

§9.01 TYPES OF JUDICIAL REMEDIES

Administrative Law in Canada, 7th Ed.

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PART II REVIEW OF THE TRIBUNAL'S ACTION

Chapter 9 JUDICIAL REMEDIES

§9.01 TYPES OF JUDICIAL REMEDIES

The judicial remedies discussed in this chapter are final in nature. Interim judicial remedies are discussed in Chapters 6 and 7.

1.

Quash the Order or Decision and Remit to the Tribunal for Reconsideration

On appeal or judicial review, a court may quash a tribunal decision or order.

If the tribunal error affects only part of its order, the entire order need not be quashed. The defective part may be severed from the order. This should be done only where the remaining order can stand on its own as a complete and enforceable order not crippled by the loss of one of its components. This turns on the effect that the tribunal intended to achieve when issuing the order. If the order could not achieve that effect without the impugned part, it should not be severed. Would the tribunal, knowing that it could not include the invalid part, have issued the order without it?¹

A common additional remedy is to remit the matter back to the tribunal to be reconsidered.² The court may issue directions to be followed by the tribunal clearly stating what the tribunal may or may not do. A direction is too vague if it simply requires the tribunal to reconsider the matter in accordance with the court's reasons.³ Directions may be given to avert unfair procedure or excess of power, but not to direct the result of the tribunal's reconsideration on the merits.⁴ Typical directions concern statutory interpretation, matters of procedure, whether an item of evidence should be considered or not, identification of the issues to be decided or a deadline by which a decision must be made.⁵ Court directions that have been overruled by statute should not be followed.⁶ If the court directs reconsideration on specific issues, the tribunal may not exercise its own power to reconsider other issues⁷ unless the decision is based on consideration of current circumstances.⁸ On the issues to be reconsidered, the parties may submit additional evidence.⁹

All Superior Courts have an inherent power to refer a matter back to a tribunal. In some jurisdictions this authority is granted expressly.¹⁰ This power does not give the court authority to supervise the tribunal's reconsideration.¹¹ Errors by the tribunal on reconsideration may be the subject of a new application for review.

An order quashing a decision or order, without a reference back, does not preclude a tribunal from dealing with the matter. Its proceedings may be continued as if the part of the proceeding that was quashed had not yet taken place.¹² Where only one step in a proceeding has been quashed, the tribunal remains seized of the matter and, upon doing that step again (without the error that resulted in it being quashed),¹³ may continue the proceeding to its conclusion. It need not start from scratch, ignoring all that went before.¹⁴ Even where all steps in a proceeding are quashed, the tribunal may continue the proceeding, although it must start again at the beginning. If there is a

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statutory time limit on the commencement of proceedings, the continuation of the proceeding after it has been quashed, even if it must start again from the beginning, is not out of time, provided the original proceeding was commenced within the time limit.¹⁵ In an exceptional case, the court may prohibit the tribunal from re-hearing the matter.¹⁶

It is efficient to have the same tribunal members conduct the re-hearing, since they are familiar with the matter,¹⁷ but if there is a reasonable apprehension that these tribunal members no longer have an open mind on the merits of the case, a court may direct that the matter be decided by a different panel,¹⁸ if available. If the court does not specify whether the re-hearing is to be before the same or a different panel, the re-hearing may be before any quorum of the tribunal.¹⁹ If the decision maker who originally heard the matter is no longer in office, the matter must be heard anew by the incumbent.²⁰ Where reconsideration does not change the result, the tribunal need not demonstrate in its reasons that it has given regard to the court's reasons for quashing the first order.²¹

A rarely awarded additional remedy is the court's substitution of its decision for that of the tribunal. On appeal, a court typically has authority to do this,²² but should not exercise it if the decision requires application of the tribunal's policy expertise.²³ In contrast, on judicial review, a court's authority is limited to quashing the decision with or without remitting it to the tribunal for reconsideration. The court on judicial review may not issue the order the tribunal should have made had it not erred because a court does not have statutory authority to exercise the discretion conferred on the tribunal,²⁴ but it may correct unintended errors made by the tribunal²⁵ and substitute its decision for that of a tribunal that fails to follow the court's remitted directions.²⁶ In the very rare situation where the outcome is inevitable and remitting the case to the tribunal would serve no useful purpose, a court on judicial review may make the only order that the tribunal could reasonably make.²⁷

2.

Prohibit Tribunal from Proceeding

Where a tribunal is about to take a specific action without legal authority, a court, on judicial review, may issue a writ of prohibition.²⁸ Given the final nature of this order, it may be made by a court only if it is clear and beyond doubt that the tribunal lacks authority to proceed. Prohibition may be refused if the existence of authority is debatable or turns on findings of fact that have yet to be made by the tribunal.²⁹ A tribunal acting within authority will not be prohibited from embarking upon what may be regarded as unnecessary, unwise or fruitless pursuits.³⁰ An advisory body will not be prohibited from conducting proceedings, simply because there is no certainty that the decision maker will follow its advice and recommendations.³¹

A court should not entertain an application for an order prohibiting a tribunal from proceeding unless the issue has been raised before the tribunal. If the tribunal lacks authority, it may, upon being advised, agree to halt its proceeding. One must not assume in advance that a tribunal will intentionally act illegally. As discussed in the introduction to Chapter 4, tribunals have a duty to decide whether they have statutory authority to proceed and, before interfering, courts permit them to consider the issue.

