CHAPTER FIFTEEN

Making a Federal Case Out of It: The Federal Court and Administrative Law

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I. INTRODUCTION

Earlier chapters in this book have focused on the broad sweep of administrative law. This chapter shifts focus and concentrates instead on one particular venue of administrative law practice: the Federal Courts of Canada. It is, of course, true that the Federal Courts of Canada are not the only superior courts in which administrative law issues arise. The provincial

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superior courts and the Supreme Court of Canada are generalist courts and have jurisdiction to deal with administrative law matters.

The Federal Courts, however, are distinguished by two qualities. First, they exercise a virtual monopoly on the administrative judicial review function in relation to the federal executive. Second, that monopoly makes Federal Courts mostly administrative law courts. Federal Court judges are, in other words, the closest things to administrative law specialists in the Canadian judicial system. For both these reasons, Federal Courts deserve special attention in a volume on administrative law.

The chapter begins with a review of the structure and jurisdiction of the Federal Courts. It then canvasses a series of fundamental issues related to federal judicial review, including basic judicial review procedure and issues surrounding the grounds of review and remedies at the federal level.

II. STRUCTURE AND JURISDICTION OF THE FEDERAL COURTS

A. Federal Courts as Statutory Courts

The Federal Courts are "statutory courts"—that is, they are created by federal statute and have only the jurisdiction conferred on them by that statute. Constitutionally, the authority to create the Federal Courts lies in Parliament under s 101 of the *Constitution Act, 1867*.[1] In addition to authorizing a national supreme appeal court, that provision empowers Parliament to "provide for the Constitution, Maintenance, and Organization … any additional Courts for the better Administration of the Laws of Canada."[2]

As s 101 "statutory courts," the Federal Courts differ from the provincial superior courts. The latter—also known as "s 96" courts, in reference to s 96 of the *Constitution Act, 1867*—are courts of inherent jurisdiction. "Jurisdiction" "is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment."[3] "Inherent," in this context, means automatic or default jurisdiction. Although provincial statutes prescribe their structural attributes, the ultimate origin of s 96 courts lies in the *Constitution Act, 1867*, and their jurisdiction is inherited from courts in the United Kingdom. In an ancient maxim recently cited with approval by the Supreme Court of Canada, "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court [in this context, courts other than the Royal Courts and their successors] but that which is so expressly alleged."[4]

1 30 & 31 Vict, c 3 (UK).

2 *Ibid*, s 101. Other s 101 courts include the Tax Court of Canada and the Court Martial Appeal Court of Canada. The first court deals with tax matters and is, essentially, a special, tax-specific, administrative court. The second hears appeals from court martials applying the Code of Service Discipline to members of the Canadian Forces. As such, it is principally a criminal law court, albeit one that applies rules more extensively than those applicable to civilians. This chapter does not deal with either of these specific bodies.

3 *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585 at para 44 [*TeleZone*].

4 *Peacock v Bell* (1667), 1 Wms Saund 73, 85 ER 84 at 87-88, cited with approval in *TeleZone*, *supra* note 3 at para 43.

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Thus, while the Federal Courts have only those powers given to them by their constituting (or other) federal statute, the provincial superior courts have all judicial powers not expressly removed from them. Moreover, it is no small thing to strip judicial powers from provincial superior courts. Parliament does have the power to give exclusive federal administrative judicial review jurisdiction to the Federal Courts.[5] However, in the Supreme Court's words, the "ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court … requires clear and explicit statutory wording to this effect."[6]

In the result, the actual jurisdiction of the Federal Courts is anemic relative to that of the provincial superior courts, and the Federal Courts must have regard to statutory authorization in the exercise of their judicial powers. As the Federal Court has itself warned repeatedly: "The Federal Court is a statutory court whose jurisdiction cannot be presumed, unlike provincial superior courts, whose jurisdiction is both general and inherent. There must be a statutory basis for the Federal Court to have jurisdiction in a given case."[7] As discussed below, the key statutory basis for Federal Court jurisdiction is the *Federal Courts Act*.[8]

B. Administrative Law Jurisdiction of the Federal Courts

1. The Federal Court of Canada and the Federal Court of Appeal

The *Federal Courts Act* constitutes the Federal Courts. Specifically, it creates both a Federal Court of Canada (FCC), once known as the Federal Court—Trial Division, and a Federal Court of Appeal (FCA). The FCC is principally a court of first instance—that is, it is the first court that hears a dispute. The FCA is an appellate court, hearing appeals from the FCC and other federal judicial bodies, such as the Tax Court of Canada.

