INTRODUCTION

In Canada, administrative tribunals are established by statute. Governments pass laws to address a variety of issues such as transportation, labour relations, the environment and, within these statutory regimes, they delegate authority to public officials or tribunals to implement the policy as it is expressed in the statute. The composition, powers and degree of independence from government enjoyed by tribunals are defined in the terms of their statute.

The purpose of delegating powers to tribunals is to create expert bodies that are better qualified to resolve complex problems that arise in particular areas. Administrative processes also provide an alternative method to resolving disputes – one that is intended to be speedier, less formal and less expensive than courts.

The Supreme Court of Canada has commented on the increasingly important role administrative tribunals play in Canada:

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 fulfil are legion.¹

There is a wide spectrum of administrative bodies in Canada, each with their own structures and functions. Some tribunals consist of a public official exercising licensing or administrative powers under a statute, for example fisheries quotas and permits. Other administrative bodies are charged with resolving disputes in a quasi-judicial forum, for example human rights tribunals and labour relations boards. Some boards may have multiple functions, some of which are appellate in nature and others of an advisory nature.

At the federal level there are also “Officers of Parliament” who have a great deal of independence and are responsible to Parliament rather than to the executive for their appointment to, and removal from, office. These include the Auditor General, the Chief Electoral Officer, the Official Languages Commissioner, the Privacy Commissioner and the Access to Information Commissioner.

In performing their functions, administrative tribunals must respect the limits of their mandates, more specifically those imposed by the Constitution Act, 1867² and the Canadian Charter of Rights and Freedoms³ as well as those contained in the statute under which the tribunal is operating and the various common law duties and obligations imposed by the Courts.

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In this paper, I provide an overview of the status of administrative tribunals in Canada at the federal level. I will touch on issues, such as the establishment of administrative tribunals, the process for appointing members, the duty of procedural fairness, the independence of tribunals, the concept of impartiality, the application of the *Canadian Charter of Rights and Freedoms* to tribunals and the process of judicial review and statutory appeals. Since Québec is the only province in Canada to have a civil law system, I have included as a separate section a discussion of the particular regime in the province of Québec that was prepared by my colleague Justice Gilles Létourneau.

**THE ESTABLISHMENT OF ADMINISTRATIVE TRIBUNALS**

Canada is a federal state whose written constitution distributes legislative powers between Parliament and the provincial legislatures.

Thus, in creating statutory regimes, the federal Parliament and the provincial legislatures must respect the division of powers created by the Constitution. Because some subject matters fall within federal jurisdiction while others in provincial jurisdiction, some tribunals are created by federal law while others are created by provincial law. Only those powers that properly fall within each government’s respective sphere of jurisdiction can be delegated to an administrative tribunal. Tribunals must also adhere to that same delineation of powers in carrying out their statutory mandates.

Since the Constitution is the supreme law of Canada, the *Charter of Rights and Freedoms*, which is incorporated in it, must be applied by these tribunals.
The members of the tribunals and the presiding officer are appointed by the executive. It is accepted that the composition of boards can, and often should, reflect all aspects of society. Its members may include the experts who give advice on the technical nature of the operations to be considered by the board, as well as representatives of government and of the community. Indeed, many boards will operate more effectively with representation from all segments of society who are interested in the operations of the Board.

Members of a tribunal therefore come from a variety of educational backgrounds, careers and regions of the country and many are not members of the legal profession but are usually knowledgeable in the area of jurisdiction of the tribunal. In many cases, members appointed to tribunals perform their duties on a part-time basis, as opposed to full-time.

**APPOINTMENT PROCESS**

As noted above, members of tribunals are appointed by the executive but the appointment process can and does vary. In some cases, the statute itself designates the public officials who will perform the administrative function and will indicate whether that person can delegate that function to another. This is most likely to be the case where the function to be exercised is purely of an administrative nature. In most other situations, members of the tribunal will be appointed by the executive and the statute may or may not specify the mode and criteria for such appointments.
The federal government has recently established by statute a public appointments commission. When it becomes operational, the public appointments commission will oversee, monitor, review and report on the selection process for appointments and reappointments by the Governor in Council (the executive) to agencies, boards, commissions and Crown corporations, and to ensure that every such process is widely made public and conducted in a fair, open and transparent manner and that the appointments are based on merit. The public appointments commission will also evaluate and approve all the selection processes proposed by ministers to fill vacancies and determine reappointments.

