Citizenship and Immigration Canada
Citoyenneté et Immigration Canada

ENF 09

Judicial Review

Canada

ENF 9 Judicial Review

Updates to chapter

Listing by date:

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Changes were made to chapter ENF 9 in order to indicate that both the Minister of Citizenship and Immigration Canada (C&I) and the Minister of Public Safety and Emergency Preparedness (PSEP) may be involved in litigation. Changes also confirm the National Security Division's (NSD's) roles and responsibilities as they relate to litigation management of inland cases involving persons who are inadmissible under A34, A35,and A37.

1. What this chapter is about

This chapter provides an understanding of the judicial review process in relation to decisions, determinations or orders made, measures taken or questions raised under the *Immigration and Refugee Protection Act* (IRPA) for which no specific right of appeal exists. Chapter ENF 19 is relevant to appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB). Procedures on ministerial interventions are detailed in chapter ENF 24. Decisions by officers outside Canada are discussed in OP 22. Neither the Minister nor the person concerned may access the Federal Court if a statutory appeal provided by the IRPA has not been exhausted.

2. Program objectives

Judicial review provides the means for the courts to oversee decisions of the Minister of Citizenship and Immigration (C&I), the Minister of Public Safety and Emergency Prepardness (PSEP) and the Ministers' officials and to ensure that decisions made under the IRPA are in accordance with the law.

The creation of a federal supervisory court is authorized by section 101 of the *Constitution Act*, 1867. Pursuant to that provision, the Federal Court of Canada was constituted on June 1, 1971. More detail on the history of the Federal Court can be found on its website:

http://www.fct-cf.gc.ca

The *Immigration and Refugee Protection Act* confers specific jurisdiction on the Federal Court to review decisions relating to immigration and refugee protection matters [A72(1)].

3. The Act and Regulations

Provision	Reference in Legislation
Stay	A50(a)
No return to Canada without prescribed authorization	A52(1)
Right to appeal visa and removal order	A63
Application for judicial review	A72
Judicial review	A74

3.1. Forms

Nil.

4. Instruments and delegations

Nil.

5. Departmental policy

5.1. Review by the Federal Court

Pursuant to subsection 72(1) of the IRPA, the Minister of C&I or the Minister of PSEP, in respect of those matters for which the Minister is responsible, as well as the person concerned have the right to seek judicial review by the Federal Court of a decision, determination, order made, a measure taken or a question raised under the Act. While the majority of the applications for leave and judicial review are initiated by our clients, occasionally the Ministers may seek to judicially review decisions rendered by quasi-judicial or judicial tribunals that are unfavourable to their

organization. The provisions outlined herein apply equally to both Ministers and to the person concerned.

5.2. Distinction between an appeal and judicial review

The IRPA provides two levels of review of decisions made under the Act: review by way of statutory appeal to the IAD and review by the Federal Court.

Pursuant to section A63 (as limited by section A64) sponsors, visa holders, permanent residents and protected persons have a right to appeal adverse decisions to the IAD. Included in these provisions is the Minister of PSEP's right to appeal to the IAD a decision made by the Immigration Division (ID) at an admissibility hearing [A63(5)].

In all other cases, where no statutory right of appeal exists or those rights have been exhausted, there is a right to seek judicial review of any decision made pursuant to the IRPA by filing an application for leave and judicial review to the Federal Court pursuant to A72(1).

The powers of the IAD when considering appeals are defined in sections A65 to A69 of the IRPA. As previously stated, the appeal processes are explained in detail in Chapters ENF 19 and ENF 26.

In the case of applications for judicial review, the powers of the Federal Court are defined in section 18.1(3) of the *Federal Courts Act* and are explained herein.

5.3. Commencing an application for leave and judicial review

An application for leave and judicial review is commenced by filing and serving an application for leave and judicial review within the time limit prescribed by the IRPA and outlined in Section 5.5. An application for leave and judicial review is a legal form defined in the *Federal Court Immigration Rule, 1993* (Rule 5).

Specific instructions for commencing a Minister's application for leave and judicial review are set out in Section 7 of this chapter.

5.4. Leave requirement

Section A72(1) of the IRPA provides that anyone seeking the judicial review of a decision, determination, order made, a measure taken or a question raised must first seek leave of the Court. Leave, in this context, means permission to have the matter resolved by the Court at an oral hearing. This provision now includes visa decisions, which were previously exempted from the leave requirement.

As a result, judicial review of decisions made under IRPA is a two-stage process. The first stage is the leave application that is decided via a paper-review process. If leave for judicial review is denied, the application is dismissed and proceeds no further because there is no right to appeal from this decision [A72(2)(e)].

If leave is granted, the proceedings move on to the second stage, the application for judicial review. The two stages together are known as an application for leave and judicial review.

For more information on:

- Time limit, see Section 5.5;
- Deemed notification, see Section 5.6;
- Extension of time, see Section 5.7;
- Service, see Section 5.8;
- Rule 9 letter, see Section 5.9;
- What happens at the leave stage, see Section 5.10;
- Disposition of the leave application, see Section 5.11;
- Leave denied, see Section 5.12;

- Leave granted, see Section 5.13;
- Rule 17 order, see Section 5.14;
- Application for reconsideration, see Section 5.15.

5.5. Time limit

For the purposes of calculating the time limit within which the application for leave and judicial review must be commenced, the IRPA sets up three scenarios. First is an application to review an officer's decision in a matter arising in Canada. The application for leave and judicial review must be commenced within 15 days after the date on which the person concerned is notified of or otherwise becomes aware of the matter [A72(2)(b)]. Second is the review of an officer's decision in a matter arising outside Canada. The application must be commenced within 60 days after the date on which the person concerned is notified of or otherwise becomes aware of the matter [A72(2)(b)].

Third is an application for leave and judicial review by the Minister of C&I or the Minister of PSEP with respect to a decision of the IRB (the Ministers may not seek judicial review of an officer's decision). In this scenario, leave and judicial review must be commenced within 15 days from the giving of notice of the decision or, where written reasons have been requested, from the sending of the written reasons, whichever is the later [A169(f)].

5.6. Deemed notification

The Regulations provide that, in the absence of proof to the contrary, a person is deemed to be notified of a decision seven days after the day on which notice of the decision was sent to the person, unless the decision was made in their presence. Therefore, when calculating the time limit to file a leave application, seven days from the date that the decision was mailed will be added to the 15-day time limit [*Federal Court Immigration Rules, 1993*].

5.7. Extension of time

An applicant who fails to commence an application for leave and judicial review within the time required by the IRPA may ask the Federal Court for an extension of the time for doing so. If the request for an extension of time is granted, the application is validly commenced. If the extension of time is denied, the application is dismissed.