In very rare cases, a tribunal may be prohibited from proceeding where it has statutory authority to proceed, but refuses to follow fair procedure or is guilty of some other serious irregularity. The tribunal should be given an opportunity to rectify the problem before an application to the court is made. In these circumstances, a court may include a term in the order of prohibition that it expires when the defects are cured.³²

In a few jurisdictions, a writ of *quo warranto* may be issued to prohibit the exercise of power by persons who do not validly hold office. This order requires office holders to prove that they have a lawful right to their office. This order is available only if the office is of a public nature created by the Crown, by a Royal Charter or by legislative Act (rather than the office of a deputy or public servant) and the holder has exercised the office (a mere claim to office is not enough).³³

In some cases a tribunal acting without authority may be stopped by injunction. Some courts are expressly

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empowered to issue injunctions in respect of the exercise of statutory powers.³⁴ However, statutes governing proceedings against the Crown prohibit the issuance of injunctions against the Crown and its servants.³⁵ The combined effect of these statutes is to permit the issuance of injunctions against entities that exercise statutory power but are not part of the Crown (such as self-regulatory bodies, municipal authorities and school boards) but to preclude the courts from issuing injunctions to prevent the lawful exercise of statutory authority by Ministers and other servants of the Crown.³⁶ Regardless, in all cases involving the illegal exercise of statutory authority, a writ of prohibition is the preferred remedy.³⁷

If an order prohibiting or enjoining the tribunal from proceeding is refused at this stage and the tribunal is permitted to proceed, an application to quash may be commenced after the tribunal decision is issued.

3.

Mandamus: Order the Tribunal to Act

A court, on judicial review, may order a tribunal to perform a specific act, but only if:

- (1) the applicant has a legal right to have the act performed in the manner and at the time the request is made for it;
- (2) the tribunal is under a corresponding legal duty to so act; and
- (3) the tribunal has been requested to act and has refused to do so.³⁸

The legal right and corresponding duty must be found in a statute, regulation or binding order. *Mandamus* is not available to enforce policy³⁹ or a contractual right.⁴⁰

The first and second requirements are not met if the statute grants discretion to the decision maker. *Mandamus* is not available because there is no legal right to have the requested act done nor a legal duty to do it.⁴¹ However, if a tribunal refuses even to consider whether to act, a court may order it to consider the issue.⁴² A court may order a tribunal to exercise its statutory discretion, but not which way to decide, unless the discretion has in fact been exercised and all that remains is the implementation of the decision,⁴³ or if it is clear that the tribunal would have granted the request but for one improper consideration.⁴⁴

As to the third requirement, a tribunal is allowed reasonable time to consider the request before application to court.⁴⁵ If there has been unreasonable delay in processing the request, the court may impose a deadline by which the decision must be made.⁴⁶ If the delay is due to a processing backlog at the tribunal, *mandamus* will not be issued to an applicant seeking to jump the queue.⁴⁷ Where discretion cannot be exercised without investigation, a court will allow an investigation that is underway to be completed.⁴⁸

4.

Enforce the Statute and Orders of the Tribunal

When a party refuses to obey an order of a tribunal, many statutes allow the tribunal or other parties to apply to court for an order requiring obedience. Then, if the court order is not obeyed, the court may fine or imprison the miscreant. Tribunals rarely have the power to enforce their orders and must request a court's assistance.⁴⁹

One common statutory procedure for enforcing an order of a tribunal is as follows. First, the tribunal issues an order requiring the person to do or refrain from doing a particular act. Then, if the order is not obeyed, the tribunal may apply to court for an order requiring the person to comply with it.⁵⁰ If the person did not take advantage of a right to appeal the tribunal order, or appealed and lost, the validity of the order is presumed.⁵¹ If the court is satisfied, by affidavit evidence on a balance of probabilities, that the person has, in fact, disobeyed the tribunal order, the person may be ordered to comply with it. A person who does not comply with a court order may be punished for contempt.

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Another common statutory procedure permits the tribunal order to be registered with the court and enforced as if it had been issued by the court.⁵² Under some statutes only the tribunal may register the order with the court — a party may not.⁵³ Then, if the order is violated, application may be made to the court for an order finding the violator in contempt.⁵⁴ A registered tribunal order may not be appealed as if it were a court order. It may be challenged only pursuant to provisions for appeal and judicial review that are available to challenge orders of the tribunal. The court may refuse to enforce it until an appeal or application for judicial review is concluded,⁵⁵ after which, the tribunal order is presumed valid.⁵⁶

To be enforced by the court, a tribunal order must be clear and unambiguous.⁵⁷ The tribunal order should specifically set out what the person is required to do or to refrain from doing. If leave of the court is required to register a tribunal order, it may be refused if no useful purpose would be served. If the tribunal order merely declares the rights of parties, leave to register it as a court order might be refused because there is no positive act to enforce, such as the payment of money or the performance of a specific act.⁵⁸ If leave is not required, a court may on the same grounds refuse to enforce an order that has been registered. An order to pay a fixed sum of money is the clearest to enforce,⁵⁹ but an order requiring the Crown to pay money is not enforceable.⁶⁰

Absent statutory provision for court enforcement of tribunal orders, the Attorney General, or the tribunal if it has a mandate to protect the public, may apply to court for an injunction.⁶¹ Success may depend on whether the tribunal order is of a type that a court would enforce, and whether the court believes it should enforce the tribunal order in the absence of any statutory procedure for obtaining court assistance.