Some tribunals have their own specific appointment process which involves providing a list of possible candidates for nomination. For example, the Immigration and Refugee Board of Canada (“IRB”) is Canada’s largest independent administrative tribunal. The IRB has what is called a merit-based appointment for decision-makers. Under this process, candidates must go through an initial screening, and then write an exam to test competencies. Candidates are then evaluated by an independent Advisory Panel whose membership is representative of Canadians highly qualified in their own fields. Those who are recommended for further consideration are interviewed by a Selection Board, which is composed of experts with an in-depth understanding of the IRB and its decision-making process. Based on the assessment of the Advisory Panel and the Selection Board, the IRB Chairperson provides the Minister of Citizenship and Immigration Canada with a list of highly qualified candidates and the Minister then makes a recommendation for appointment to the Governor in Council.
The Canada Industrial Relations Board (the “CIRB”) is another example of a large federal administrative tribunal. The Chairperson and the Vice-Chairpersons of the CIRB are appointed by the Governor in Council, on the recommendation of the Minister, to hold office during good behaviour for terms not exceeding five years each, subject to removal by the Governor in Council at any time for cause. The Canada Labour Code explicitly requires that the Chairperson and Vice-Chairpersons have experience and expertise in industrial relations.

**REMUNERATION AND TENURE**

The remuneration of tribunal members is fixed by the Governor in Council and varies from tribunal to tribunal.

There is no uniformity regarding the terms of office of tribunal members. Most are appointed for a fixed term which is usually renewable and their appointment is subject to good behaviour. Where the executive seeks to remove a member who has been appointed pursuant to a statute to hold office during good behaviour, the law requires an inquiry into whether that person has become incapacitated or disabled from the due execution of the office he or she occupied by reason of a) age or infirmity; b) having been guilty of misconduct; c) having failed in the due execution of that office; or d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office.
THE DUTY OF PROCEDURAL FAIRNESS

All administrative tribunals owe a duty of fairness to the parties appearing before them. A decision that affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. However, the mere existence of a duty of fairness does not determine what degree of fairness will be required in a given set of circumstances.

The concept of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

Several factors have been recognized as relevant to determining what is required by the duty of fairness. These include the nature of the decision being made and the process followed in making it; the statutory scheme and the terms of the statute pursuant to which the body operates; and the importance of the decision to the individual or individuals affected.

Administrative tribunals that have the primary purpose to develop, or supervise the implementation of, particular government policies may require little by way of procedural protections. On the other hand, tribunals that adjudicate disputes through some form of hearing are required to comply with more stringent requirements of procedural fairness.
The degree of independence required of a particular decision-maker or tribunal is determined by its enabling statute.

The precise standard of independence requirement will depend on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make.

This principle reflects the fundamental distinction between administrative tribunals and courts. The Supreme Court of Canada made the following observations in respect of this distinction:

[...] Superior 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 same constitutional imperative applies to the provincial courts: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 (the "Provincial Court Judges Reference"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges -- both in fact and perception -- by insulating them from external influence, most notably the influence of the executive: Beauregard v. Canada, [1986] 2 S.C.R. 56, at p. 69; Régie, at para. 61.

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. The degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected. 4

It is therefore ultimately Parliament or the legislature that determines the nature of a tribunal’s relationship to the executive.

4 Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch) [2001] 2 S.C.R. 781 at paras. 23 and 24, 2001 SCC 52.
IMPARTIALITY OF TRIBUNALS

The concept of impartiality includes both an individual and an institutional aspect. Individual impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. A decision-maker may, for instance, be biased in a particular situation because of a personal interest in the case.

Institutional impartiality concerns the objective status of the tribunal when the system is so structured as to give rise to a reasonable apprehension of bias at the institutional level. Therefore, whether or not a decision-maker harboured pre-conceived biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met. Institutional bias generally arises in situations of overlapping roles, that is, that one individual is carrying out more than one function with regard to a particular decision – e.g. the same individual was involved both in an initial investigation and at the later decision making stage.

CODE OF CONDUCT

Over the years, there have been various guidelines, principles and Codes in effect with respect to the conduct of public office holders. The Federal Accountability Act (“FAA”) creates, among other things, a legislative regime governing the ethical conduct of public office holders, both during and after employment. The term “public office holders” is defined under the FAA to include Order in Council appointments such as Ministers, Deputy Ministers and Heads of Boards and Agencies.
For the purposes of the FAA, a public officer holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests. As such, every public office holder has an obligation to arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest. For instance, the FAA prohibits a public office holder from making a decision or participating in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.