Generally, an extension of time will be granted where the applicant has always intended to challenge the decision, where the proposed application is not frivolous, where there is an explanation for the entire delay, and where the other party's ability to respond to the application has not been seriously affected as a result of the delay.

A request for an extension of the time to commence the application for leave and judicial review is to be included in the Application for Leave and Judicial Review document (Rule 6, *Federal Court Immigration Rules, 1993*).

5.8. Service

Service is a legal term for delivering a document to the opposing party. There is only one way to validly serve an Application for Leave and Judicial Review upon the Minister: it must be delivered to the appropriate office of the Department of Justice. If officers are served with an Application For Leave and Judicial Review, they should make a note of when they received the document or when it first came to their attention and fax it immediately to their local Department of Justice office. Please note that this does not apply to the Notice of Appearance (which may be placed in the file) or the Rule 9 or Rule 17 requests which must be processed in accordance to the procedures outlined below.

5.9. Rule 9 letter

An applicant may specify in the Application for Leave and Judicial Review form that they have not received the written reasons of the officer or the IRB. If the applicant does so, the Registry of the Federal Court of Canada will write to the office where the decision was made to request that a

certified copy of the decision and reasons, if any, be sent to each of the parties and two certified copies to the Court Registry. The parties in this context are (a) the applicant who initiates the court process by filing an application for leave and judicial review (in most cases the person concerned) and (b) the respondent who must respond to the leave application (in most instances the Minister). In cases where the Minister seeks to judicially review a decision made by the IRB, the Minister is the applicant and the person concerned in the respondent. The requirement to produce the decision and reasons, if any, is set out in Rule 9 of the *Federal Court Immigration Rules, 1993,* [Appendix C] and that is why the letter from the Registry of the Federal Court of Canada is commonly referred to as a Rule 9 letter. The office where the decision was made is required to respond to the Rule 9 letter by providing the decision and written reasons, or where no written reasons exist, by advising the Court and the parties that there are no written reasons.

Since the bulk of the immigration litigation relates to decisions made by the IRB, the majority of the Rule 9 requests will be directed to that office. In cases where the tribunal or the decision-maker is the Minister or an officer designated by the Minister, the Rule 9 request will be sent to the appropriate Canada Immigration Centre (CIC) or the Canada Border Services Agency (CBSA) office where the decision was made.

It should be noted that there is no requirement for officers to give (written or oral) reasons for their decisions in the manner that independent tribunals, such as the Immigration Division (ID) or the Refugee Protection Division (RPD) are required to do. However, the Supreme Court of Canada ruled in the case of *Baker vs. MCI,* July 9, 1999, that where the decision has a significant impact on the person concerned, the officer's notes will constitute reasons for decision. As a result of this court ruling, all Rule 9 requests should be dealt with in the following manner. If the file or FOSS contain notes which explain or provide a rationale for the decision that is being challenged, those notes should be sent as reasons for decision pursuant to a Rule 9 request. If neither the file nor FOSS contain any notes to explain the decision that is being challenged, the Rule 9 response will enclose the decision and indicate that no reasons were provided.

It is important to respond to a Rule 9 request in a proper and timely fashion to avoid delays in both Court and immigration processing. In cases of uncertainty on how to respond, officers should seek advice and guidance from the regional Justice Liaison Officer, the Director, Litigation Management (BCL), CIC, or the Senior Litigation and Policy Advisor, National Security Division (NSD), CBSA.

5.10. What happens at the leave stage

The leave stage of an application for leave and judicial review proceeds entirely in writing. Once the application is commenced, the applicant has 30 days in which to file the Application Record. This period is extended in cases where the applicant indicates that they have not received the written reasons of the officer or the IRB. In those cases, the Application Record must be filed within 30 days after receiving the response to the Rule 9 letter (Rule 10, *Federal Court Immigration Rules, 1993*).

The Application Record includes the applicant's affidavits and written memorandum of argument. An affidavit is a sworn document and is therefore a written form of testimony. In the affidavit, the applicant provides the evidence needed to support the request to have the officer or the IRB's decision set aside. In the memorandum of argument, the applicant sets out the legal argument in support of the application.

The respondent to the application files its responding material within 30 days after receiving the Application Record. Filing an affidavit is optional for the respondent, but the respondent must file a memorandum of argument (Rule 11, *Federal Court Immigration Rules, 1993*).

Justice counsel may decide to file an affidavit by the officer responsible for making the decision. The decision to file the affidavit will be based on whether Justice counsel feels that the affidavit is necessary to defend the decision or will improve the chances of having the application for leave and judicial review dismissed.

Cross-examination is not allowed at the leave stage of the application. If, however, leave is granted, the officer who signed the affidavit may be cross-examined on the affidavit by opposing

counsel. Cross-examination of officers is relatively rare. If cross-examination is required, Justice counsel will assist the officer to prepare and will represent the officer at the cross-examination.

The applicant may file a memorandum in reply within ten days of receiving the respondent's materials. This is the final document exchanged between the parties before the determination of the leave stage of the application by the Federal Court.

5.11. Disposition of the leave application

At the leave stage, the applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge reviewing the application believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the judicial review application.

5.12. Leave denied

If the judge reviewing the written materials is not persuaded that the applicant has raised a serious issue that merits a judicial review of the decision, leave will be denied and the matter will proceed no further. As previously stated, there is no right of appeal from this decision [A72(2)(e)].

5.13. Leave granted

If the judge is satisfied that the applicant has raised a serious or arguable issue, leave for judicial review of the decision will be granted. If leave is granted, the hearing must be held not earlier than within 30 days and not later than 90 days of the date granting leave [A74(b)]. The judge then will make an order that sets out deadlines for subsequent steps in the application for judicial review including the date that the hearing is to take place. Those deadlines include:

- the deadline for production of the tribunal record;
- deadlines for further affidavits, if any, from both the applicant and the respondent;
- the deadline for competing cross-examinations;
- the deadline for a final exchange of memoranda of argument from both sides;
- the time and date for hearing oral argument (which must be within 90 days from the date of granting leave).

5.14. Rule 17 order

The order granting leave for judicial review constitutes an order pursuant to Rule 17 of the *Federal Court Immigration Rules* whereby the tribunal (decision-maker) is required to produce the tribunal record within the time frame specified in the Court order. In cases where the Minister or an officer designated by the Minister is the decision-maker, the Rule 17 order will be directed to the CIC or the CBSA office responsible for making the decision.