In some areas of Federal Courts jurisdiction, this pattern of trial court and court of appeal operates much as it would in any superior court. Thus, the FCC has concurrent jurisdiction with the provincial superior courts to hear civil claims brought against the federal government. This means that plaintiffs may choose to bring their action before either the FCC or a s 96 court. If they opt for the FCC as the court with original jurisdiction, any appeal from the trial of that action is to the FCA and, from there, with leave, to the Supreme Court of Canada. (Whether counsel selects the federal court or provincial superior court for civil actions is a question more of strategy than of law. Many civil litigators will have limited experience with the federal court, and will gravitate toward provincial superior court.)

This simple description does not, however, adequately capture the jurisdictional division of labour between the FCC and the FCA. In the administrative law area, it is not always the case that the FCC is inevitably the court of first instance. Most notably, there are several administrative tribunals enumerated in s 28 of the *Federal Courts Act* for whom the FCA is the

5 *TeleZone*, *supra* note 3 at para 45, citing *Canada Labour Relations Board v Paul L'Anglais Inc*, [1983] 1 SCR 147 at 154.

6 *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 46, cited with approval in *TeleZone*, *supra* note 3 at para 42.

7 *Pontbriand v Federal Public Service Health Care Plan Administration Authority*, 2011 FC 1029, [2011] 4 FCR D-11 at para 2. See also *DRL Vacations Ltd v Halifax Port Authority*, 2005 FC 860, [2006] 3 FCR 516 at para 6.

8 RSC 1985, c F-7.

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court of first instance on judicial review. These special tribunals include, among others, the Canadian International Trade Tribunal, the Public Service Labour Relations Board, the Copyright Board, and the Competition Tribunal. And they also include "the National Energy Board [NEB] established by the *National Energy Board Act*." As discussed below, the NEB is the quasi-judicial body charged, among other things, with pipeline approvals.

This division of labour between FCC and FCA has much to do with history. Basically, the FCA was given a special role in relation to quasi-judicial tribunals when the federal court system was created. That history lingers in the present s 28—the entities listed in it are formalized tribunals with court-like qualities. But the list is a closed one and so deciding whether one goes to the FCC or the FCA obliges nothing more than a reading of the statute.

And any applicant should read s 28, or risk filing their application for judicial review in the wrong court. That said, the clear majority of applications for judicial review are not in relation to administrative bodies listed in s 28, and thus it is the FCC that has exclusive "original" jurisdiction—that is, it is the place you start your proceeding. In part, this is because the bulk of federal judicial review work stems from immigration disputes and not from decisions issued by the finite list of tribunals listed in s 28. The balance of this chapter focuses mostly on this more common FCC judicial review route.

2. The Federal Court's Exclusive Jurisdiction

Section 18 of the *Federal Courts Act* specifies that, subject to the above-discussed s 28, the FCC has "exclusive original jurisdiction":

> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Section 18 is the source of the FCC's considerable role in Canadian administrative law. It purports to give the FCC "exclusive" powers to issue classic administrative law remedies (and hear any application in relation to these) for any "federal board, commission or other tribunal." "Exclusive" means, essentially, a monopoly, subject to considerations discussed below.

For its part, "federal board, commission or other tribunal" is expansively defined in s 2 of the Act as:

> any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under s. 96 of the *Constitution Act, 1867*.

Note the sweep of this paragraph. Somewhat counterintuitively, "board, commission or other tribunal" need only be a single "person." So long as that person is deploying powers conferred by a federal statute *or* under the royal prerogative, administrative judicial review jurisdiction lies with the FCC.

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Because, as a practical matter, all the powers that matter in federal administrative action are conferred by statute or under royal prerogative, the FCC has administrative judicial review authority over all federal administrative action. As the Supreme Court noted recently, "[t]he federal decision makers that are included [by s 2] run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between."[9]

The question has occasionally arisen as to how exclusive the FCC exclusive jurisdiction really is. As already noted, s 96 courts guard their jurisdictional prerogatives closely. Parliament can assign Federal Courts powers to conduct administrative judicial review authority. But Parliament cannot assign Federal Courts exclusive federal *constitutional* judicial review authority: as the Supreme Court noted recently, Parliament "cannot operate to prevent provincial superior court scrutiny of the constitutionality of the conduct of federal officials."[10] Constitutional review jurisdiction is concurrent, shared by both provincial superior courts and Federal Courts. Accordingly, an attack on administrative action that is, in turn, grounded in an attack on an allegedly unconstitutional statute or unconstitutional conduct can be brought in either s 96 courts or Federal Courts.

