

This booklet is prepared under the direction of the Chief Administrator of the Courts Administration Service for the information of those who seek judicial review in the Federal Court and the Federal Court of Appeal. It does not reflect the views of the Courts or of its judges. It is a guide to procedures, but it does not provide legal advice on how a person should proceed. For such advice, a person should obtain legal counsel. Questions on procedure may be directed to the Courts Administration Service.

May 2007

* The use of the masculine incorporates the feminine.

INTRODUCTION & HISTORICAL BACKGROUND TO THE COURTS JUDICIAL REVIEW JURISDICTION

The Federal Court of Canada was established in 1971 by the *Federal Court Act*.¹ It came into existence, however, not as a completely new entity but as a reorganization of the former Exchequer Court of Canada, which dated back to 1875. The constitutional basis for such courts is section 101 of the *Constitution Act, 1867*, authorizing the Parliament of Canada to establish “additional Courts for the better Administration of the Laws of Canada.”

With the current *Federal Courts Act*, jurisdiction for supervision of federal administrative tribunals is given to the Federal Court and the Federal Court of Appeal. Previously, there having been no federal legislation on the subject, such supervision had been the task of the provincial superior courts.² This had meant that tribunals functioning throughout Canada were subjected to “multiple supervision, with a lack of consistent jurisprudence and application.”³

The original Act by section 18 gave exclusive jurisdiction to the Trial Division, now called the Federal Court, in respect of federal boards, commissions and other tribunals to issue an

injunction, a writ of *certiorari*, prohibition, *mandamus* or *quo warranto*, or to grant declaratory relief. It also offered (section 28) a new statutory remedy of judicial review by the Appeal Division, now called the Federal Court of Appeal. In some cases, however, once the Court was in operation, confusion arose concerning which division had jurisdiction to decide particular matters, and such problems were resolved by litigation and jurisprudence.

Bill C-38,⁴ *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, was introduced in part to remedy this problem. “One of the principal objectives of the Bill,” said Minister of Justice Doug Lewis, speaking to the legislative committee,⁵ “. . . is to eliminate futile and wasteful jurisdictional contests.” The legislation received Royal Assent on March 29, 1990, and came into force on February 1, 1992.

The Federal Court now has exclusive jurisdiction for judicial review of decisions of federal boards, commissions, or other tribunals, except those specifically mentioned in the *Act* as falling under the authority of the Federal

1 R.S.C. 1985, Chapter F-7.

2 See *Three Rivers Boatman Ltd. v. C.L.R.B.*, [1969] S.C.R. 607.

3 John Turner, Minister of Justice, Commons Debates, March 25, 1970, on Second Reading of the *Federal Court Bill*.

4 Second Session of the Thirty-Fourth Parliament, 1989.

5 Legislative Committee on Bill C-38, Minutes, November 23, 1989.

Court of Appeal (these are listed in a subsequent section of this guide).

In view of the legislation, it was necessary to alter the *Federal Court Rules*⁶ to accommodate the changes in the Act and establish a common procedure for both divisions.

In 1993, the *Federal Court Rules* Committee began a comprehensive review of the Federal Court Rules. This project was undertaken with the objectives of harmonizing the rules with those of the provincial superior courts, making them more understandable and enhancing the efficiency of litigation in the Court. There followed discussion papers, public consultation and revisions, with the result that the *Federal Court Rules, 1998*, now the *Federal Courts Rules*⁷, came into effect on April 25, 1998. These rules repeal and replace the former rules.

One of the features introduced in the *Federal Courts Rules* is the case management system. An application for judicial review must be perfected and a requisition for a hearing date submitted within 180 days of commencement of the proceeding in the Courts. The Courts will monitor the progress of cases and order a status review of any proceeding which fails to meet its “major milestones.”

With the enactment of the *Courts Administration Services Act* on July 2, 2003, the existing two divisions of the Federal Court of Canada became a separate court of appeal and trial court. Each Court has its own Chief Justice. The short title of the Act then became the *Federal Courts Act*.

This guide paraphrases provisions of the legislation and rules for judicial review in the Federal Court and the Federal Court of Appeal. Readers are advised to consult the original text of the *Federal Courts Act*, R.S.C. 1985, Chapter F-7, and of the *Federal Courts Rules*, SOR/98-106. With regard to proceedings under the *Immigration and Refugee Protection Act*, specific reference should be made to that Act and to the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. It is to be noted that a separate guide exists regarding judicial review for immigration proceedings.

Applications for judicial review are made under sections 18 to 18.5 and section 28 of the Act and, except in cases where the Federal Court directs that the application should proceed as an action, Part 5 of the *Federal Courts Rules* is applicable. Both Courts can offer the same remedies.