If the party who refuses to obey the tribunal order is another tribunal over whom the first tribunal has power, the preferable process is an application for *mandamus*.⁶²

A party whom the order benefits may bring an action against the disobedient party to enforce it.⁶³ If the order is for the payment of money, the plaintiff may move for summary judgment and the defendant may not re-litigate the issues decided by the tribunal.⁶⁴

Many statutes provide for prosecution of persons who disobey tribunal orders. Validity of the order cannot be challenged in defence to the charge if adequate alternate procedures for challenging the order were available.⁶⁵ In addition, the *Criminal Code* makes it a criminal offence to disobey a lawful order made by any tribunal, federal or provincial.⁶⁶

Some statutes authorize a tribunal to apply to court for an order requiring a person to comply with its statute, regulations and by-laws. The injunction may be granted upon proof of violation of the law without proof of harm to the public interest and the court's discretion to refuse an injunction is exercised only in exceptional circumstances.⁶⁷ The tribunal need not hold a hearing into whether the Act has been violated before applying to court.⁶⁸ Failure of the tribunal to enforce the statute against other violators is not a valid reason to refuse an injunction.⁶⁹

Absent statutory authority, a tribunal with a mandate to protect the public may apply to court for an injunction to enforce a statute.⁷⁰ Proof that the person is violating the statute, without any other evidence of harm, may be sufficient proof of harm to the public to weigh the balance of convenience in favour of granting an injunction unless the injunction would interfere with a *Charter* right, in which case stronger proof may be required.⁷¹ The court is not bound by the tribunal's interpretation of the statute even if the defendant has unsuccessfully appealed tribunal orders on the same issue.⁷²

The Attorney General may also bring an action for an injunction to enforce a statutory requirement and, upon showing that there has been a clear and deliberate breach of the Act, an injunction is usually granted.⁷³

The court order should be clear and specific. It must set out what must be done to comply and must relate to the nature and scope of the infraction. Whether an order to comply with the statute is sufficiently clear depends on the context. Implementation of the court order should not require supervision by the court.⁷⁴

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Violation of a court order is civil contempt, which may be punished if proven beyond a reasonable doubt.⁷⁵ Evidence must establish that, after receiving notice of the order, the person intentionally did an act that is prohibited by the order.⁷⁶ Only proof of the intention to do the act is required. An intention to violate the order need not be proven.⁷⁷ The sentence is a term of imprisonment or a fine determined in accordance with typical sentencing principles.⁷⁸

A court will not issue *mandamus* requiring a tribunal to commence a court proceeding to enforce its order or statute because a tribunal has discretion.⁷⁹

5.

Declaration: Define Powers, Rights and Duties

On judicial review or appeal, a court may apply the applicable standard of review to a question of statutory interpretation to determine the scope of a tribunal's authority or the legal rights or duties of a party. Such a declaration is often part of a court decision that grants other relief. A stand-alone declaration is a remedy of last resort if there is no other procedure or forum to determine the question and other relief is unnecessary or unavailable.⁸⁰

The purpose of requesting a declaration of the court is to clarify the law on a particular point but courts refuse to decide academic questions. Declaratory relief must be necessary to determine a party's rights with respect to an actual exercise of statutory power.⁸¹ They are not made on matters of morality, wisdom or policy.⁸² A declaration may be refused if it would have no practical effect, if there is no one present in court with a true interest in presenting the opposing view,⁸³ or if the question could more appropriately be raised in proceedings before a tribunal.⁸⁴

A declaration of the court does not order anyone to do anything or to refrain from doing anything. It is not enforceable as a mandatory or a compensatory order may be but, given the respect for the court, a declaration of the court may be preferable to *mandamus*.⁸⁵

6.

Award Compensation or Damages

A public officer may be sued for damages for abuse of power. To establish this tort of misfeasance in public office, the plaintiff must prove, first, that the public officer engaged in deliberate and unlawful conduct in the role of a public officer and, second, that the public officer knew both that the conduct was unlawful and that it was likely to harm the plaintiff.⁸⁶ All of these elements must be pleaded and proven because there is no stand-alone cause of action for bad faith.⁸⁷ If the claim is against the Crown or other employer, facts must be pleaded that enable them to identify their employee.⁸⁸ Allegations that discretion was exercised for political purposes do not meet the requirement to plead unlawfulness.⁸⁹ To sue a person for commencing or continuing discipline proceedings in bad faith, the appropriate tort is misfeasance in public office rather than malicious prosecution.⁹⁰

In the absence of misfeasance, there is no liability in damages for the negligent exercise of statutory power, for the misinterpretation of statute or for the failure to follow proper procedures,⁹¹ but there might be liability for negligent failure to implement a court order.⁹² Tribunal members may enjoy judicial immunity.⁹³ A discretionary statutory power does not attract a fiduciary duty.⁹⁴ Experts and others who advised or gave evidence to the tribunal may not be sued.⁹⁵

A municipality or the Crown might be vicariously liable⁹⁶ in damages for negligence by its servants in their exercise of routine duties such as inspections⁹⁷ but not for core policy decisions.⁹⁸ There is no liability for negligent performance of duties owed to the public generally, for representations made to the public or for any circumstance where liability would conflict with the public servant's overarching duty to the public.⁹⁹ The plaintiff must be a person

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to whom the statute imposes on the public servant a duty of care,¹⁰⁰ or must have had direct interactions with the public servant beyond the typical interactions with a regulator to an extent to give rise to a duty to take care.¹⁰¹ Allegations of direct interactions are often pleaded as negligent misrepresentation, but there is no liability for representations by officials who lacked authority.¹⁰² Liability may be denied for policy reasons including if the statute contains indicators that liability should not be imposed, such as an immunity provision or compensation scheme, if the effect would be to make taxpayers liable as if they were insurers, if the servant acted on legal advice, or if the extent of the risks of harm were indeterminate at the time of the negligent act.¹⁰³

