and law, more deference is owed if the question is fac-
tually intensive. If the question is legally intensive, less deference
is owed. Where the question involves the exercise of discretion by
the tribunal, greater deference will be accorded.
As the Chief Justice of the Supreme Court affirmed, this func-
tional and pragmatic analysis must be undertaken every time a

at para. 28.
97. Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1
S.C.R. 982 at para. 33.
98. Id. at para. 35.
99. Id. at para. 33.
100. Id. at para. 36.
at para. 31.
102. Id. at para. 32.
review involves an administrative body exercising delegated powers, including the exercise of discretion. The pragmatic and functional approach may result in the application of different standards of review to various administrative tribunals. In a more recent decision, the Federal Court of Appeal held that "the pragmatic and functional approach must be undertaken anew by the reviewing Court with respect to each decision of an administrative tribunal, not only each general type of decision of a particular administrative body under a particular provision." 103 The same standard of review will not necessarily apply to all aspects of a tribunal's decision, especially if the tribunal is dealing with multiple complaints at once. In *Toronto (City) v. Canadian Union of Public Employees (CUPE), Local 79*, 104 for example, there were two standards of review in play: the standard of correctness applied to the question of whether the employees' criminal convictions could be re-litigated, while the standard of patent unreasonableness applied to the issue of whether the employees had been dismissed for just cause. 105 The standard of review applicable to the decision of a tribunal may therefore vary depending on the statutory provision that is the subject of judicial review.

Depending on how the factors of the pragmatic and functional approach play out in a particular instance, the standard of review applicable to a tribunal's decision may be the standard of correctness, reasonableness or patent unreasonableness, each requiring more or less deference towards the decision of the tribunal.

There has been some frustration with the apparent lack of clarity with respect to the relationship between the standard of patent unreasonableness and that of reasonableness *simpliciter*. The Supreme Court of Canada addressed this in *CUPE Local 79* and re-evaluated the contours of the various standards of review, especially with respect to patent unreasonableness. In broad terms, a decision will be patently unreasonable where there is no doubt that the decision is defective because it is "clearly irrational" or "evidently not in accordance with reason." 106

Finally, there is an important distinction to be made between judicial review on the ground of breach of procedural fairness and the standard of review in other cases of substantive judicial review. The pragmatic and functional analysis only applies to the

105. *Id.* at para. 95.
106. *Id.* at para. 81.
latter. The Supreme Court of Canada addressed this issue in Canadian Union of Public Employees v. Ontario (Minister of Labour)\textsuperscript{107} where Justice Binnie explained that "[t]he content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations."\textsuperscript{108} He continued:

On occasion, a measure of confusion may arise in attempting to keep separate these different lines of enquiry. Inevitably some of the same "factors" that are looked at in determining the requirements of procedural fairness are also looked at in considering the "standard of review" of the discretionary decision itself.\textsuperscript{109}

An administrative decision may therefore be reviewed both in terms of procedural fairness and according to the pragmatic and functional standard of review. In such circumstances, a court is required to isolate any act or omission relevant to procedural fairness from the substantive decision. The procedural fairness element is reviewed as a question of law, meaning that no deference is due. The decision-maker will have either complied with or breached the particular duty of fairness. If the duty of fairness is breached, the decision in question will be set aside. With respect to the substantive decision, the appropriate standard of review will be determined according to the pragmatic and functional analysis.\textsuperscript{110}

7. Judicial Remedies

a. Interlocutory Measures

The commencement of an application for judicial review does not prevent an administrative body's decision from taking effect nor does it stop the proceedings in progress. An applicant for judicial review may therefore seek to stay the proceeding before the tribunal or prevent the federal tribunal from executing its order or decision until the court rules on the judicial review application. Section 18.2 provides that the Federal Court may make any in-

\begin{itemize}
  \item 108. Id. at 591.
  \item 109. Id. at 592.
\end{itemize}
interim orders that it considers appropriate pending the final disposition of the judicial review application before it. The Federal Court of Appeal also has this power.

The test used by the Court in deciding to grant a stay is the same as that used in the granting of interlocutory injunctions. The Supreme Court of Canada established a three-stage test for interlocutory injunctions in *RJR-Macdonald, Inc. v. Canada (A.G.)*. At the first stage, the applicant must demonstrate a serious question to be tried. At the second stage, the applicant must establish that it will suffer irreparable harm if relief is not granted. The third stage, requiring an assessment of the balance of convenience by the Court, will often determine the result in applications involving Charter rights.

b. Final Remedies

Although a person may have a right to seek judicial review before the Federal Court, this does not mean that the Court is required to undertake judicial review. The relief which a court may grant by way of judicial review is discretionary. Subsection 18.1(3) describes the relief that the Federal Court may grant on an application for judicial review. The Court may:

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

The Federal Court of Appeal has the same remedial powers on judicial review as the Federal Court. The Federal Courts also have the power to issue prerogative and extraordinary remedies under subsection 18(1), which include the issuance of an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or the grant of declaratory relief. A writ of habeas corpus may be issued pursuant to

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115. *Id.* § 18.1(3)(b).
116. *Id.* § 28(2).
subsection 18(2) only in relation to any member of the Canadian Forces serving outside Canada.