Further, the Federal Courts' s 18 jurisdiction does not include issuance of the remedy of *habeas corpus*, except in narrow circumstances.[11] For this reason, the provincial superior courts retain *habeas corpus* jurisdiction in relation to federal administrative action in circumstances where that remedy's own requirements are met.[12]

III. JUDICIAL REVIEW BEFORE THE FEDERAL COURTS

In addition to defining the Federal Courts' jurisdiction, the *Federal Courts Act* creates a relatively comprehensive guide to the manner of, and basis for, judicial review of federal administrative action. This includes special rules relating to certain types of statutory appeals, standing, limitation periods, grounds of review, and remedies.

A. Statutory Appeals

As discussed earlier by Cristie Ford in Chapter 2, applicants must exhaust all other remedies—such as statutory appeals—before applying for judicial review. Failure to exhaust this administrative appeal option may be a basis for the denial of a remedy on judicial review, a concept as true at the federal level as it is at the provincial.[13]

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9 *TeleZone*, *supra* note 3 at para 3. Section 2 does exempt other judges from FCC supervision and those provincial agencies constituted by a provincial law who might have occasion to apply federal law. But these are limited exceptions.

10 *Canada (Attorney General) v McArthur*, 2010 SCC 63, [2010] 3 SCR 626 at para 14.

11 Section 18 gives the FCC "exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada." This power is obviously less sweeping than that found in other parts of s 18, being limited to members of the Canadian Forces overseas.

12 *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809 at para 32.

13 See e.g. *Fast v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 368.

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To take one example, many pipeline disputes—a recurring theme in this book—come to the Federal Court of Appeal via statutory appeals. The NEB is the quasi-judicial tribunal charged with issuing certificates for pipeline construction under the *National Energy Board Act*.[14] That statute creates an appeal for such decisions directly to the Federal Court of Appeal "on a question of law or of jurisdiction, after leave to appeal is obtained from that Court."[15]

Attentive readers may wonder why, given this statutory appeal, Parliament also listed the NEB in s 28 of the *Federal Courts Act* as a tribunal for which judicial review applications go straight to the FCA? Why is there any need for judicial review of the NEB if the *National Energy Board Act* creates a statutory right of appeal? There are two simple answers: first, the NEB performs functions under other statutes as well as the *National Energy Board Act*. And, second, there may be instances where judicial review applications are brought in advance of an actual decision of the NEB, on interlocutory grounds. In these latter circumstances, the statutory appeal mechanism is not yet available, and judicial review is the correct path.

Of course, review of interlocutory decisions is generally disfavoured by the courts. But they can arise—the *Forest Ethics Advocacy* case discussed below is one example.

1. Section 18.5

The *Federal Courts Act* adds an even more robust bar to judicial review where there are certain statutory appeals:

> [I]f an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.[16]

Put simply, where a statutory appeal from an administrative decision-maker lies in one of the bodies listed in the section, there can be no judicial review of the same subject matter covered by that appeal.

A point to be carefully underscored: s 18.5 is a rigid bar on judicial review. Where it applies, there is no further analysis required. As the Federal Court has noted, "Parliament's clear intention ousts judicial review by the Federal Court under s 18.1 of the *Federal Courts Act* and this intention also removes the necessity for this Court to test whether the prescribed review route provides for an adequate alternative remedy."[17]

This bar to judicial review for certain statutory appeals is a sensible and unsurprising limitation for those statutory appeals that go from an administrative body to a court itself. It would make little sense, for example, for judicial review to be available before the Federal Court when the same issue may be statutorily appealed to the FCA. Section 18.5 also reaches

14 RSC 1985, c N-7 [NEBA].

15 NEBA, ss 22; 31.

16 *Federal Courts Act*, s 18.5.

17 *Abbott Laboratories Ltd v Canada (Minister of National Revenue)*, 2004 FC 140, [2005] 1 FCR D-40 at para 40.

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more than courts, however, and includes circumstances where an appeal lies to the governor in council (GIC) or the Treasury Board. The result may create some confusing situations.

2. The Sometimes Tricky Operation of Section 18.5

There are circumstances where statutory appeals may be available to *both* the FCA *and* the GIC. The *Telecommunications Act* authorizes the GIC to "vary or rescind" a decision of the Canadian Radio and Telecommunications Commission (CRTC) made under that statute.[18] That same Act creates an appeal from the CRTC to the FCA "on any question of law or of jurisdiction."[19]

Both the common law doctrine of exhaustion and s 18.5 demand that any challenge to a decision of the CRTC under the *Telecommunications Act* must come in the form of an appeal to the FCA or to the GIC.[20] Presumably, an applicant would select the FCA where questions of "law or jurisdiction" are at issue. In other instances, where the challenge is to the policy wisdom of the CRTC decision, recourse to the GIC would likely be preferred. What happens next varies between these two sorts of appeals.