If the statute grants immunity from suit, the action may be struck even if the claim is for breach of the plaintiff's *Charter* rights.¹⁰⁴ If the immunity is for negligent acts done in good faith in the performance of their duties, facts amounting to bad faith must be pleaded and proven.¹⁰⁵ Bad faith must be proven either with direct evidence of the public officer's words or conduct or by circumstantial evidence of acts that are so markedly inconsistent with the statutory mandate that a court cannot reasonably conclude that they were performed in good faith.¹⁰⁶

No action in libel or slander may succeed for comments made in a tribunal's reasons or in the course of its proceedings.¹⁰⁷ This absolute privilege may also extend to regulatory investigators.¹⁰⁸

Regulators, such as marketing boards, that have power to contract and to carry on a business may be ordered to pay damages for breach of contract, but not in respect of their exercise of statutory powers.¹⁰⁹

A party who received money as a result of a tribunal order that was later declared invalid might not be able to rely on the order in defence to an action for recovery by those who paid pursuant to the order.¹¹⁰

An action designed to discourage parties from exercising their legal rights before a regulator may be struck as abusive.¹¹¹ Absolute privilege protects a party from suit for defamatory statements made in a regulatory proceeding unless the statements were gratuitous and irrelevant.¹¹²

Footnote(s)

- 1 *Saskatchewan (Employment Standards, Director) v. North Park Enterprises Inc. (c.o.b. Maxie's Excavating Enterprises Inc.)*, [2019] S.J. No. 273 (Sask. C.A.).
- 2 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 141.
- 3 *Ouellet v. Canada (Attorney General)*, [2018] F.C.J. No. 63 (F.C.A.); *University of British Columbia v. British Columbia College of Teachers*, [2002] B.C.J. No. 1039 (B.C.C.A.).
- 4 *Lockyer-Kash v. British Columbia (Workers' Compensation Board)*, [2015] B.C.J. No. 271 (B.C.C.A.), leave to appeal refused [2015] S.C.C.A. No. 133; *Testa v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No. 665 (B.C.C.A.).
- 5 *Yansané v. Canada (Minister of Citizenship and Immigration)*, [2017] F.C.J. No. 264 (F.C.A.).
- 6 *Régie de rentes du Québec v. Canada Bread Co.*, [2013] S.C.J. No. 46.
- 7 *Shuchuk v. Alberta (Workers' Compensation Board)*, [2012] A.J. No. 153 (Alta. C.A.).
- 8 *Millett (c.o.b. Rocky Top Farm) v. Nova Scotia (Minister of Agriculture)*, [2017] N.S.J. No. 1 (N.S.C.A.).
- 9 *Afanasyev v. Canada (Minister of Citizenship and Immigration)*, [2012] F.C.J. No. 1361 (F.C.).
- 10 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(3)(b); *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, ss. 5, 6; *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 3.24; *Saskatchewan Queen's Bench Rules*, r. 3-61; *Rules of Court*, N.B. Reg. 82-73, r. 69.13(7); *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 3(3)(e).
- 11 *Teva Neuroscience G.P.-S.E.N.C. v. Canada (Attorney General)*, [2010] F.C.J. No. 1499 (F.C.).

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- 12 *Yamani v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1550 (F.C.), affd [2003] F.C.J. No. 1931 (F.C.A.).
- 13 But, absent the violation of an express direction from the court, a repetition of the error is not contempt: *Pelishko v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 129 (F.C.T.D.).
- 14 *Nova Scotia (Labour Relations Board) v. Little Narrows Gypsum Co.*, [1977] N.S.J. No. 603 (N.S.C.A.); *Watko v. St. Clements (Rural Municipality)*, [1979] M.J. No. 280 (Man. Q.B.).
- 15 *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*, [1980] O.J. No. 3845 (Ont. C.A.), leave to appeal refused [1981] S.C.C.A. No. 254; *Webb v. Ontario (Securities Commission)*, [1987] O.J. No. 161 (Ont. Div. Ct.).
- 16 *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2009] O.J. No. 1050 (Ont. C.A.).
- 17 *Zuk v. Alberta Dental Assn. and College*, [2020] A.J. No. 500 (Alta C.A.), leave to appeal refused [2020] S.C.C.A. No. 208.
- 18 *Edmonton Police Service (Chief of Police) v. Furlong*, [2013] A.J. No. 487 (Alta. C.A.); *Eastern Provincial Airways Ltd. v. Canada (Labour Relations Board)*, [1983] F.C.J. No. 907 (F.C.A.); *Conseil des Montagnais de Natashquan v. Malec*, [2012] F.C.J. No. 1528 (F.C.); *Foothills Provincial General Hospital v. United Nurses of Alberta, Local 115*, [1994] A.J. No. 24 (Alta. Q.B.).
- 19 *Singh (Re)*, [1978] F.C.J. No. 180 (F.C.A.).
- 20 *Floris v. Nova Scotia (Director of Livestock Services)*, [1987] N.S.J. No. 106 (N.S.T.D.); *Ayangma v. Eastern School Board*, [2009] P.E.I.J. No. 33 (P.E.I.C.A.).
- 21 *Lee v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 977 (F.C.T.D.), affd [2004] F.C.J. No. 602 (F.C.A.).
- 22 *Commission de protection du territoire agricole du Québec c. Tremblay*, [2007] J.Q. no 9983 (Que. C.A.).
- 23 *Ontario (Motor Vehicle Act, Registrar) v. Jacobs*, [2004] O.J. No. 189 (Ont. Div. Ct.).
- 24 *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45; *Edgar v. Canada (Attorney General)*, [1999] O.J. No. 4561 (Ont. C.A.).
- 25 *Gichuru v. Law Society of British Columbia*, [2014] B.C.J. No. 2552 (B.C.C.A.).
- 26 *Canada (Attorney General) v. Philips*, [2019] F.C.J. No. 1116 (F.C.A.).
- 27 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 142.
- 28 *Ontario v. Gratton-Masuy Environmental Technologies Inc. (c.o.b. EcoFlo Ontario)*, [2010] O.J. No. 2935 at paras. 55-56 (Ont. C.A.).
- 29 *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] S.C.J. No. 10; *Citizens for a Southern Bypass Committee v. Pasadena (Town)*, [1995] N.J. No. 341 (Nfld. C.A.).
- 30 *Little Narrows Gypsum Co. v. Nova Scotia (Labour Relations Board)*, [1977] N.S.J. No. 603 (N.S.C.A.).
- 31 *Swampy Cree Tribunal Council v. Manitoba (Clean Environment Commission)*, [1994] M.J. No. 747 (Man. Q.B.).
- 32 *Elliott v. Burin Peninsula School Board District No. 7*, [1998] N.J. No. 128 (Nfld. C.A.); *Chyz v. Appraisal Institute of Canada*, [1985] S.J. No. 820 (Sask. C.A.).
- 33 *Roseau River Anishinabe First Nation v. Nelson*, [2013] F.C.J. No. 178 (F.C.); *Comité de surveillance de l'Association des intermédiaires en assurance de personnes du Québec c. Murphy*, [2007] J.Q. no 3655 (Que. C.A.); *Union canadienne des travailleurs en communication c. Papiccio*, [2005] J.Q. no 1324 (Que. C.A.).
- 34 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18; *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2; *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 3.15(1)(b); *Saskatchewan Queen's Bench Rules*, r. 3-56(2)(b); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1); *Nova Scotia Civil Procedure Rules*, r. 7.11(c); *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 2(1)(b).
- 35 *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 22 [as am.]; *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 11; *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25, s. 17; *Proceedings Against the Crown Act, 2019*, S.S. 2019, c. P-27.01, s. 17; *Proceedings Against the Crown Act, C.C.S.M.*, c. P140, s. 14; *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17, s. 22; *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P-18, s. 14;