Upon receipt of the order granting leave, the decision-maker or the official assigned to the task must immediately prepare and send two certified copies of the tribunal record to the Court Registry and one certified copy to each of the parties (the applicant's counsel and the Department of Justice). The tribunal record will consist of the following documents numbered consecutively:

(a) the decision or order that is the subject of the application and the written reasons, if any, or a notice that no written reasons were issued;

(b) all papers relevant to the matter that are in the tribunal's possession or control;

(c) any affidavits or other documents filed or considered during the course of any hearing, interview or process that resulted in the decision or order; and

(d) a transcript if there is one of any oral testimony given during the hearings, interviews or processes that led to the decision or order.

It is imperative that the tribunal record is produced as aforementioned no later than the date specified in the Court order. All papers relevant to the matter specified in paragraph (b) above refer to all the file material that the decision-maker referred to, considered or relied upon before

making their decision. Such material would normally include the officer's summary report or interview/review notes, submissions and any documents submitted by the client and or counsel and any other file material referred to or considered by the decision-maker, including FOSS or CAIPS notes. Any material or file information that was not considered by the decision-maker or postdates the decision date is not required and should not be included in the tribunal record. The person preparing the tribunal record should consult with the decision-maker where there are doubts as to what material was considered in making the decision that is being challenged.

Sensitive, secret or confidential third party information should not be included in the Rule 17 record without prior consultation with the Regional Justice-Liaison Officer, the Director, Litigation Management (BCL), the Senior Litigation and Policy Advisor, NSD, or the Department of Justice. Correspondence from the Department of Justice or Legal Services is solicitor-client privileged information and should never be released to the Court or the applicant.

Officers must not contact the Court Registry for advice on how to comply or what documents to include in the tribunal record. If there is any uncertainty, officers may seek clarification and guidance from the regional Justice Liaison Officer, the Director, Litigation Management (BCL), NHQ or the Senior Litigation and Policy Advisor, NSD.

5.15. Application for reconsideration

While leave decisions cannot be appealed, applicants may file motions to the Federal Court to seek reconsideration of the leave decision. It is rare that the Court will grant a reconsideration request.

5.16. Application for judicial review stage

Once leave is granted, the application for judicial review proceeds in accordance with the order granting leave (see Leave granted, Section 5.13).

5.17. Grounds for judicial review

A judicial review application is different from an appeal. On an appeal, the judge decides the issues based on what the judge determines to be the correct answer when the law is applied to the facts of the case. Appeals are therefore concerned with getting the right decision. Judicial review is concerned with the manner in which a decision is made. For example, a judge may disagree with an officer's decision, but if the judge is satisfied that the officer proceeded fairly, understood the facts of the case, and acted within the authority of the IRPA, the judge may dismiss the application for judicial review.

In simplified terms, the main reasons for allowing an application for judicial review are:

(a) the decision-maker made an error in law, whether that error is obvious or not;

(b) the decision-maker got the facts wrong at a fundamental level, or appears to have ignored a fact of fundamental importance;

(c) the decision-maker violated a principle of natural justice or failed to observe procedural fairness;

(d) the decision-maker's decision goes beyond the authority conferred upon the decision-maker by the IRPA and the Regulations [section 18.1(4), *Federal Courts Act*].

The precise grounds upon which judicial review may be granted are set out in Appendix B.

5.18. Disposition of the application for judicial review

Judicial review is concerned with the manner in which a decision was arrived at (see Section 5.17 above). Accordingly, when the judicial review application is granted, the judge does not make the decision which, in the Court's opinion, should have been made. The determination that the manner in which the decision was arrived at was flawed results in the subject matter being returned for redetermination. In order to avoid even the suggestion that the original decision-maker may now be biased against the applicant, the subject matter is usually sent back to a different officer or a different panel of the IRB. The flawed decision is quashed and set aside which is essentially equivalent to being cancelled. Therefore, the most commonly encountered

order, where the Court allows an application for judicial review, is that the original decision is quashed and the subject matter of the application is remitted for redetermination by a different officer or a different panel of the IRB, as the case may be.

Where the Court is satisfied that the decision was arrived at in a lawful manner, the application for judicial review is dismissed and the decision of the tribunal is upheld.

5.19. Compliance with the Court's order

Where the Court makes the usual order, remitting the subject matter of the application for redetermination by a different officer or by a different panel of the IRB, the decision is cancelled and the parties proceed as if the earlier decision had never been made. This means that the officer making the redetermination starts afresh and may consider any facts arising since the earlier decision was taken, provided that the officer of the IRB observes the principles of procedural fairness.

In some cases, the disposition of the judicial review application may result in certain factual or other issues being determined by the Court. If the officer who redetermines the matter does not act in accordance with the Court's conclusions, the applicant will have grounds to apply again for judicial review. In order to avoid this, the Court may specify in its order that the redetermination of the matter is to be conducted in accordance with the Court's reasons. In those cases, the officer conducting the redetermination must examine the Court's conclusions carefully and may not revisit any matter determined by the Court.

When in doubt, an officer should seek clarification from the regional Justice Liaison Officer, the Director, Litigation Management (BCL) or the Senior Litigation and Policy Advisor, NSD, to ensure proper compliance with the order of the Court. Failure to comply with a Court order is a serious matter and can place the Minister at risk of being found to be in contempt of the Court order.

5.20. Appeal to the Federal Court of Appeal

Access to the Federal Court of Appeal is limited by the IRPA. A party may only appeal a decision of a Federal Court on an application for judicial review in an immigration or refugee protection case if the Federal Court judge certifies that there is a serious question of general importance for consideration by the Federal Court of Appeal [A74(d)].

In general terms, a serious question of general importance will arise where the Court, in determining the application, has considered a new issue which is likely to arise in future cases.

It takes about two years to resolve an appeal. If the appeal is successful, the Federal Court of Appeal will make the order that the Federal Court ought to have made. Therefore, the Court will, in most cases, either make an order dismissing the application for judicial review or make an order remitting the subject matter to a different officer or panel of the IRB for redetermination.

Where the Court of Appeal is satisfied that the Federal Court made the right decision, the Court of Appeal will usually make an order dismissing the appeal.

In either case, the Court of Appeal will also answer the serious question of general importance certified by the Federal Court and which gave rise to the appeal in the first place.

5.21. Appeal to the Supreme Court of Canada

The party who is not satisfied with the decision of the Federal Court of Appeal has the right to seek leave to appeal the decision (of the FCA) to the Supreme Court of Canada [*Supreme Court Act* subsection 40(1)]. The appellant has 60 days to file the leave application that is decided via a paper- review process. The Supreme Court of Canada may grant leave to appeal if the issues raised are of significant national importance and have not previously been addressed. Most leave applications to the SCC are denied. If leave to appeal is granted, the matter will proceed to a full hearing by the SCC. It usually takes the Court about two years to hear an appeal unless it is expedited.