In instances where an appeal is brought to the FCA, there will *never* be judicial review. Section 18.5 of the *Federal Courts Act* bars judicial review of the CRTC matter that is on appeal. Once the FCA issues its statutory appeal decision, that decision is not amenable to judicial review—the FCA is not a federal "board, commission or other tribunal" under the *Federal Courts Act*. Instead, it is a court, and any further challenge to any of its determinations are simply taken up the regular court appeal chain to the Supreme Court of Canada, with leave.

If the CRTC decision were instead appealed to the GIC under s 12 of the *Telecommunications Act*, the pattern would be slightly different. Again, s 18.5 would preclude judicial review of a CRTC matter that is subject to appeal to the GIC—that GIC appeal must be exhausted. Once it is exhausted, and the GIC issues its determination, judicial review now become a possibility: the GIC decision is not subject to any additional statutory appeal. Because the GIC is a "federal board, commission or other tribunal," it is itself subject to judicial review before the Federal Court. Thus the FCC could judicially review the GIC appeal decision. A litigant unhappy with the outcome of that FCC judicial review could then appeal that decision up the regular court appeal chain to the FCA and from there to the Supreme Court of Canada, with leave.

Note the differential impact of s 18.5 in these two scenarios. In the first, where the statutory appeal is to the FCA, s 18.5 has the end effect of creating an appeal-*only* route. In the second, where the statutory appeal is to the GIC, s 18.5 prioritizes that GIC appeal over judicial review. Then, once the GIC completes its task, judicial review re-emerges as a sort of "one step removed from the CRTC decision" possibility.

18 SC 1993, c 38, s 12.

19 *Ibid*, s 64.

20 Note that the CRTC has roles under other statutes as well; readers should thus be attentive to the appeal rules that may exist under these other instruments. The pattern may not be the same as described for the *Telecommunications Act*. To add an extra layer of complexity, in those statutes where the CRTC is amenable to judicial review (that is, where there is no statutory appeal triggering s 18.5), judicial review would go first to the FCA because the CRTC is one of the bodies listed in s 28 of the *Federal Courts Act*.

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This discussion conveys one recurring caution: any administrative lawyer must passionately embrace the close reading of statutes, and federal administrative lawyers should be particularly zealous lest they miss signals directing them down one review path or another.

3. Leave Requirements and Judicial Review

Generally speaking, there is no requirement that the Federal Court give leave before an applicant brings an application for judicial review. One significant exception to this observation relates to immigration matters. Under the *Immigration and Refugee Protection Act*,[21] judicial review must be commenced via an application for leave brought before the Federal Court.[22] These may or may not be granted and constitute an extra hurdle for judicial review applications in the immigration context.

B. Standing

The *Federal Courts Act* provides that "[a]n application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought."[23] This provision provides standing as of right to the government of Canada and standing to persons "directly affected" by federal, administrative decision-making.

For a person to be directly affected, "the decision at issue must be one which directly affects the party's rights, imposes legal obligations on it, or prejudicially affects it directly."[24] There are, however, some decisions so general that it is difficult to envisage them being of sufficient direct affect vis-à-vis any single person. Pipeline projects may fall into this category—there may not be a natural applicant with enough individual interest to meet the directly affected standard. And public interest groups may seek to fill the vacuum. But they themselves are not "directly affected." For example, during an NEB pipeline assessment process, a group called "Forest Ethics Advocacy" was denied participation opportunities. It challenged the board's decision on judicial review, instantly raising standing issues. The Federal Court of Appeal concluded the "Board's decisions do not affect [the group's] legal rights, impose legal obligations upon it, or prejudicially affect it in any way."[25]

If standing rules were not relaxed in these circumstances, the government would be immunized from challenge. Accordingly, the Federal Courts do recognize "public interest standing," something that exists where the three-part test established by the Supreme Court in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*[26] is met. The applicant must show that a serious issue has been raised; it must have a genuine or

21 SC 2001, c 27.
22 *Ibid*, s 72.
23 *Federal Courts Act*, s 18.1(1).
24 *League for Human Rights of B'Nai Brith Canada v Canada*, 2008 FC 732 at para 24, cited with approval in *Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2011 FCA 101, [2011] 2 FCR D-1 at para 21.
25 *Forest Ethics Advocacy Assn v Canada (National Energy Board)*, 2014 FCA 245 at para 30 [*Forest Ethics Advocacy*].
26 [1992] 1 SCR 236.

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direct interest in the outcome of the litigation; and there must be no other reasonable and effective way to bring the matter to court.