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Proceedings Against the Crown Act, R.S.N.S. 1989, c. 360, s. 16; *Crown Proceedings Act*, R.S.P.E.I. 1988, c. C-32, s. 13; *Proceedings Against the Crown Act*, R.S.N.L. 1990, c. P-26, s. 15.

- 36** *Douglas v. Saskatchewan (Minister of Learning)*, [2005] S.J. No. 401 (Sask. Q.B.); *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, [2006] P.E.I.J. No. 32 (P.E.I.C.A.); *Loomis v. Ontario (Ministry of Agriculture and Food)*, [1993] O.J. No. 2788 (Ont. Div. Ct.); *Aroland First Nation v. Ontario*, [1996] O.J. No. 557 (Ont. Gen. Div.).
- 37** *Bingo Enterprises Ltd. v. Manitoba (Lotteries and Gaming Licensing Board)*, [1983] M.J. No. 57 (Man. C.A.).
- 38** *Karavos v. Toronto (City)*, [1947] O.J. No. 331, [1948] O.W.N. 17 at 18 (Ont. C.A.); *Winning Combination Inc. v. Canada (Minister of Health)*, [2017] F.C.J. No. 491 (F.C.A.), leave to appeal refused [2017] S.C.C.A. No. 304; *Sunrise North Senior Living Ltd. (c.o.b. Sunrise of Richmond Hill) v. York (Regional Municipality) (Sheriff)*, [2020] O.J. No. 282 (Ont. Div. Ct.).
- 39** *Arsenault v. Canada (Attorney General)*, [2009] F.C.J. No. 1306 (F.C.A.), leave to appeal refused [2009] S.C.C.A. No. 543; *Hassum v. Contestoga College Institute of Technology and Advanced Learning*, [2008] O.J. No. 1141 (Ont. S.C.J.).
- 40** *Devil's Gap Cottagers (1982) Ltd. v. Rat Portage Band No. 38B*, [2008] F.C.J. No. 1018 (F.C.).
- 41** *Ridge v. Saskatchewan Assn. of Architects*, [1979] S.J. No. 419 (Sask. C.A.); *Winning Combination Inc. v. Canada (Minister of Health)*, [2017] F.C.J. No. 491 (F.C.A.), leave to appeal refused [2017] S.C.C.A. No. 304.
- 42** *Canada (Minister of Manpower and Immigration) v. Tsiafakis*, [1977] F.C.J. No. 26 (F.C.A.); *Corp. Brasserie Lakeport Inc. v. Québec (Régie des alcools, des courses et des jeux)*, [1996] Q.J. No. 1638 (Que. S.C.).
- 43** *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] S.C.J. No. 43.
- 44** *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32; *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44; *Mignault Perrault (Succession de) c. Hudson (Ville d')*, [2010] J.Q. no 11921 (Que. C.A.); *Apotex Inc. v. Canada (Attorney General)*, [1993] F.C.J. No. 1098 (F.C.A.), affd [1994] S.C.J. No. 113.
- 45** *Austin v. Canada (Minister of Consumer and Corporate Affairs)*, [1986] F.C.J. No. 696 (F.C.).
- 46** *Wu v. Vancouver (City)*, [2019] B.C.J. No. 55 (B.C.C.A.), leave to appeal refused [2019] S.C.C.A. No. 90; *Douze v. Canada (Minister of Citizenship and Immigration)*, [2010] F.C.J. No. 1680 (F.C.).
- 47** *Jia v. Canada (Minister of Citizenship and Immigration)*, [2014] F.C.J. No. 647 (F.C.), affd [2015] F.C.J. No. 763 (F.C.A.). *Contra: Thomas v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2020] F.C.J. No. 127 (F.C.).
- 48** *Alouette Amusement Canada Inc. v. Atlantic Lottery Corp.*, [1991] N.B.J. No. 465 (N.B.Q.B.); *Conille v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1553 (F.C.); *Onghaei v. Canada (Minister of Citizenship and Immigration)*, [2020] F.C.J. No. 1087 (F.C.).
- 49** One tribunal that does is the Competition Tribunal: *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] S.C.J. No. 64.
- 50** For example, see the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 19.
- 51** *British Columbia (Provincial Agricultural Land Commission) v. Pickell*, [1980] B.C.J. No. 145 (B.C.S.C.).
- 52** For a typical provision, see the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 54. *Chédor v. Canada (Minister of Citizenship and Immigration)*, [2016] F.C.J. No. 1218 (F.C.).
- 53** *McMillan v. British Columbia (Director of Employment Standards)*, [2018] B.C.J. No. 1117 (B.C.C.A.).
- 54** *Warman v. Tremaine*, [2011] F.C.J. No. 1502 (F.C.A.), leave to appeal refused [2011] S.C.C.A. No. 510; *Citation Industries Ltd. v. C.J.A., Local 1928*, [1988] B.C.J. No. 1795 (B.C.C.A.); *United Electrical, Radio and Machine Workers of America, Local 567 v. Milltronics Ltd.*, [1981] O.J. No. 276 (Ont. H.C.J.); *Alberta (Minister of Environment) v. Verbeek (c.o.b. Verbeek Sand and Gravel)*, [2004] A.J. No. 269 (Alta. Q.B.).
- 55** *Boucher c. Logistik Unicorp Inc.*, [2001] J.Q. no 64 (Que. C.A.); *Citation Industries Ltd. v. C.J.A., Local 1928*, [1988] B.C.J. No. 1795 (B.C.C.A.); *International Woodworkers of America v. Patchogue Plymouth, Hawkesbury Mills*, [1976] O.J. No. 1062 (Ont. H.C.J.).