5.22. Litigation impact on immigration proceedings

As previously stated, our clients have the right to seek judicial review of any decision, order, etc., made pursuant to the IRPA. The mere filing of a Court application, however, does not necessarily affect normal immigration processing and does not preclude the Ministers' officials from enforcing the provisions of the IRPA, including the enforcement of a removal order. The automatic stay provisions in IRPA (A50 and R230 to R234) specify when a removal order is to be stayed. In all other situations, immigration proceedings are not automatically suspended where there are pending Court applications, no matter at which stage of the judicial review process they may be. The Court, however, has the power to grant an interim stay of immigration proceedings, including the enforcement of a removal order, as explained below.

5.23. Right to return at the Minister's expense

When a judicial review application is allowed, the matter that was the subject of judicial review is referred back to a different decision-maker for redetermination in accordance with the law and any directions contained in the Court order. If the applicant (the client) has been removed and is no longer in Canada, the client is not entitled to return to Canada unless the removal order has been set aside by the Court [A52(2)]. Requests for advice and guidance on how to proceed in a situation where the removal order has been quashed by the Court and the person who has been removed wants to return to Canada may be directed to the regional Justice Liaison Officer, Litigation Management (BCL), or the Senior Litigation and Policy Advisor, NSD.

5.24. When the Minister seeks judicial review

Pursuant to A70(2), if the Minister files an application for leave and judicial review against a decision made by the IAD, the examination of the permanent resident or the foreign national is suspended until the final determination of the Court application. This ensures that the Minister's application for judicial review is disposed of before the decision of the IAD takes full effect.

5.25. Applications for stays

Any person who has filed an application for leave and judicial review (challenging a decision made under the IRPA) may apply to the Court for a temporary suspension of any proceedings concerning them until the outcome of the judicial review. If there is no statutory stay of a removal order under A50 or R236 to R240, the subject of a removal order may seek a temporary stay of the execution of a removal order from the Court. The Court has the authority to issue interim orders prohibiting the Minister of PSEP from executing the removal order pending the disposition of the litigation initiated by the client.

The Court will not normally entertain a stay request unless: (a) an application challenging a decision/ order, etc., has been filed and is pending before the Court; and (b) removal is imminent, i.e., the person has been convoked for a removal interview or has been notified of removal arrangements. In considering whether to grant the stay, the Court takes into account the following factors which are known as the tri-partite test for a stay:

- whether there is a serious issue to be decided (with respect to the decision under attack in the main application);
- whether the applicant will suffer irreparable harm if removed; and
- whether the balance of convenience is in favour of granting the stay.

For more information, see:

- When an application for a stay is filed, section 5.26
- When an application for a stay is granted, section 5.27

5.26. When application for a stay is filed:

The Court normally deals with stay applications expeditiously and in virtually all cases decisions on stay motions are made prior to the planned removal date. The Court often hears urgent stay

requests after normal business hours in order to ensure that a decision is available prior to the scheduled removal time.

In cases where officers are notified by Justice officials that a stay motion has been filed with the Court, removal should not proceed until a decision is rendered on the stay request, given that a decision will be rendered before the scheduled removal time. In the event that a decision is not rendered before removal is to occur, or the Court reserves its decision, removal must be deferred until the stay motion is resolved. It should be noted that it is very rare that the Court will not render a decision prior to the scheduled removal time.

CBSA officers will not automatically defer removal simply because the client claims they have filed a stay motion or claims an intention to file a stay motion. Confirmation that a stay motion has been filed must be received from a DOJ official before removal is deferred until the stay motion is resolved. Officers should bring to the attention of the Justice Liaison Officer any case where it appears that a stay motion has been filed solely for the purpose of frustrating or delaying the removal process. An example of such a situation might be where a client seeks another stay from the Court immediately after the Court denied a similar stay request; or the client attempts to appeal a stay decision when there is no jurisdiction to do so. In such situations, a decision on whether to automatically defer removal will be made after consultation with the Department of Justice, BCL or the NSD.

5.27. When application for a stay is granted

A judge of the Federal Court, if satisfied that the applicant has met the tri-partite test described above, will issue an order expressly barring the Minister from enforcing the removal order. The duration of the stay will be specified in the order; such duration is usually until the underlying application for leave and judicial review (challenging a decision made under the IRPA) is resolved. Whenever the Court issues such an order, the removal order must not be enforced under any circumstances until the conditions imposed by the stay order have been fully satisfied. Ignoring such an order could be construed as contempt of Court and may have very serious consequences to the Minister.

A decision on a stay application is final and cannot be appealed [A72(2)(e)].

5.28. Undertaking by the Minister to defer removal

Occasionally, cases arise where there is no legal bar to removal but the Minister of PSEP feels that it is appropriate to defer removal pending the disposition of the outstanding litigation. In such situations, appropriate instructions are issued to Justice counsel who provide the undertaking to the Court and to the applicant's counsel. The appropriate CIC or CBSA office is also notified and the information is entered in the FOSS litigation screen.

It should be noted that an undertaking given on behalf of the Minister has the same effect as a stay and a removal order must never be carried out under these circumstances. Non-compliance with a legal undertaking can also be construed as contempt of court.

5.29. FOSS litigation screen

In the larger regions (Ontario, Quebec, BC), Department of Justice officials enter the information relating to Court litigation and stays into the FOSS litigation screen. In the smaller regions this information is entered by local CICs. An "X" in the appropriate stay field in the FOSS litigation screen indicates a stay of removal (pending an outstanding court challenge of a decision made under the IRPA). There are three stay fields in the litigation screen, namely:

- Act – a stay imposed by the IRPA
- Court Order – a stay imposed by the Court;
- Minister – undertaking by the Minister to defer removal pending the outcome of the litigation.

The absence of an "X" in the appropriate stay field of the litigation screen means that the pending Court action does not pose a legal bar to the execution of the removal order. Officers should exercise caution when reading the litigation screen and, if there is any discrepancy between

information on the file and the FOSS litigation screen, such discrepancy should be brought to the attention of the Regional Officer responsible for litigation.

The FOSS litigation screen will only show stays of removal which flow or arise from a pending Court application, for example, a stay imposed by the Court or an undertaking given on behalf of the Minister in connection with a pending Court application. The FOSS litigation screen will not reflect other types of stays imposed by the provisions of the IRPA, i.e., A50 and R230-R234.

5.30. Minister's right to seek judicial review

Instructions on appeals can be found in chapter ENF 19, Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB).

The IRPA provides authority for the Minister of C&I and the Minister of PSEP to seek judicial review of unfavorable decisions that are rendered by any of the four divisions of the IRB. The Ministers (as the client) are required to exhaust any statutory right of appeal before seeking judicial review.