Seriousness of the issue "encompasses both the importance of the issues and the likelihood of their being resolved in favour of the applicant," with the latter measured by considering whether the applicant has a "fairly arguable case."[27] The requirement of genuine or direct interest sufficient to satisfy the test for public interest standing relates, at least in part, to the experience and expertise of the applicant in relation to the subject matter of the litigation.[28] Last, the "reasonable and effective means" threshold once focused on whether there is a more appropriate applicant. As discussed in Chapter 9, Fairness in Context: Achieving Fairness Through Access to Administrative Justice, the Supreme Court has since relaxed this prong of the test and now requires consideration of "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court."[29] The court has also emphasized:

> These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes.[30]

But even this more flexible public interest standing test still presents a hurdle. In the *Forest Ethics Advocacy* case noted above, the Federal Court of Appeal was rather stern:

> 33 Forest Ethics is a classic "busybody," as that term is understood in the jurisprudence. Forest Ethics asks this Court to review an administrative decision it had nothing to do with. …
>
> 34 The record filed by Forest Ethics does not show that it has a real stake or a genuine interest in freedom of expression issues similar to the one in this case. Further, a judicial review brought by Forest Ethics is not a reasonable and effective way to bring the issue before this Court. Forest Ethics' presence is not necessary—Ms. Sinclair, represented by Forest Ethics' counsel, is present and is directly affected by the Board's decision to deny her an opportunity to participate in its proceedings.
>
> 35 Also, … the issue before this Court is not evasive of review—others can be expected to raise the issue and, indeed, are now raising it.
>
> 36 If Forest Ethics were allowed to bring an application for judicial review in these circumstances, it and similar organizations would be able to bring an application for judicial review against any sort of decision anywhere at any time, pre-empting those who might later have a direct and vital interest in the matter. That is not the state of our law.[31]

In sum, federal standing rules open the door wide to applicants, but there is still a door, and courts will not hear matters brought by those with no demonstrable interest in the government decision.

27 *Sierra Club of Canada v Canada (Minister of Finance)*, [1999] 2 FC 211 at paras 38 and 39 (TD) [*Sierra Club*].

28 *Ibid* at para 53.

29 *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 52.

30 *Ibid* at para 20.

31 *Forest Ethics Advocacy*, *supra* note 25 at paras 33-36.

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C. Limitation Periods

The *Federal Courts Act* also establishes an unusually demanding limitation period on applications for judicial review: "An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it."[32] A judge may extend this time either before or after its expiry, but, to receive such an extension, the applicant must "show a continuing intention to pursue the application, that the application has some merit, that no prejudice to the respondent arises from the delay, and that a reasonable explanation for the delay exists."[33]

Note that even if a court accepts an extension on the statutory limitation period, the court retains a discretion to deny a remedy because of unreasonable delay.[34]

We should also note that the limitation period applies only to circumstances where there has been an actual administrative decision, as opposed to a challenge to a persisting situation. The limitations clock does not, for example, attach to a circumstance in which "an application for judicial review is sought for an order in the nature of mandamus, prohibition or declaratory relief for redress against a state of affairs that is by its very nature continuing and on-going and is alleged to be invalid or unlawful."[35]

D. Grounds of Review

Among the most difficult issues raised by the Federal Court's administrative law role are the grounds of review available to applicants challenging federal executive decisions. The *Federal Courts Act* specifies that

> [t]he Federal Court may grant relief … if it is satisfied that the federal board, commission or other tribunal
>
> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
> (d) 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;
> (e) acted, or failed to act, by reason of fraud or perjured evidence; or
> (f) acted in any other way that was contrary to law.[36]

Great care is required in reading this language. In the past, some courts have interpreted the grounds of review listed in s 18.1(4) as also prescribing the standard of review,[37] although

32 *Federal Courts Act*, s 18.1(2).

33 *Stanfield v Canada*, 2005 FCA 107 at para 3, applied to s 18.1 by, *inter alia*, *Sander Holdings Ltd v Canada (Minister of Agriculture)*, 2006 FC 327, 289 FTR 221 at para 29, aff'd 2007 FCA 322, 370 NR 274.

34 *Sander*, *supra* note 33 at para 34.

35 *Maple Leaf Foods Inc v Consorzio Del Prosciutto Di Parma*, 2009 FC 1035 at para 19.

36 *Federal Courts Act*, s 18.1(4).