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- 56** *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] S.C.J. No. 37; *Fraser v. Victoria (City) Police*, [1990] B.C.J. No. 1617 (B.C.C.A.).
- 57** *United Food and Commercial Workers, Local 1252 v. Western Star, a Division of Thomson Newspaper Co.*, [1995] N.J. No. 334 (Nfld. T.D.); *Toronto Transit Commission v. Ryan*, [1998] O.J. No. 51 (Ont. Gen. Div.); *Larocque v. Louis Bull Tribe*, [2008] F.C.J. No. 1817 (F.C.).
- 58** *Central and Eastern Trust Co. v. Seven Seas Restaurant Ltd.*, [1978] N.B.J. No. 37 (N.B.S.C.).
- 59** *British Columbia (Securities Commission) v. Kelly*, [2011] B.C.J. No. 809 (B.C.S.C.).
- 60** *Hughes v. Canada (Canadian Human Rights Commission)*, [2019] F.C.J. No. 378 (F.C.).
- 61** *Pharmascience Inc. v. Binet*, [2006] S.C.J. No. 48; *Toronto (Metropolitan) Police Force v. Lymer*, [1992] O.J. No. 2359 (Ont. Gen. Div.), leave to appeal refused (*sub nom. Metro. Toronto (Municipality) Police Services Board v. Metro. Toronto Police Assn.*), [1992] O.J. No. 2464 (Ont. Gen. Div.).
- 62** *DeWolf v. Halifax (City)*, [1979] N.S.J. No. 711 (N.S.S.C.); *Lee v. Alberta (Workers' Compensation Board)*, [1999] A.J. No. 306 (Alta. Q.B.); *Hallingham v. Newfoundland (Workers' Compensation Commission)*, [1997] N.J. No. 259 (Nfld. C.A.).
- 63** *Melia v. Moose Jaw R.C. Separate/Separé School District No. 22*, [1979] S.J. No. 568 (Sask. C.A.).
- 64** *Durnford v. 2201336 Nova Scotia Ltd. (c.o.b. Courtesy Chrysler)*, [2003] N.S.J. No. 303 (N.S.S.C.); *British Columbia (Securities Commission) v. Hrapstead*, [2009] B.C.J. No. 1736 (B.C.S.C.).
- 65** *R. v. Bird*, [2019] S.C.J. No. 7; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] S.C.J. No. 32; *R. v. Al Klippert Ltd.*, [1998] S.C.J. No. 33.
- 66** R.S.C. 1985, c. C-46, s. 127; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] S.C.J. No. 37; *R. v. Gibbons*, [2012] S.C.J. No. 28.
- 67** *College of Opticians (B.C.) v. Coastal Contacts Inc.*, [2009] B.C.J. No. 2099 (B.C.C.A.); *Downing v. Agri-Cultural Renewal Co-operative Inc. (c.o.b. Glencolton Farms)*, [2018] O.J. No. 46 (Ont. S.C.J.); *British Columbia (Minister of Environment, Lands and Parks) v. Alpha Manufacturing Inc.*, [1997] B.C.J. No. 1989 (B.C.C.A.); *Maple Ridge (District) v. Thornhill Aggregates Ltd.*, [1998] B.C.J. No. 1485 (B.C.C.A.).
- 68** *Ontario (Board of Funeral Services) v. Blondell*, [1994] O.J. No. 2441 (Ont. Gen. Div.).
- 69** *Toronto (City) v. Polai*, [1972] S.C.J. No. 73.
- 70** *Vancouver Coastal Health Authority v. Adamson (c.o.b. Canadian Accelerated Daycare Assn.)*, [2020] B.C.J. No. 817 (B.C.C.A.).
- 71** *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] S.C.J. No. 31; *Ordre des pharmaciens du Québec c. MediTrust Pharmacy Services Inc.*, [1994] J.Q. no 749 (Que. C.A.); *Chicken Farmers of Ontario v. Drost*, [2005] O.J. No. 3973 (Ont. Div. Ct.); *Fraser Health Authority v. Jongerden (c.o.b. Home on the Range)*, [2010] B.C.J. No. 480 (B.C.S.C.); *St. Paul (County No. 19) v. Belland*, [2006] A.J. No. 152 (Alta. C.A.). But see: *British Columbia Assn. of Optometrists v. Clearbrook Optical Ltd.*, [2000] B.C.J. No. 934 (B.C.C.A.); *Law Society of Upper Canada v. Junger*, [1991] O.J. No. 2024 (Ont. Gen. Div.), *affd* [1996] O.J. No. 201 (Ont. C.A.).
- 72** *International Alliance of Theatrical Stage Employees Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Stage Local 56 v. Société de la Place des Arts de Montréal*, [2004] S.C.J. No. 4.
- 73** *Sault Ste. Marie (City) v. S.S. Kresge Co. Ltd.*, [1966] O.J. No. 1002 (Ont. H.C.J.); *Ontario (Attorney General) v. Paul Magder Furs Ltd.*, [1990] O.J. No. 63 (Ont. H.C.J.).
- 74** *Air Canada v. Thibodeau*, [2012] F.C.J. No. 1201 (F.C.A.), *affd* [2014] S.C.J. No. 67. In *British Columbia (Workers' Compensation Board) v. Skylite Building Maintenance Ltd.*, [2017] B.C.J. No. 48 (B.C.C.A.), the court upheld an order to comply with the Act and regulations, ruling that regulated persons are expected to know the regulatory requirements.
- 75** *Chirico v. Szalas*, [2016] O.J. No. 3907 (Ont. C.A.); *College of Optometrists of Ontario v. SHS Optical Ltd. (c.o.b. Great Glasses)*, [2008] O.J. No. 3933 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. No. 506; *Autorité des marchés financiers c. Lacroix*, [2017] J.Q. no 18291 (Que. S.C.).
- 76** *Warman v. Tremaine*, [2011] F.C.J. No. 1502 (F.C.A.), leave to appeal refused [2011] S.C.C.A. No. 510.
- 77** *North Vancouver (District) v. Sorrenti*, [2004] B.C.J. No. 1130 (B.C.C.A.).