A72(1) reads as follows:

"Judicial review by the Federal Court with respect to any matter – a decision, determination or order made, a measure taken or a question raised – under this Act is commenced by making an application for leave to the Court."

A72(2)(a) specifies that:

"The application may not be made until any right of appeal that may be provided by this Act is exhausted."

The authority to decide whether to seek judicial review under A72(1) is delegated to the Director, Litigation Management, (BCL), NHQ, and the Senior Litigation and Policy Advisor, NSD.

Hearings officers will submit recommendations for judicial review by the Minister to BCL **after** they have obtained concurrence from their supervisor or manager, subject to local procedures. If it is decided to proceed with judicial review, BCL will instruct the Department of Justice to file the required application with the Court.

Recommendations to seek judicial reviews concerning a permanent resident or a foreign national who is considered to be inadmissible on grounds of national security (security A34, human and international rights violations A35, organized criminality A37) can be submitted to the Senior Litigation and Policy Advisor, National Security Division, CBSA. All other recommendations to seek judicial review are to be submitted to the Director of Litigation Management (BCL).

5.31. Decisions subject to judicial review by the Minister

In view of subparagraph A72(2)(a) mentioned above, the Minister of C&I or the Minister of PSEP must first exhaust any appeal right provided under the IRPA before seeking to judicially review an unfavorable decision rendered by the Immigration Division or the Refugee Protection Division of the IRB.

A63(5) states:

"The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing."

A110(1) states:

"A person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection, or a decision of the Refugee Protection Division rejecting an application by the Minister for a

determination that refugee protection has ceased or an application by the Minister to vacate a decision to allow a claim for refugee protection."

In accordance with these provisions, final determinations made by the ID will be appealed to the IAD (see ENF 19) before they may be challenged in the Federal Court. Until the provisions respecting the Refugee Appeal Division (RAD) come into force, unsuccessful refugee claimants have the right to apply for judicial review to the Federal Court, with permission. When RAD comes into existence, it will provide failed refugee claimants with the right to a paper appeal of a negative decision from the IRB. The Minister may seek judicial review of any decision made by the IAD or any interim decision made by the ID and the RPD that is not a final determination of the matter. The types of decisions that the Minister may challenge to the Federal Court include the following:

- A decision made by an Immigration Division member during the course of an admissibility hearing that is not a final determination of the matter, for example:
  - a decision relating to jurisdiction or other procedural issue;
  - a refusal to grant an adjournment;
  - a decision to release a person from detention;
  - a decision arising from a detention review;
- A decision made by the Refugee Determination Division during the course of a refugee hearing that is not a final determination of the refugee claim, for example:
  - a decision relating to jurisdiction or other procedural issue;
  - a refusal to grant an adjournment;
- Any decision rendered by the IAD during the course of an appeal hearing including the final decision concerning the appeal.

5.32. Recommendations of judicial review

It is not expected nor is it desirable that all positive decisions be appealed or reviewed. Hearings officers should, however, carefully assess the circumstances of each case where a positive decision is rendered by a tribunal and make a written notation on the file to explain why an appeal or judicial review on behalf of the Minister was not considered or pursued. The following factors may be considered when deciding whether to pursue an appeal to the IAD or judicial review pursuant to A72(1):

- What are the operational and program implications or consequences to CIC or the CBSA if the positive tribunal decision remains unchallenged?
- What are the chances of success?

Positive (unfavorable) decisions relating to sensitive, high profile or serious criminality cases (i.e., war crimes/crimes against humanity, terrorists, danger cases, etc.) must be given special attention to ensure that the appropriate appeal/review mechanism is not overlooked. Officers should also be aware that notifying various sections at NHQ of a favourable decision by the Immigration Division (ID), the RPD or the IAD is not sufficient to comply with the appeal or judicial review requirement. Proper compliance requires that, after concurrence from local management, a written request is submitted (by facsimile or e-mail) in a timely manner to the Director, Litigation Management, NHQ, accompanied by all of the relevant available information/material with a notation concerning any information which is to follow.

For cases of national security involving persons considered to be inadmissible on grounds of security, hunman and international rights violations and organized criminality, the request can be sumitted to the Senior Litigation and Policy Advisor, National Security Division, Intelligence Directorate, Enforcement Branch, CBSA.

For more information, see:

- Judicial review initiated by hearings officers, Section 7.
- Form of report for judicial review, section 7.

6. Definitions

Writ of habeas corpus	This means literally, "you have the body". It directs the authority that has an individual in custody to come forward and justify the detention. This centuries-old remedy against arbitrary imprisonment is fundamental to our system of justice. The detaining authority must make a "return", or response, to the writ, to show that the detention is lawful.
Writ of certiorari	Roughly translated this means, "inform me more fully". This writ commands an inferior tribunal to provide its record to the superior court for review "to the end that justice might be done". The result of a successful application will be the quashing of the decision of the tribunal. These writs are not usually issued if there is an appeal process provided by statute. On *certiorari* the court does not delve into the merits of the case, but questions the jurisdictional and procedural aspects of the decision.
Writ of mandamus	This writ ("we command") is issued to compel the performance of a duty. It is available in cases where the injured party has a right to have a thing done and has no other specific means of compelling its performance. It is used to compel public officers to perform duties imposed upon them by common law or by statute, or to compel tribunals to proceed in matters within their jurisdiction. The person against whom it is issued must be under a legal duty to act in a certain way, must have been asked to act, and must have refused to do so. If granted, the writ compels the performance of the act required.
Writ of prohibition	This writ is issued to prohibit the exercise of a particular function or act. It is considered to be a sister remedy to *certiorari*; the two differ in the time appropriate for their use. While *certiorari* quashes something already done erroneously, prohibition seeks to prevent an error from either occurring or continuing. Prohibition does not lie until a right to complain has arisen, but it may be sought as soon as an absence of jurisdiction has either arisen or may clearly be foreseen.

7. Procedures

7.1. Procedures: Judicial review initiated by a hearings officer

Where the officer who represents the Minister before a Division of the Immigration and Refugee Board believes that there are or may be grounds to seek judicial review, the officer will immediately consult their supervisor or manager to discuss the possibility of seeking judicial review of the decision. If the supervisor or manager agrees that judicial review should be pursued, the hearings officer must do the following:

(a) immediately request the reasons for decision from the Board; and

(b) within five business days of the decision, determination, order, etc., being made, send a report to the Director, Litigation Management BCL at NHQ or the Senior Litigation and Policy Advisor, NSD. The report is to be transmitted by facsimile or by electronic means.

Officers should note that, pursuant to A169, the RPD must give written reasons if it rejects a claim, and in all other situations the Division must provide written reasons if the person concerned or the Minister requests reasons within ten days of notification of the decision.