The definition of a federal board, commission or other tribunal is found in section 2 of the *Federal Courts Act*. The particular boards, commissions and tribunals in regard to which judicial review may be sought in the Federal Court of Appeal are listed in section 28. As of this writing, they are the following:

- the Board of Arbitration established by the *Canada Agricultural Products Act*;
- the Review Tribunal established by the *Canada Agricultural Products Act*;
- the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;
- the Pension Appeals Board established by the *Canada Pension Plan*;
- the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;
- the National Energy Board established by the *National Energy Board Act*;

- the Canada Industrial Relations Board established by the *Canada Labour Code*;
- the Public Service Staff Relations Board established by the *Public Service Labour Relations Act*;
- the Copyright Board established by the *Copyright Act*;
- the Canadian Transportation Agency established by the *Canada Transportation Act*;
- umpires appointed under the *Employment Insurance Act*;
- the Competition Tribunal established by the *Competition Tribunal Act*;
- assessors appointed under the *Canada Deposit Insurance Corporation Act*; and
- the Canadian Artists and Producers Professional Relations Tribunal established by subsection 10(1) of the *Status of the Artist Act*.

All other applications for judicial review fall under section 18 and must be heard at first instance in Federal Court.

An application for judicial review in either Court must be made in accordance with the provisions of section 18.1.

⁶ C.R.C., Chapter 663, SOR/92-43.

⁷ SOR/2004-283, s. 2.



Who May Make Application?

Anyone directly affected by the matter may apply for relief, as well as the Attorney General of Canada.

[Subsection 18.1(1)]

When?

Unless otherwise specified by statute, the application must be made within 30 days after the decision or order in question was first communicated to the Deputy Attorney General or to the party directly affected. [Subsection 18.1(2)] A judge of the appropriate Court may, however, extend the time.

(See Rules 8, 359 and 369)

Relief Available on Judicial Review

Subsection 18.1(3) of the *Act* provides that either Court may:

- order the tribunal to do what it has unlawfully failed to do or has unreasonably delayed in doing [paragraph 18.1(3)(a)] or
- declare a decision, order, act or proceeding to be invalid or unlawful, or quash, set aside or set aside and refer back, prohibit, or restrain the impugned decision. [Paragraph 18.1(3)(b)]

In addition, the Federal Court has authority to grant the following relief:

- injunction;
- writ of *certiorari*;
- writ of prohibition;
- writ of *mandamus*;
- writ of *quo warranto*;
- declaratory relief.

The Federal Court of Appeal, as well as the Federal Court, has jurisdiction to grant this relief in respect of any matter that falls under subsection 28(1). [Subsections 28(2) and 18(1)]

Grounds of Review

The application must be based on the grounds that the board, commission, or tribunal: [Subsection 18.1(4)]

- (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.

Subsection 18.1(5) governs defects in form or technical irregularity.

Interim Orders

The legislation gives the Federal Court authority to make interim orders, such as a stay of proceedings, on judicial review applications before their final disposition. [Section 18.2]

Summary Proceedings

All judicial review matters are to be treated as summary proceedings and will be heard and determined without delay. [Subsection 18.4(1)] The exception to this provision occurs when the Federal Court directs that an application for judicial review shall proceed as an action. [Subsection 18.4(2)]

Exceptions

The Federal Court cannot entertain an application for judicial review from a decision of a federal board, commission or tribunal when there is statutory provision for an appeal. [Section 18.5]

Subsection 28(2) states that sections 18 to 18.5, with the exception of subsection 18.4(2), apply to applications for judicial review in the Federal Court of Appeal. Where the Federal Court of Appeal has jurisdiction over any matter, the Federal Court has none. [Subsection 28(3)]



JUDICIAL REVIEW UNDER THE FEDERAL COURTS RULES

Applications for judicial review are covered in Part 5 of the *Federal Courts Rules*. However, as with all matters before the Courts, other parts of the rules may also be applicable. Where the Federal Court has ordered that the application for judicial review should be treated as an action, the rules in Part 4 relating to actions apply instead. [Rule 300(a)] These provisions came into force on April 25, 1998.

Notice of Application

An application for judicial review shall be commenced by a notice of application in accordance with Form 301. (See FORMS, *Federal Courts Rules*. This form is also set out at pages 11-12 of this booklet.) The notice must include the following [Rule 301]:

- the appropriate name of the Court;
- names of the applicant and respondent;
- the federal board, commission or other tribunal;
- date and details of the decision for which review is sought and the date on which it was first communicated to the applicant;
- the precise relief sought;
- the grounds to be argued;
- a list of the documentary evidence to be used at the hearing.

Rule 302 states that a notice of application for judicial review must be limited to a single decision, unless the Court orders otherwise.