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- 78** *Warman v. Tremaine*, [2014] F.C.J. No. 891 (F.C.A.); *Professional Institute of the Public Service of Canada v. Bremsak*, [2013] F.C.J. No. 1009 (F.C.A.).
- 79** *Wnek v. Witless Bay (Town)*, [2003] N.J. No. 36 (N.L.T.D.); *Tousignant c. St-Jean-sur-Richelieu (Ville de)*, [2015] J.Q. no 2358 (Que. S.C.), affd [2015] J.Q. no 8342 (Que. C.A.).
- 80** *Canada v. Kelso*, [1981] S.C.J. No. 19; *Ontario v. Gratton-Masuy Environmental Technologies Inc. (c.o.b. EcoFlo Ontario)*, [2010] O.J. No. 2935 (Ont. C.A.); *Shuswap Lake Utilities Ltd. v. British Columbia (Comptroller of Water Rights)*, [2008] B.C.J. No. 716 (B.C.C.A.).
- 81** *Big Thunder Windpark Inc. v. Ontario (Minister of the Environment)*, [2014] O.J. No. 2430 (Ont. Div. Ct.).
- 82** *Dee v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 1158 (F.C.T.D.).
- 83** *Canada v. Solosky*, [1979] S.C.J. No. 130.
- 84** *Ordre des opticiens d'ordonnances di Québec v. Harrison*, [1993] J.Q. no 1416 (Que. C.A.).
- 85** *Western Canada Wilderness Committee v. Canada (Minister of Fisheries and Oceans)*, [2014] F.C.J. No. 151 (F.C.); *Lount Corp. v. Canada (Attorney General)*, [1983] F.C.J. No. 137 (F.C.T.D.), affd [1985] F.C.J. No. 139 (F.C.A.); *Fisher-Tennant v. Canada (Minister of Citizenship and Immigration)*, [2019] F.C.J. No. 816 (F.C.A.).
- 86** *Odhavji Estate v. Woodhouse*, [2003] S.C.J. No. 74; *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1.
- 87** *Alberta v. Elder Advocates of Alberta Society*, [2011] S.C.J. No. 24.
- 88** *Adventure Tours Inc. v. St. John's Port Authority*, [2011] F.C.J. No. 875 (F.C.A.); *Wu v. Vancouver (City)*, [2019] B.C.J. No. 55 (B.C.C.A.), leave to appeal refused [2019] S.C.C.A. No. 90.
- 89** *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, [2013] O.J. No. 5117 (Ont. C.A.).
- 90** *Estabrooks v. New Brunswick Real Estate Assn.*, [2014] N.B.J. No. 186 (N.B.C.A.), leave to appeal refused [2014] S.C.C.A. No. 404. But see: *Clark v. Hunka*, [2017] A.J. No. 1101 (Alta. C.A.), leave to appeal refused [2018] S.C.C.A. No. 17.
- 91** *Holland v. Saskatchewan*, [2008] S.C.J. No. 43; *Odhavji Estate v. Woodhouse*, [2003] S.C.J. No. 74; *Harris v. Law Society of Alberta*, [1936] S.C.J. No. 5; *Welbridge Holdings Ltd. v. Winnipeg (City)*, [1970] S.C.J. No. 102; *Cooper v. Hobart*, [2001] S.C.J. No. 76; *Roeder v. Lang Michener Lawrence & Shaw*, [2007] B.C.J. No. 501 (B.C.C.A.); *Aylmer Meat Packers Inc. v. Ontario*, [2020] O.J. No. 4448 (Ont. S.C.J.). But see *O'Dwyer v. Ontario (Racing Commission)*, [2008] O.J. No. 2219 (Ont. C.A.).
- 92** *Holland v. Saskatchewan*, [2008] S.C.J. No. 43. But see *Courtiers JD & Associés Itée c. Québec (Procureur général)*, [2009] J.Q. no 3466 (Que. S.C.); *Chiasson v. Canada (Attorney General)*, [2009] F.C.J. No. 1268 (F.C.A.).
- 93** *Fitzgerald v. Reaume*, [2021] O.J. No. 2698 (Ont. C.A.); *Pacific Shower Doors (1995) Ltd. (c.o.b. Pacific Shower Doors) v. Osler, Hoskin & Harcourt, LLP*, [2011] B.C.J. No. 1910 (B.C.S.C.); *Rainbow Concrete Industries Ltd. v. Anderson*, [2011] O.J. No. 3763 (Ont. S.C.J.), affd [2012] O.J. No. 4578 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 239.
- 94** *Alberta v. Elder Advocates of Alberta Society*, [2011] S.C.J. No. 24.
- 95** *Arndt v. Banerji*, [2018] A.J. No. 591 (Alta. C.A.), leave to appeal refused [2018] S.C.C.A. No. 277.
- 96** Most statutes concerning Crown liability retain Crown immunity from direct liability but acknowledge vicarious liability for torts committed by servants of the Crown: *Hinse v. Canada (Attorney General)*, [2015] S.C.J. No. 35 at para. 92.
- 97** *Ingles v. Tutkaluk Construction Ltd.*, [2000] S.C.J. No. 13; *Fallowka v. Pinkerton's of Canada Ltd.*, [2010] S.C.J. No. 5; *Nelson (City) v. Marchi*, [2001] S.C.J. No. 41. As against the Crown, I am not aware of any Canadian case finding liability for negligent inspection. See, e.g., *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, [2013] B.C.J. No. 122 (B.C.C.A.), leave to appeal refused [2013] S.C.C.A. No. 134.
- 98** *R. v. Imperial Tobacco Canada Ltd.*, [2011] S.C.J. No. 42.
- 99** *R. v. Imperial Tobacco Canada Ltd.*, [2011] S.C.J. No. 42; *Bowman v. Ontario*, [2020] O.J. No. 5390 (Ont. S.C.J.).
- 100** For example, statutes governing maintenance of roads typically impose liability for damage caused by negligent maintenance. However, under most regulatory statutes the duty of care is owed to the public as a whole: e.g., *Cooper v. Hobart*, [2001] S.C.J. No. 76.