Officers should also keep in mind the very strict time limits involved when seeking judicial review. The 15 days for serving and filing the leave application with respect to a decision of the Board is

calculated from the giving of notice of the decision or from the sending of written reasons, whichever is later.

In order for NHQ to correctly calculate the date for filing, the request for judicial review must clearly indicate the date the decision was received by the CIC or the CBSA office as well as the date that the reasons were requested and received. Once BCL or the NSD agrees to seek judicial review, immediate instructions will be issued to the Department of Justice to file the appropriate documentation with the Court. Should BCL or the NSD disagree with the recommendation for judicial review, the CIC or the CBSA office will be provided with a rationale for their decision.

In situations where an application is required to be filed with the Court on an urgent basis in order to preserve the Minister's rights, the decision to seek judicial review may be made at the regional level. BCL or the NSD will be notified as soon as possible thereafter. Officers should refer such requests to the regional Justice Liaison Officer after they have obtained concurrence from their supervisor or manager.

7.2. Procedures: Form of report for judicial review

It is essential that the report or recommendation for judicial review contain the following information:

(a) a complete rationale for the recommendation to seek judicial review; and

(b) a complete description of the errors of law or fact or mixed law and fact that warrant judicial review.

The report must also contain as much of the following details as is practicable in the circumstances:

(c) names and telephone numbers of the officer and the supervisor;

(d) all relevant file numbers, i.e., the CIC or the CBSA office, hearings officer, regional or national, and divisional file numbers, if known;

(e) personal information concerning the person or persons directly involved in the issue to be litigated, i.e., the person concerned, sponsors or relatives, and known associates if relevant. Personal information for each person would include, where known, full names, places and dates of birth, citizenship addresses, and numbers and dates of issue of any identity documents issued to or in the possession of the significant parties;

(f) name and business address of counsel representing the person concerned;

(g) if available, a copy of any order or decision that is to be reviewed by the Court and the date the order or decision was made or given;

(h) a copy of the officer's notes taken at the hearing (because it is often the case that applications for judicial review are based on evidence or allegations of inadmissibility that were ignored or misconstrued by the tribunal, it is critical that the officer provide detailed notes taken at the hearing); and

(i) a detailed summary of the decision and reasons of the tribunal and whether or not the decision or order was given from the bench. If applicable, on indication that written reasons have been requested within ten days or within such other circumstances set out in the Rules of the Board. [A169(e)].

Litigation Management (BCL) or the NSD will ensure that the originating office and all other interested parties within the Department are informed of the developments and decisions made with respect to the recommendation. In addition, BCL will make the appropriate FOSS entries with respect to any litigation initiated by the Minister of C&I or the Minister of PSEP as well as the dispositions.

8. Litigation Roles

8.1. Litigation Management (BCL)

Litigation Management Division (BCL), directorate in the Case Management Branch, CIC, at National Headquarters, is responsible for the management of cases involving litigation of decisions made under the IRPA which fall outside the parameters of established instructions. From the onset of litigation in such cases, BCL provides instructions to Department of Justice (DOJ) lawyers with respect to pending litigation.

Litigation Management (BCL) manages litigation of all decisions made under IRPA, whether the decision falls within the responsibility of the Minister of C&I or the Minister of PSEP.

BCL analyses policy, program and legal issues arising in specific cases and coordinates program input. It monitors and manages developments in the areas of immigration, citizenship and refugee litigation and ensures that preventive program action is taken to lower program vulnerability to court challenges. This involves ensuring that program and policy sectors have adequate opportunity to review, evaluate and respond to developments in litigation issues that may have significant consequences for departmental policy or programs. BCL identifies issues requiring strategic consideration by the Department's Litigation Strategy Committee.

8.2. National Security Division (NSD)

The National Security Division, Intelligence Directorate, Enforcement Branch, CBSA, is responsible under IRPA for policies related to the following grounds of inadmissibility: security, human and international rights violations and organized criminality (national security grounds). The NSD supports CIC and CBSA field operations by providing functional guidance and intelligence support. In consultation with BCL, the Senior Litigation and Policy Advisor, NSD, manages litigation with respect to persons in Canada who are inadmissible on national security grounds and provides instructions to Department of Justice lawyers with respect to these cases.

8.3. Regional Justice Liaison Officer (JLO)

The regional Justice Liaison Officer is responsible for managing and coordinating the litigation activities for the region, is the primary contact with the Department of Justice at the regional level, and has the authority to provide instructions to Justice lawyers. Cases that come within the authority of the JLO are decisions regarding applications under PRRA or applications for permanent residence from within Canada; decisions relating to detention, execution of removal orders and administrative decisions (eligibility/removal orders). The regional Justice Liaison Officer is responsible for liaison with the local CICs, other regional directorates, the Department of Justice and the Litigation Management Division at NHQ. The JLO is the primary contact on all litigation issues for the local CICs and the regional Director. Additionally and subject to local arrangements with DOJ, this officer is responsible for ensuring proper and timely FOSS litigation entries. The regional Justice Liaison Officer may also seek legal advice from the local Department of Justice in cases of local or regional concern.

8.4. Department of Justice (DOJ)

DOJ lawyers represent the Minister of C&I or the Minister of PSEP in all applications before the Federal Court and in the provincial courts. DOJ, Citizenship and Immigration Canada (CIC) and the Canada Border Services Agency (CBSA) are separate organizations but have a solicitor-client relationship – CIC and the CBSA are the clients and DOJ is the solicitor. DOJ lawyers act on instructions from their clients, CIC and the CBSA. BCL is responsible for providing those instructions, except for cases that come within the authority of the National Security Division or the regional Justice Liaison Officer. It is the responsibility of the Department of Justice to defend arguable decisions made under the IRPA in the Federal Court and to uphold the validity and integrity of the IRPA.

8.5. Departmental Legal Services (DLSU)

DLSU is the primary source of legal advice to the Department to ensure uniform advice and to keep senior departmental officials informed of new or unexpected issues. Sometimes the need for incidental legal advice in particular cases arises in the field when regional officials may seek advice from the local office of the Department of Justice. Such requests for legal advice will normally be channeled through the regional Justice Liaison Officer. If significant or sensitive legal or policy issues are involved, requests for legal opinions should be directed to DLSU through the appropriate area management at NHQ.

9. Transitional provisions

The transitional provisions relating to court proceedings are outlined in the attached Appendix E and are summarized below:

(a) Any leave application or application for judicial review that is pending before the Federal Court or Supreme Court of Canada at the time that the new legislation comes into force will be deemed to have been commenced under section A72 of the IRPA and will be governed by those provisions.

(b) An application for judicial review that is pending or in progress at the time that the new legislation comes into force that was not subject to the leave requirement under the former Act (visa cases) will not require leave under the IRPA.