In addition to the statutory obligations found under the FAA, public office holders are also required to comply with the *Conflict of Interest and Post-Employment Code for Public Office Holders* (the “Conflict of Interest Code”). The objective of the Conflict of Interest Code is to provide guidance to all public office holders in the discharge of their official duties and responsibilities. Under the Conflict of Interest Code, public office holders are required, on appointment to office and thereafter, to arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest. They are also required to act with honesty and uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.
Some tribunals have at their disposal a number of instruments that guard against ethical transgressions and conflicts of interests. The IRB, for example, has its own Members’ Code of Conduct to govern the conduct of members in their professional lives. An important companion of the IRB’s Code of Conduct is a process that enables members of the public to bring forward complaints about member conduct, entitled Protocol Addressing Member Conduct Issues. The IRB also has a Senior Officer to whom any IRB member or public servant can bring forward a concern or an allegation of wrongdoing.

The Canada Labour Code also provides for an internal mechanism to deal with the conduct of members of the CIRB. Under the Code, the Chairperson may request the Minister to decide whether any member of the Board should be subject to remedial or disciplinary measures. On receipt of the request, the Minister may, among other things, request the Governor in Council to have an inquiry. After such an inquiry, the judge may recommend that the member be suspended without pay or removed from office or that any other disciplinary measure or any remedial measure be taken if the member has failed in the proper execution of that office or has been placed in a position that is incompatible with the due execution of that office.

**ADMINISTRATIVE TRIBUNALS AND THE CHARTER**

Since its inception in 1982, Canada’s Charter of Rights and Freedoms has had a significant impact on administrative law. 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 Two to Fourteen 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.\(^5\) In this regard, tribunals must comply with the principles of fundamental justice in respect of the conduct of its proceedings. Second, the powers exercised by a


[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.
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 remedies available under the Charter.

One of the relevant sections of the Charter is section 7, which reads as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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 power to interpret the law.

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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.\textsuperscript{7} 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.\textsuperscript{8} Absent an explicit grant, it becomes necessary to consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law under the challenged provision.\textsuperscript{9} Implied jurisdiction must be discerned by looking at the statute as a whole.\textsuperscript{10} 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;
- 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.\textsuperscript{11}

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:

\textsuperscript{8} Ibid.
\textsuperscript{9} Ibid. at para. 41.
\textsuperscript{10} Ibid.
\textsuperscript{11} Ibid.
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.¹²

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.

Section 24 of the Charter

The second remedy available under the Charter is found under 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)?

¹² Ibid at para. 31.
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. A court or tribunal must possess the three attributes to be considered a “court of competent jurisdiction” for the purpose of providing a Charter relief under 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.” 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. The Supreme Court stated the test as follows:

The question, in essence, is whether the legislature or Parliament has furnished the court or tribunal with the tools necessary to fashion the remedy sought under s. 24 in a just, fair and consistent manner without impeding its ability to perform its intended function.

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 of the Charter.

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15 Ibid. at 598.
JUDICIAL REVIEW AND STATUTORY APPEALS

While most administrative procedure is 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. Some enabling statutes explicitly provide for a right of appeal to the courts. However, even in the absence of a statutory right of appeal, an individual may still have recourse by way of judicial review.

The term “judicial review” refers to a court’s review of the decision of an administrative tribunal. 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, “[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.”16

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 that body’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 and the Federal Court of Appeal. If it is empowered by provincial statute,

jurisdiction will belong to the respective provincial superior court. The Supreme Court of Canada has the ultimate and final authority over the decisions of all administrative tribunals.

There have recently been statutes enacted to codify the process of judicial review. For federally constituted administrative tribunals, 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 jurisdiction to hear and determine applications for judicial review made in respect of the tribunals listed in subsection 28(1) of the *Federal Courts Act*.

The Federal Court of Appeal may also be granted original judicial 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 other judicial review applications heard by that court.

**CONCLUSION**

Administrative law is a very important aspect of public law in Canada. There are many jurisdictions with the constitutional power to establish administrative tribunals and there is a wide variety of such tribunals. The legal regime under which they operate, however,
is marked by the unifying influence of decisions by the Supreme Court of Canada and the supremacy of the Constitution and, in particular, the *Charter*. 