37 See *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 at paras 37 and 38 [*Mugesera*].

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that reasoning has not survived the Supreme Court's decision of *Canada (Citizenship and Immigration) v Khosa*,[38] an immigration case. The exact matter before the court in the latter case was "the extent to which, if at all, the exercise by judges of statutory powers of judicial review (such as those established by ss. 18 and 18.1 of the *Federal Courts Act* …) is governed by the common law principles lately analysed by our Court in *Dunsmuir v. New Brunswick*."[39] A majority of the court concluded that s 18.1(4), although clearly prescribing grounds of review, was largely silent on the standard of review to be applied. Accordingly, it was entirely proper for the court in *Khosa* to turn to the common law (as had been recently by *Dunsmuir*) in determining what standard of review it would apply to the ground of review in question.

Extrapolating from *Khosa*, we might make the following observations about the key grounds enumerated in s 18.1(4).

1. Acting Without Jurisdiction

As the Supreme Court noted in *Khosa*, "jurisdictional issues command a correctness standard."[40] Once again, however, special caution is warranted because jurisdictional issues are virtually non-existent in the common law administrative law jurisprudence, and their invocation in the *Federal Courts Act* has, so far, not resuscitated them. Although, in *Dunsmuir*, the Supreme Court appeared to open the door a crack to a new creature known as a "true question of jurisdiction," it has held its shoulder against that door to prevent any further embellishment of the concept. As the court observed in 2011, "our Court has held since *Dunsmuir* that issues which in other days might have been considered by some to be jurisdictional, should now be dealt with under the standard of review analysis in order to determine whether a standard of correctness or of reasonableness should apply."[41]

2. Procedural Fairness

In *Khosa*, the Supreme Court observed "procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review."[42] More generally, there is usually nothing unusual or unique in the Federal Court approach to common law procedural fairness. The procedural fairness described elsewhere in this book is that applied at the Federal Court. Indeed, Federal Court jurisprudence is the source of much of that general law on procedural fairness. This reflects, in part, the fact that, at the federal level, there is no codified procedural statute intended to apply to all or some significant part of federal administrative action. This places federal administrative decision-making on a very different procedural footing than, for instance, Ontario provincial equivalents governed by the *Statutory Powers Procedures Act*.[43] (Note that it is an error to assert that the

38 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*].
39 *Ibid* at para 1, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].
40 *Khosa, supra* note 38 at para 42.
41 *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at para 24 [*Canada v Canada*].
42 *Khosa*, *supra* note 38 at para 43.
43 RSO 1990, c S.22.

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Federal Court may or can apply these provincial laws—they *do not apply* to federal administrative decision-making.)

But it is necessary to add two caveats to the claim that there is nothing much unique in Federal Court approaches to procedural fairness. First, there is now a line of cases associated from the Federal Court of Appeal that, while applying a correctness standard of review to procedural fairness, talks also about deference and a "margin of appreciation." Thus, in the *Forest Ethics Advocacy* case discussed above, the FCA held that the NEB was "entitled to a significant margin of appreciation in the circumstances of this case."[44] These circumstances included expertise and experience, a general deference to the NEB's procedural choices, statutory language supporting deference on the procedural matter at issue (whether someone can participate in an NEB proceeding) and the existence of a privative clause. Some of these considerations echo those listed in the *Baker* test[45] for the content of procedural fairness. But this is not at all the *Baker* test—it is a hybrid between *Baker* and *Dunsmuir*, and its fate remains uncertain. (See Chapters 5, 11, and 12, for a discussion on *Dunsmuir* and its aftermath.)

Second, one due process area that is distinctly federal is the *Canadian Bill of Rights*.[46] The procedural guarantees found in ss 1(a) and 2(e) of that instrument apply exclusively to the federal level. Thus, to the extent there is a jurisprudence interpreting these provisions (and it is a slender jurisprudence), it originates in the Federal Courts.

Sections 1(a) and 2(e) of the *Bill of Rights* read:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law. …
>
> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to …
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.[47]

One reason that these provisions have received relatively little treatment by the courts is because of their overlap with both common law procedural fairness and s 7 of the Charter. For the most part, the jurisprudence seems to treat the *Bill of Rights* provisions as alternative sources of the same sorts of procedural protections offered by the common law and the Charter—that is, procedural rights under the Bill are different in source but not in kind from those found at common law or in s 7 of the Charter. There are, however, several caveats to this point.

First, unlike the common law (but like the Charter), a statute does not displace *Bill of Rights* procedural entitlements (unless the *Bill of Rights* is expressly excluded by that statute). Like the Charter, therefore, the *Bill of Rights* is available to challenge *statutory* provisions that curtail procedural rights.

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44 *Forest Ethics Advocacy*, *supra* note 25, at para 72.

45 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

46 SC 1960, c 44.

47 *Canadian Bill of Rights*, ss 1(a) and 2(e).