(c) Judicial review proceedings commenced with respect to any decision or order made or any matter arising under the former legislation after the coming into force of the new legislation will be governed by section 72 judicial review provisions outlined in the IRPA.

(d) Any person who, immediately prior to the coming into force of the new legislation, was entitled to seek judicial review of a decision or matter within 30 days pursuant to subsection 82.1(2) of the former Act (visa cases) but did not do so has 60 days from the coming into force of the new Act to file an application for leave under section 72 of the IRPA.

(e) A decision or an act of the Minister or an officer that is referred back by the Federal Court or Supreme Court of Canada after the coming into force of the new legislation will be determined in accordance with the IRPA.

(f) A decision of the IAD made under the former Act that is referred back by the Federal Court or the Supreme Court of Canada after the coming into force of the new legislation will be determined in accordance with the former Act.

(g) A decision of the Adjudication Division made under the former Act that is referred back by the Federal Court or Supreme Court of Canada after the coming into force of the new legislation will be determined by the Immigration Division in accordance with the IRPA.

(h) In accordance with A198, the Refugee Protection Division has authority to consider decisions of the CRDD that have been set aside by the Federal Court or the Supreme Court of Canada in accordance with the IRPA.

10. Communication

CIC, the CBSA and visa office staff should not communicate directly with the Court nor should they send any memoranda or files directly to the Court. When required to respond to a Rule 9 request or a Rule 17 Court order, CIC, the CBSA and visa office staff must follow the instructions contained herein and any relevant operations memoranda. Department of Justice lawyers may request case-related information directly from the local or visa office in order to respond to Court applications. When such requests are received from the Department of Justice, every effort should be made to provide the required information or documentation in a timely manner. Documents or materials should never be removed from the files. Photocopies of documents from the file may be sent to the DOJ unless it is necessary for them to review the original file. In that

case, the CIC, the CBSA or the visa office should retain either a photocopy of the entire file or copies of key documents.

11. Unforeseen circumstances

Officers who encounter issues or circumstances not addressed in this chapter should refer their questions or comments to the designated regional officer or to the Director, Litigation Management at National Headquarters.

Appendix A Process chart—Judicial review

Tribunal includes departmental officers or their supervisors or managers; members of a Division of the Immigration and Refugee Board; senior officials of the Department; Deputy Minister or Minister.

All avenues of appeal must first be exhausted.

Officer, with concurrence of superiors, forwards a report recommending an application for judicial review to **Litigation Management** within **five business days.**

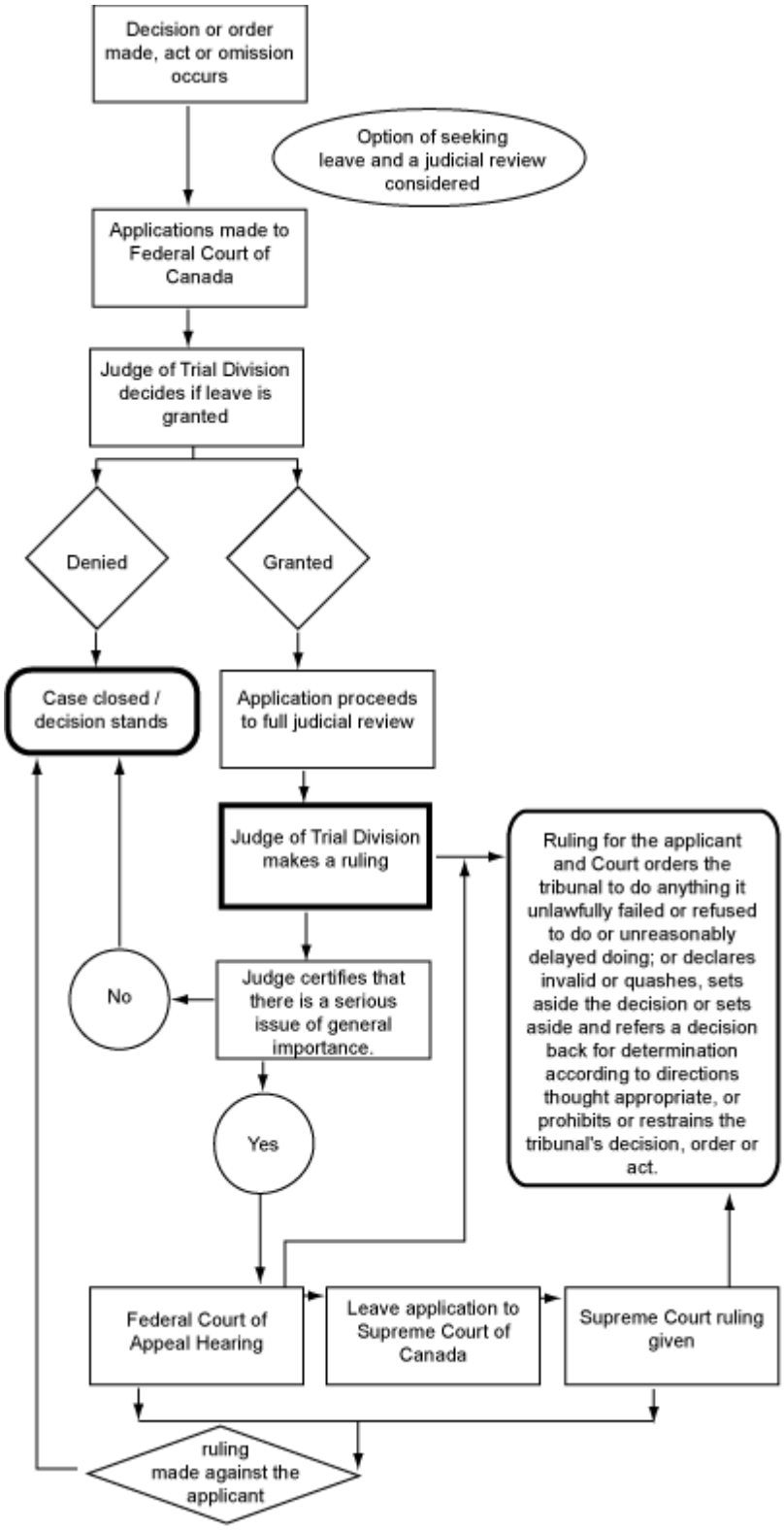
Applications must be filed within **15 days** if decision/order/act/omission occurred in Canada or within **60 days** if occurred outside Canada.

Applications for extension of time must be included in or accompany applications for leave and judicial review.

A judge decides issue on basis of materials submitted with application. The applicant must satisfy the judge that there is a ***serious issue*** to be heard for leave to be granted.