Canadian courts have no jurisdiction to award damages in judicial review proceedings.

8. The "Dialogue"

Judicial review under the Charter has come under scrutiny. Some argue that judicial review of the Charter is undemocratic because judges are substituting their views of policy for that of elected representatives of government. The answer to this sort of criticism lies within the Charter itself, which provides for the supremacy of the rule of law. However, in a paper entitled The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All), authors Peter Hogg and Allison Bushell observe that this answer may be unsatisfactory because:

[The law of the Constitution is for the most part couched in broad, vague language that rarely speaks definitely to the cases that come before the courts. Accordingly, judges have a great deal of discretion in “interpreting” the law of the constitution into the likeness favoured by the judges. This problem has been captured in a famous American aphorism: “We are under a Constitution, but the Constitution is what the judges say it is.”117

Instead, the authors suggest that judicial review is part of a dialogue between the judiciary and the legislatures.118 As they explain, “[w]hen the Court strikes down law, it frequently offers a suggestion as to how the law could be modified to solve the constitutional problems. The legislative body often follows that suggestion, or devises a different law that also skirts the constitutional barriers.”119 According to their research, which surveyed sixty-five cases in which a law was struck down for breach of the Charter, “in forty-four cases (two-thirds), the competent legislative body amended the impugned law”120 and “[i]n most cases, relatively minor amendments were all that was required in order to respect

118. Id. at 79.
119. Id. at 80.
120. Id. at 80-81.
The Charter, without compromising the objective of the original legislation.\footnote{121}

The Federal Court of Appeal recognized the existence of a continuing "dialogue" between courts and legislatures in \textit{Sauv\'e v. Canada (Chief Electoral Officer)},\footnote{122} a case that addressed the issue of prisoner voting rights. Justice Linden noted that:

In 1992 and 1993, two Appeal Courts and the Supreme Court of Canada held that a blanket disqualification of prisoners from voting, contained in earlier legislation which was challenged, violated section 3 of the Charter and could not be saved by section 1 of the Charter. Parliament responded to this judicial advice by enacting legislation aimed at accomplishing part of its objectives while complying with the Charter.\footnote{123}

Accordingly, without making policy decisions on behalf of government, courts may give guidance to Parliament and legislatures on how a Charter violation may be remedied. Courts have flexibility in determining what course of action to take following a violation of the Charter. Depending on the circumstances, "a court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislatures has had an opportunity to fill the void."\footnote{124} Additionally, the court may resort to the technique of reading meaning into the legislation where appropriate.\footnote{125} All these remedies allow the courts to interfere with the laws adopted by the legislature as little as possible and give the government an opportunity to amend the offending statute to ensure conformity with the principles of the Charter.

Hogg and Bushell describe the dialogue between courts and legislatures in reference to the Supreme Court decision in \textit{RJR-MacDonald, Inc. v. Canada (Attorney General)}.\footnote{126} They note that:

In \textit{RJR-MacDonald, Inc. v. Canada (A.G.)} (1995), the Supreme Court of Canada struck down a federal law that pro-
hibited the advertising of tobacco products. In its discussion of the least restrictive means standard, the Court made clear that it would have upheld restrictions that were limited to "lifestyle advertising" or advertising directed at children. Within two years of the decision, Parliament enacted a comprehensive new Tobacco Act. The new Act prohibits lifestyle advertising and restricts advertising to media which is targeted at adults, but allows tobacco manufacturers to use informational and brand-preference advertising in order to promote their products to adult smokers.127

Another example of this type of dialogue arose out of the Supreme Court of Canada Reference Manitoba Language Rights,128 where Acts of the legislature of Manitoba were declared invalid and of no force or effect because they were printed in English only, as opposed to English and French, contrary to the requirements of the Manitoba Act, 1870. However, to preserve the rule of law, the Supreme Court held that those offending statutes would be deemed temporarily to have been, and continue to be, effective:

All Acts of the Manitoba Legislature which would currently be valid and of force and effect, were it not for their constitutional defect, are deemed temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing. Rights, obligations and any other effects which have arisen under these current laws by virtue of reliance on acts of public officials, or on the assumed legal validity of public or private bodies corporate, are enforceable and forever beyond challenge under the de facto doctrine. The same is true of those rights, obligations and other effects which have arisen under current laws and are saved by doctrines such as res judicata and mistake of law.129

With respect to the duration of the temporary period, the Court was not equipped to determine the period during which it would not be possible for the Manitoba legislature to comply with its constitutional duty. The Court therefore decided to set a special hearing on application by the government to hear submissions and de-

129. Id. at para. 109.
termine the minimum period necessary for translation, reenactment, printing and publishing of the statutes.

PART III: APPELLATE REVIEW OF JUDICIAL DECISIONS

In closing, I wish to contrast the standard of review in administrative matters with that in judicial matters.