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However, unlike the Charter, the trigger for the application of s 1(a) of the *Bill of Rights* includes more than simply life, liberty, and security of the person. It also includes property. This gives it a much more expansive reach than s 7 of the Charter.

For both these reasons, the *Bill of Rights* may be the sole source of procedural rights available to litigants presented with a statutory annulment of procedural rights in circumstances where property interests (but not life, liberty, or security of the person) are engaged.

A second caveat to the observation that the *Bill of Rights* procedural rights dovetail with those provided by common law and the Charter flows from some slender jurisprudence on the concept of "due process" in s 1(a). There is a hint in the jurisprudence that "due process" in this context may reach "substantive due process," a concept that is not truly explored to date.[48] In a somewhat antiquated case, one Federal Court judge concluded that "due process requires, in addition to a fair hearing, a total process which provides for the making of a decision authorized by law, a means for rationally relating the facts in the case to criteria legally prescribed, as in this case, by Parliament."[49] This definition has never caught on, but it is notable that, were it to do so, it would give s 1(a) coverage more closely associated with substantive grounds for administrative judicial review. Specifically, rationally relating fact to applicable legal standards is the sort of decision-making process one would associate with reasonable exercises of discretion.

Lawyers who ignore the *Bill of Rights* do so at considerable disservice to their clients. As this book goes to press, the FCC has pointed to the *Bill of Rights* in invalidating portions of the *Citizenship Act* process for denaturalizations. It did so in circumstances where it concluded that s 7 of the Charter did not apply.[50] Put another way, but for the *Bill of Rights*, counsel would have lost this case.

3. *Error of Law*

Again, there is nothing unique about Federal Court application of this ground. Despite quite different language in a predecessor case,[51] *Khosa* establishes that an error of law may be reviewable on correctness *or* reasonableness grounds. Which standard applies depends on consideration of the sorts of issues raised by *Dunsmuir* and its successors—for example, the Supreme Court has emphasized as a justification for reasonableness review the fact that the statute in question involved "the home statute or a closely related statute" applied "by an expert decision-maker."[52] The other variables that point toward correctness versus reasonableness review of errors of law are discussed elsewhere in this book.

But I shall highlight one example: *Smith v Alliance Pipelines Ltd*[53] involved an arbitration panel established to adjudicate compensation for the expropriation of land for pipeline purposes. At issue was what "costs" could be awarded under the *National Energy Board Act*

48 *Authorson v Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40 at para 51.

49 *Smith, Kline & French Laboratories v Canada (Attorney General)*, [1986] 1 FC 274 (TD), aff'd [1987] 2 FC 359 (CA).

50 *Hassouna v Canada (Minister of Citizenship and Immigration)*, 2017 FC 473.

51 See *Mugesera*, *supra* note 37 at para 37, asserting that errors of law under s 18.1(4) are reviewable on a standard of correctness.

52 *Canada v Canada*, *supra* note 41 at para 44.

53 2011 SCC 7, [2011] 1 SCR 160.

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to a successful claimant. In deciding this matter, the Supreme Court applied a reasonableness standard. And it also articulated the clearest expression of its *Dunsmuir* approach (sadly, since muddied by unnecessary complexity of the sort discussed elsewhere in this book):

> Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" …; (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*". … On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" …; (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues … .[54]

Often, there is now little real contest over standard of review, given the extent to which the Supreme Court has emphasized reasonableness review. In the *Forest Ethics Advocacy* case noted above, all the parties agreed that the standard of review for the NEB in its pipeline decisions under the *National Energy Board Act* was reasonableness.[55]

4. *Erroneous Finding of Fact*

As with errors of law, there is an earlier jurisprudence assigning standard of review significance to the phrase "perverse and capricious manner or without regard for the material before it."[56] Some courts envisaged this language as connoting "patent unreasonableness" under the pre-*Dunsmuir* tripartite standard-of-review approach, while others applied a reasonableness *simpliciter* concept. This debate fell away after *Dunsmuir* and, for its part, *Khosa* holds that "it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*."[57]

5. *Other Way Contrary to Law*

This provision serves as a basket clause allowing the evolution of new grounds of review. Error of discretion is an obvious ground of review not expressly mentioned elsewhere in s 18.1(4) that reasonably falls within this category.[58] As Audrey Macklin observes in Chapter 11, Standard of Review: Back to the Future?, *Dunsmuir* establishes that courts will generally review errors of discretion using the reasonableness standard.