If the judge grants leave, a full judicial review of the application must be held summarily and no sooner than 30 days or later than 90 days after leave is granted.

ENF 9 Judicial Review



Appendix B *Federal Courts Act*, Sections 18 and 18.1

18(1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Armed Forces serving outside Canada.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

18.1(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or order of a federal board, commission or other tribunal shall be made within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, or within such further time as a judge of the Federal Court may, either before or after the expiration of those thirty days, fix or allow.

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in so doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

(5) Where the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or order, make an order validating the decision or order, to have effect from such time and on such terms as it considers appropriate.

Appendix C Excerpts From Federal Court Immigration Rules, 1993

Note: These Rules are subject to change by the Chief Justice of the Federal Court.

Obtaining Tribunal's Decision and Reasons

9. (1) Where an application sets out that the applicant has not received the written reasons of the tribunal, the Registry shall forthwith send the tribunal a written request in Form IR-3 as set out in the schedule.

(2) Upon receipt of a request under subrule (1) a tribunal shall, without delay,

(a) send a copy of the decision or order, and written reasons therefor, duly certified by an appropriate officer to be correct, to each of the parties, and two copies to the Registry; or

(b) if no reasons were given for the decision or order in respect of which the application is made, or reasons were given but not recorded, send an appropriate written notice to all the parties and the Registry.

(3) A tribunal shall be deemed to have received a request under subrule (1) on the tenth day after it was sent by mail by the Registry.

(4) The applicant shall be deemed to have received the written reasons, or the notice referred to in paragraph 9(2)(b), as the case may be, on the tenth day after it was sent by mail by the tribunal.

Disposition of Application for Leave

14. (1) Where

(a) any party has failed to serve and file any document required by these Rules within the time fixed, or

(b) the applicant's reply memorandum has been filed, or the time for filing it has expired,

a judge may, without further notice to the parties, determine the application for leave on the basis of the materials then filed.

(2) Where the judge considers that documents in the possession or control of the tribunal are required for the proper disposition of the application for leave, the judge may, by order, specify the documents to be produced and filed and give such other directions as the judge considers necessary to dispose of the application for leave.

(3) The Registry shall send to the tribunal a copy of an order made under subrule (2) forthwith after it is made.

(4) Upon receipt of an order under subrule (2), the tribunal shall, without delay, send a copy of the materials specified in the order, duly certified by an appropriate officer to be correct, to each of the parties, and two copies to the Registry.

(5) The tribunal shall be deemed to have received a copy of the order on the tenth day after it was sent by mail by the Registry.

15. (1) An order granting an application for leave

(a) shall fix the place and language, and a day that is no sooner than thirty days and no later than ninety days after the date of the order, for the hearing of the application for judicial review;

(b) shall specify the time limit within which the tribunal is to send copies of its record required under Rule 17;

(c) shall specify the time limits within which further materials, if any, including affidavits, transcripts of cross-examinations, and memoranda of argument are to be served and filed;

(d) shall specify the time limits within which cross-examinations, if any, on affidavits are to be completed; and

(e) may specify any other matter that the judge considers necessary or expedient for the hearing of the application for judicial review.

(2) The Registry shall send to the tribunal a copy of an order granting leave forthwith after it is made.

(3) The tribunal shall be deemed to have received a copy of the order on the tenth day after it was sent by mall by the Registry.

Obtaining Tribunal's Record

17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:

(a) the decision or order in respect of which the application is made and the written reasons given therefor,

(b) all papers relevant to the matter that are in the possession or control of the tribunal,

(c) any affidavits, or other documents filed during any such hearing, and

(d) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application, and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

Appendix D Prerogative writs

The principal common-law means for judicial review of the decisions of government tribunals are found in the remedies of *habeas corpus*, *certiorari*, *mandamus* and prohibition. Although they are now regulated by legislation, their origins were in the common law. They are issued only by superior courts: those courts which, historically, did not derive their authority from statute but from the Crown. These remedies are referred to as "prerogative writs", a term which emphasizes that they are issued at the discretion of the court.

Although the function of each writ is somewhat different, the main feature of each is to permit the courts to supervise the actions of inferior tribunals ("inferior" means a court that is subject to the control of a higher court). This supervisory role is not all encompassing, because the courts are limited in the extent to which they can go beyond the jurisdictional and procedural aspects of a decision to review the actual merits. See section 6, Definitions, for information on:

- habeas corpus
- certiorari
- mandamus
- prohibition.

Appendix E Transitional provisions (Part 20 of Regulations)

Division 6

Court proceedings

Judicial review

348. (1) On the coming into force of this section, any application for leave to commence an application for judicial review and any application for judicial review or appeal from an application that was brought under the former Act and is pending before the Federal Court or the Supreme Court of Canada is deemed to have been commenced under Division 8 of Part 1 of the *Immigration and Refugee Protection Act* and is governed by that Division and section 87.

Where no leave required

(3) Despite subsection (1), an application for judicial review that was not subject to the requirement of an application for leave under the former Act and was pending on the coming into force of this section does not require such an application under the *Immigration and Refugee Protection Act*.

Judicial review after coming into force

(4) Any judicial review proceeding brought in respect of any decision or order made or any matter arising under the former Act after the coming into force of this section is governed by Division 8 of Part 1 and section 87 of the *Immigration and Refugee Protection Act*.

Time for filing

(5) A person in respect of whom the 30-day period provided by section 18.1 of the *Federal Courts Act* for making an application for judicial review from a decision or matter referred to in subsection 82.1(2) of the former Act has not elapsed on the coming into force of this section and who has not made such an application has 60 days from the coming into force of this section to file an application for leave under section 72 of the *Immigration and Refugee Protection Act*.

Other court proceedings

349. On the coming into force of this section, an appeal made under section 102.17 of the former Act or an application for an order made under section 102.2 of the former Act that is pending remains governed by the provisions of the former Act.

Decisions referred back

350. (1) Subject to subsections (2) and (3), if a decision or an act of the Minister or an immigration officer under the former Act is referred back by the Federal Court or Supreme Court of Canada for determination and the determination is not made before this section comes into force, the determination shall be made in accordance with the *Immigration and Refugee Protection Act*.

Immigration Appeal Division decisions

350. (5) If a decision of the Immigration Appeal Division made under the former Act is referred back by the Federal Court or Supreme Court of Canada for determination and the determination is not made before the date of the coming into force of this section, the Immigration Appeal Division shall dispose of the matter in accordance with the former Act.

Adjudication Division decisions

350. (6) If a decision of the Adjudication Division made under the former Act is referred back by the Federal Court or Supreme Court of Canada for determination and the determination is not made before the date of the coming into force of this section, the Immigration Division shall dispose of the matter in accordance with the *Immigration and Refugee Protection Act*.