

HAD-119 Discretion not to consider issue first raised on review.

Halsbury's Laws of Canada - Administrative Law (2022 Reissue)

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Note 2

See also *Strata Plan VR 1120 v. Mitchinson*, [2022] B.C.J. No. 938 at para. 48-50, 2022 BCCA 189 (B.C.C.A.): If a reviewing court cannot adequately show deference to the administrative decision-maker because it cannot discern the decision-maker's views on the new issue, even by implication, that should generally lead the reviewing court to refuse to entertain the new issue. While a reviewing court may permit a new issue to be raised on judicial review but remit the issue to the tribunal to provide reasons in the first instance, there must be exceptional circumstances to warrant such an order.

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Just as a court has discretion to refuse to undertake judicial review where there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so.¹ Courts should generally not exercise the discretion to consider an issue that could have been but was not raised before the tribunal, especially where the issue relates to the tribunal's specialized functions or expertise. The underlying reasons for this approach are the requirement to defer to decisions made by administrative tribunals, the possibility of prejudice to the opposing party and the lack of a proper evidentiary record for the decision. Where the decision by the tribunal on the particular issue is implicit due to the decision as a whole, it is not an error for the court to exercise its discretion to consider the issue on judicial review.² An allegation of bias or procedural unfairness on the part of the administrative decision-maker may not be raised for the first time on appeal or judicial review,³ whether or not it pertains to specialized expertise.

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Footnote(s)

- 1** See *Forest Ethics Advocacy Assn. v. Canada (National Energy Board)*, [2014] F.C.J. No. 1089 at para. 43, 2014 FCA 245 (F.C.A.): “As a general rule, this Court is restricted to reviewing the Board’s decisions through the lens of the standard of review using the evidentiary record developed before the Board and passed to it.”
- 2** *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Assn.*, [2011] S.C.J. No. 61 at paras. 22-29, [2011] 3 S.C.R. 654 (S.C.C.).
- 3** *Hennessey v. Canada*, [2016] F.C.J. No. 650 at paras. 20-21, 2016 FCA 180 (F.C.A.); *Taseko Mines Ltd. v. Canada (Minister of the Environment)*, [2019] F.C.J. No. 1502 at paras. 45-47, 2019 FCA 320 (F.C.A.), leave to appeal refused [2020] S.C.C.A. No. 49 (S.C.C.).

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