One final note on grounds of review relates to the nature of proceedings before the Federal Court. Judicial review applications are heard on the record—that is, they do not involve the presentation of *viva voce* evidence by, for example, witnesses testifying in court. Instead, at issue before the court is the record of decision made by the decision-maker in

54 *Ibid* at para 26.
55 *Forest Ethics Advocacy*, *supra* note 25 at para 60.
56 See again *Mugesera*, *supra* note 37 at para 38.
57 *Khosa*, *supra* note 38 at para 46.
58 *Telfer v Canada (Revenue Agency)*, 2009 FCA 23, [2009] 2 FCR D-15 at para 23.

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question, as demonstrated either by the documents produced by that decision-maker in rendering its decision or, for more informal decisions, by affidavits describing the decision. Therefore, judicial review applications bear more resemblance to appellate court proceedings than to trial-like proceedings.

E. Remedies

A last issue relating to administrative judicial review before the Federal Courts is remedies. As already noted, the Federal Court has exclusive, original jurisdiction under s 18 "to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal."[59] A more formal remedies section is found at s 18.1:

> (3) On an application for judicial review, the Federal Court may
> (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
> (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.[60]

In essence, this language simply encapsulates in textual form the meaning of the prerogative writs of *certiorari*, *mandamus*, and prohibition and the ordinary remedies of declaration and injunction discussed by Cristie Ford in Chapter 2. In this respect, it equips the Federal Courts with the same remedies as the provincial superior courts, operating under an unmodified common law administrative remedy regime. Further, like these common law remedies, the Federal Courts' power to award remedies is purely discretionary: s 18.1(3) uses the word "may." As a consequence, the Act "preserves the traditionally discretionary nature of judicial review."[61]

In practice, therefore, the circumstances in which the Federal Courts will award relief are not greatly different from those in which provincial superior courts will now act. For instance, in deciding whether to "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,"[62] the Federal Court has employed the common law tests for the writ of *mandamus*. Likewise, in deciding whether to exercise its discretion to deny a remedy, the Federal Court has looked to considerations like those contemplated by provincial superior courts, including "prematurity, mootness, waiver, impermissible collateral attack, conduct, the existence of an alternate remedy, or on the basis of a broader assessment of the balance of convenience between the parties."[63]

That said, there are a few potential differences between the federal and provincial remedies systems. First, relief under s 18.1(3), "while doubtless modelled on the forms of relief available under the prerogative orders and the declaration and injunction, are not necessarily encrusted with the same technicalities that at one time hampered the development of

59 *Federal Courts Act*, s 18(1)(a).
60 *Ibid*, ss 18.1(3)(a) and (b).
61 *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 31.
62 See e.g. *Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159, [2007] 2 FCR D-2 at para 38.
63 *Mwesigwa v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1367 at para 15.

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the common law remedies of judicial review."[64] This is particularly true in the area of standing and procedure. To the extent that different common law remedy rules had embedded in them distinct rules of procedure and standing, the Federal Court regime abolishes those in favour of the system established in the *Federal Courts Act*. Put another way, one follows the same process regardless of the administrative law remedy one is seeking. That hasn't always been the case at the provincial level, although modern provincial judicial review statutes echo the *Federal Courts Act* in consolidating judicial review procedure into a single process, irrespective of the remedy sought.

Second, there is a modest statutory embellishment on the common law remedies standard found in s 18.1:

> (5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may
>
> (a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and
>
> (b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.[65]

IV. CONCLUSION

In summary, the federal system of administrative law is a variant to that applied provincially. The Federal Court issues a large number of administrative law cases every year, and as a close perusal of the cases cited elsewhere in this book suggests, federal cases have been the source of many important developments in administrative law. This is particularly the case in common law procedural fairness.

However, both students and practitioners of administrative law must be wary of several important considerations in approaching administrative practice in front of Federal Courts. First, because the Federal Courts are statutory bodies, they are unusually attentive to a statutory basis for their authority. Second, that statutory basis simplifies matters to an important extent by prescribing in detail guidance on issues such as standing, limitation periods, grounds of review, and remedies.

Nevertheless, we should exercise caution in relation to these statutory prescriptions. For one thing, the *Federal Courts Act*'s limitation period is unusually brief, and inattentive applicants may quickly find their applications dismissed as untimely. For another, the statutory codification of grounds of review does not in any real way answer the question of standard of review. Accordingly, Federal Court practitioners, like other administrative lawyers, must pay close attention to Supreme Court machinations on standard of review. Likewise, the codification of remedies in the statute is incomplete, in the sense that much of the common law on remedies remains relevant, as are the discretionary bases for declining to issue a remedy.

Put another way, the *Federal Courts Act* is the place to start in understanding administrative judicial review at the federal level. It is not, however, the final answer in any judicial review analysis.

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64 *Sierra Club, supra* note 27 at para 47.

65 *Federal Courts Act*, ss 18.1(5)(a) and (b).

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