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- 101** *Fallowka v. Pinkerton's of Canada Ltd.*, [2010] S.C.J. No. 5; *Cobble Hill Holdings Ltd. v. British Columbia*, [2020] B.C.J. No. 405 (B.C.C.A.), leave to appeal refused [2020] S.C.C.A. No. 134.
- 102** *South Yukon Forest Corp. v. Canada*, [2012] F.C.J. No. 669 (F.C.A.), leave to appeal refused [2012] S.C.C.A. No. 349.
- 103** *Cooper v. Hobart*, [2001] S.C.J. No. 76; *Fallowka v. Pinkerton's of Canada Ltd.*, [2010] S.C.J. No. 5; *R. v. Imperial Tobacco Canada Ltd.*, [2011] S.C.J. No. 42.
- 104** *Ernst v. Alberta Energy Regulator*, [2017] S.C.J. No. 1.
- 105** *Ontario v. Gratton-Masuy Environmental Technologies Inc. (c.o.b. EcoFlo Ontario)*, [2010] O.J. No. 2935 (Ont. C.A.); *Holland v. Saskatchewan (Minister of Agriculture Food and Rural Revitalization)*, [2017] S.J. No. 276 (Sask. Q.B.).
- 106** *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] S.C.J. No. 57 at paras. 25-26; *Finney v. Barreau du Québec*, [2004] S.C.J. No. 31.
- 107** *Morier v. Rivard*, [1985] S.C.J. No. 81; *Stark v. Auerbach*, [1979] B.C.J. No. 988 (B.C.S.C.).
- 108** *D'Mello v. Law Society of Upper Canada*, [2014] O.J. No. 6112 (Ont. C.A.); *Tsatsi v. College of Physicians and Surgeons of Saskatchewan*, [2018] S.J. No. 270 (Sask. C.A.), leave to appeal refused [2018] S.C.C.A. No. 456.
- 109** *B.G. Ranches v. Manitoba (Agricultural Lands Protection Board)*, [1983] M.J. No. 72 (Man. Q.B.).
- 110** *Garland v. Consumers' Gas Co.*, [2004] S.C.J. No. 21.
- 111** *1704604 Ontario Ltd. v. Pointes Protection Association*, [2020] S.C.J. No. 22: labelled SLAPP: Strategic Litigation Against Public Participation.
- 112** *Wilson v. Switlo*, [2013] B.C.J. No. 2365 (B.C.C.A.).