A. Appellate Review

A party who is not satisfied with the decision of a court on a judicial review application may appeal that decision. Judgments of the Federal Court are appealed to the Federal Court of Appeal pursuant to section 27 of the Federal Courts Act. Subject to certain exceptions, notably in immigration matters, the appeal to the Federal Court of Appeal is available as of right, and leave to appeal is not required. In addition to appeals from the Federal Court, subsection 27(1.1) of the Federal Courts Act confers to the Federal Court of Appeal jurisdiction to determine appeals from judgments of the Tax Court of Canada.

When the judicial review application is decided by the Federal Court of Appeal, that decision may be appealed to the Supreme Court of Canada, but only with leave to appeal. There is, however, an appeal as of right to the Supreme Court from a decision of the Federal Court of Appeal under section 19 of the Federal Courts Act, which deals with intergovernmental disputes.

The powers of the Federal Court of Appeal in the appellate context are set out in section 52 of the Federal Courts Act. When the appeal is from the Federal Court, the Court of Appeal may dismiss the appeal, give the judgment and award the process or other proceedings that the Federal Court should have given or awarded. Additionally, the Court may order a new trial if it is in the ends of justice to do so, or the Court may make a declaration as to the conclusions that the Federal Court should have reached on the issues decided by it and refer the matter back to the Federal Court on that basis. In the case of all other appeals, the Federal Court

130. See subsection 82.1 of the Immigration Act, R.S.C. 1985, c. I-2, which provides that "an application for judicial review under the Federal Courts Act with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division."


of Appeal may dismiss the appeal, give the decision that should have been given, or refer the matter back for determination in accordance with such directions it considers appropriate.

B. Types of Questions

There is an important distinction to be made between the review of an administrative decision and the review of an appeal from a lower court decision. The pragmatic and functional approach only applies to the review of decisions by administrative tribunals. For review of judicial decisions, the rules of appellate review of lower courts apply. This test was articulated by the Supreme Court of Canada in *Housen v. Nikolaisen.* That test is concerned with the nature of the question in issue. The Supreme Court of Canada identified four types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

C. Standard of Review

The standard of review on a question of law is that of correctness. The appellate court is therefore free to replace the opinion of the trial judge. The standard of review for findings of fact and inferences of fact is "palpable and overriding error." This means that findings of fact will not be reversed unless it can be established that the trial judge forgot, ignored or misconceived the evidence in a way that affected his conclusion. The standard of review for inferences of fact is also palpable and overriding error. "If there is no palpable and overriding error with respect to the underlying facts that the trial judge relied on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion." Lastly, the standard of review for questions of mixed fact and law is palpable and overriding error, "unless it is clear that the trial judge made some extricable error in principle

134. *Id.* at para. 8.
135. *Id.* at para. 10.
with respect to the characterization of the legal test or its application, in which case the error may amount to an error of law.”

On appeal from an exercise of discretion by a trial judge, regard should be given to the following passage of the Federal Court of Appeal decision in Elders Grain Co. Ltd. v. The Vessel M/V "Ralph Misener".139

An appellate court is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the trial judge. However, if the decision was based on an error of law or if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations or that the trial judge considered irrelevant factors or failed to consider relevant factors, then an appellate court is entitled to exercise its own discretion.140

The question of the appropriate standard of review is a question of law and, therefore, must be answered correctly by a reviewing judge in the lower court. If the reviewing judge has erred in choosing or applying the standard of review, the Federal Court of Appeal must correct the error, substitute the appropriate standard, and assess or remit the administrative decision-maker’s determination on that analysis.

The role of an appellate court when reviewing the decision of an administrative tribunal on the Charter is subject to judicial review on a correctness standard.141 An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court.142

CONCLUSION

If there is anything that you should remember from my article, it is this: administrative law in Canada is intrinsically linked to the Canadian Constitution and, more particularly, to the constitutional division of powers. The Federal Parliament and the provincial legislatures can only delegate to administrative bodies those powers that fall within their respective spheres of competence.

139. [2002] FCA 139.
140. Id. at para. 13.
142. Id. at para. 31.
Administrative tribunals are creatures of statute. They can only exercise those duties and functions that are expressly or implicitly delegated to them in their enabling statute. In carrying out their mandate, administrative tribunals must, at a minimum, comply with the common law rules of procedural fairness and respect the rights and freedoms guaranteed under the Charter.

When judicially reviewing the decisions of administrative bodies, judicial courts have the difficult task of striking a balance between the intent of the legislature in delegating powers to administrative bodies with ensuring respect of the rule of law. The principle of judicial independence is vital to meaningful judicial review and to the achievement of that balance. Courts must be able to hear and decide cases before them free of outside influence, including political pressures from government. Otherwise, judicial review is only an illusion.

Also, it is important to remember that judicial review is not an appeal. A court will not automatically substitute its decision for that of an administrative body. The factors of the pragmatic and functional approach will assist in setting a standard of review. That standard will dictate how much deference must be afforded to the decision of the administrative tribunal. In some cases, this may mean that a decision will be allowed to stand even where the reviewing court would have arrived at a different conclusion. Where, however, judicial review is justified, courts have broad powers to provide a remedy that is appropriate under the circumstances.
APPENDIX