The applicant should designate as respondent any person directly affected by the order sought or required to be named as a party pursuant to a statute. [Rule 303(1)] In the absence of such persons, the Attorney General of Canada will be a respondent. [Rule 303(2)]

Interventions

Any person, including the subject tribunal, may apply by way of notice of motion for leave to intervene in the proceeding. Refer to Part 7 for rules applicable to motions. The notice must include:

- how the person wishes to participate in the hearing;
- how that participation will assist in the determination of an issue.

When the Court grants leave to intervene it may direct the procedure to be followed by the intervener. [Rule 109]

Service of Documents

In accordance with Rules 127 and 304(1), the notice of application is to be served personally by the applicant within 10 days of issuance on:

- the respondents;
- the tribunal involved, other than in a decision of a visa officer;
- any other person who participated before the tribunal;
- the Attorney General of Canada.

An applicant may obtain directions as to service upon *ex parte* motion to the Court. [Rule 304(2)]

Proof of service must be filed within 10 days of service of the notice of application. [Rule 304(3)]

Service of the notice of application on the Crown is effected by filing the notice and two copies in the appropriate Registry. [Rule 133(1)]

Documents, other than the notice of application, require proof of service in order to be filed. [Rule 73]

Notice of Appearance

A respondent who intends to oppose an application must serve and file a notice of appearance in accordance with Form 305, within 10 days of service of the notice of application. [Rule 305]

Affidavits

The applicant shall serve and file supporting affidavits and documentary exhibits within 30 days of issuance of the notice of application [Rule 306]; the respondent shall serve and file any supporting material within 30 days of service of the applicant's affidavits [Rule 307]. Within 20 days after the filing of the respondent's affidavits or the expiration of the time for doing so, cross-examinations have to be completed by all parties. [Rule 308] Upon motion, the Court may permit a party to file additional supporting affidavits and to conduct additional cross-examinations. [Rule 312(a) and (b)]

Application Records

The applicant is required to prepare, serve and file a record within 20 days after the completion of all parties' cross-examinations, or the expiration of the time for doing so. The following documents are to be included in the record in the sequence given, with pages numbered consecutively [Rule 309(2)]:

- table of contents with nature and date of each document included;
- notice of application;
- any decision or order in respect of which the application is being made;
- each supporting affidavit with its documentary exhibits;



- transcript of any cross-examination on the affidavits that the applicant has conducted;
- portions of any transcript of evidence before a tribunal to be used by the applicant at the hearing;
- description of any physical exhibits that the applicant intends to use at the hearing;
- applicant's memorandum of fact and law.

Similar provisions apply to the respondent, who must serve and file a record within 20 days of service of the applicant's record and serve it on all other parties. [Rule 310] The respondent's record should include the following documents on consecutively numbered pages and in the order given:

- table of contents with nature and date of each document;
- each supporting affidavit, including documentary exhibits;
- transcript of any cross-examination on affidavits that the respondent has conducted;
- portions of any transcript of evidence before a tribunal to be used by the respondent at the hearing;

- description of any physical exhibits that the respondent intends using;
- respondent's memorandum of fact and law.

Rule 312(c) authorizes the filing of a supplementary record with leave of the Court.

A party is responsible for the preparation of its record unless, upon application by the party, the Court orders the Chief Administrator to prepare the record. [Rule 311(1)] In this situation the party must submit the material to be included in the record to the Chief Administrator. [Rule 311(2)]

The number of copies of the record or supplementary record required to be filed is:

- Federal Court – three copies;
- Federal Court of Appeal – five copies. [Rules 309(1)(b) and 310(1)(b)]

The Court may order that additional material be produced and filed if the application record is found to be incomplete. [Rule 313]

Obtaining Documents in the Possession of the Tribunal

A party may serve on the tribunal and then file in the appropriate Registry a written request for a certified copy of the specific material in the tribunal's possession, but not in the possession of the party, on which it wishes to rely. [Rule 317(1)] An applicant may include this request in the originating notice of application. (Form 301 of the *Federal Courts Rules*, attached at pages 11-12.) The tribunal shall then forward a certified copy of this material, which can be reproduced, to the party and to the Registry within 20 days of service of a request. [Rule 318(1)] An objection by the tribunal or by a party to the release of material requested must be communicated in writing to all parties and to the Chief Administrator with the reasons for the objection. [Rule 318(2)] The Court may give directions on the procedure for submissions respecting the objection; after hearing the submissions the Court may order the tribunal to send a certified copy of all or part of the material to the Registry. [Rule 318(3) and (4)]

Requisition for Hearing

An applicant must serve and file a requisition for a hearing date in Form 314 within 10 days of service of the respondent's record or the expiration of the time for doing so. [Rule 314(1)] The text of this form is reproduced at page 14. A pre-hearing conference may be ordered by the relevant Court. [Rule 315]

The Court will set the date, time and place for the hearing of the judicial review application, and the appropriate Registry will communicate this information to all parties.

Time Limits

With the exception of the notice of application, the parties are permitted to extend the time limits once, for no more than one half of the period stated in the Rules, by filing the consent of all parties in writing. [Rule 7] Any further extension of time will only be permitted by order of the appropriate Court. [Rule 8]

Where 180 days have elapsed since the issuance of the notice of application and a requisition for a hearing date has not been filed, the proceeding shall be subject to status review. [Rule 380]



In summary, a judicial review proceeding will follow this course:

- the applicant commences an application by a notice of application (Form 301) (within 30 days of being advised of decision [subsection 18.1(2)], unless otherwise specified by statute;
- the applicant pays the tariff fee set out in Tariff A, paragraph 1(1)(a);
- the applicant serves the notice of application on respondents and others as required by the rule – 10 days after issuance [Rule 304(1)];
- the applicant files proof of service – 10 days after service [Rule 304(3)];
- the respondent serves and files a notice of appearance (Form 305, reproduced at page 13) – 10 days after service of notice of application [Rule 305];
- the applicant serves and files supporting affidavits – 30 days after issuance of notice of application [Rule 306];
- the respondent serves and files affidavit(s) in reply – 30 days after service of applicant’s affidavits [Rule 307];
- all parties complete cross-examinations on affidavits – 20 days after filing of respondent’s affidavits [Rule 308];
- the applicant serves and files a record – within 20 days of completion of cross-examinations [Rule 309];
- the respondent serves and files a record – 20 days after service of applicant’s record [Rule 310];
- the applicant serves and files a requisition for a hearing date – 10 days after service of respondent’s record [Rule 314];
- applicant pays filing fee, in Federal Court [Tariff A(2)(f)];
- a hearing date is fixed by Order;
- the matter is heard and determined by the appropriate Court.

NOTICE OF APPLICATION

(General Heading (Use Form 66))

(Court seal)

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at *(place where Federal Court of Appeal (or Federal Court) ordinarily sits)*.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant’s solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date) Issued by: _____
(Registry Officer)

Address of local office: _____

TO: *(Name and address of each respondent)*
(Name and address of every other person required to be served)





(Separate page)

APPLICATION

(Where the application is an application for judicial review)

This is an application for judicial review in respect of

(Identify the tribunal.)

(Set out the date and details of the decision, order or other matter in respect of which judicial review is sought.)

The applicant makes application for: *(State the precise relief sought.)*

The grounds for the application are: *(State the grounds to be argued, including any statutory provision or rule relied on.)*

This application will be supported by the following material: *(List the supporting affidavits, including documentary exhibits, and the portions of transcripts to be used.)*

(If the applicant wishes a tribunal to forward material to the Registry, add the following paragraph:)

The applicant requests *(name of the tribunal)* to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the *(tribunal)* to the applicant and to the Registry: *(Specify the particular material.)*

(Date)

(Signature of solicitor or applicant)

(Name, address, telephone and fax number of solicitor or applicant)

NOTICE OF APPEARANCE – APPLICATION

(General Heading – Use Form 66)

NOTICE OF APPEARANCE

The respondent intends to oppose this application.

(Date)

(Signature of solicitor or respondent)

(Name, address, telephone and fax number of solicitor or respondent)

TO:

(Names and addresses of other solicitors or parties)



REQUISITION FOR HEARING – APPLICATION

(General Heading – Use Form 66)

REQUISITION FOR HEARING

THE APPLICANT REQUESTS that a date be set for the hearing of this application.

THE APPLICANT CONFIRMS:

1. The requirements of subsection 309(1) of the *Federal Courts Rules* have been complied with.
2. A notice of constitutional question has been served in accordance with section 57 of the *Federal Courts Act*.

(or)

There is no requirement to serve a notice of constitutional question under section 57 of the *Federal Courts Act* in this application.

3. The hearing should be held at *(place)*.
4. The hearing should last no longer than *(number)* hours *(or days)*.
5. The representatives of all parties to the application are as follows:
 - (a) on behalf of the applicant: *(name of solicitor or party if self-represented)*
who can be reached at: *(address, telephone and fax numbers)*
 - (b) on behalf of the respondent: *(name of solicitor or party if self-represented)*
who can be reached at: *(address, telephone and fax numbers)*
 - (c) on behalf of the intervener: *(name of solicitor or party if self-represented)*
who can be reached at: *(address, telephone and fax numbers)*

(If more than one applicant, respondent or intervener represented by different solicitors, list all.)

6. The parties are available at any time except: *(List all dates within the next 90 days on which the parties are not available for a hearing.)*
7. The hearing will be in *(English or French, or partly in English and partly in French)*.

(Date)

(Signature of solicitor or applicant)

(Name, address, telephone and fax number of solicitor or applicant)

TO:

(Name and address of each solicitor or party served with requisition)

SOR/2004-283, s. 35.

