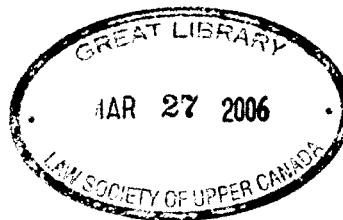


ADMINISTRATIVE LAW IN CANADA

FOURTH EDITION

Sara Blake



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Administrative Law in Canada

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fatal error.¹³¹ In either case, a tribunal may not make an order that it could not have made initially.¹³²

4.5 PREVIOUS DECISIONS ARE NOT BINDING

When parties appear before a tribunal with a new case raising legal or policy issues similar to those decided in a previous case between the same parties, the tribunal is not bound by the concept of *res judicata*. This flexibility enables a tribunal to continue its pursuit of the public interest, to consider and apply changes in policy and to effectively regulate dynamic and ongoing relationships between parties. A tribunal may permit re-litigation and may come to a different conclusion without risk of court interference.¹³³ However, the importance of stability in an industry requires that a tribunal have good reason for reversing its decisions.¹³⁴

A tribunal may refuse to permit parties to re-litigate factual questions. A tribunal may rely on findings of fact made by it in previous proceedings between the same parties, if these findings are relevant to the present proceeding and there is no new evidence that would support a different finding.¹³⁵

The principle of *stare decisis* does not apply to tribunals.¹³⁶ A tribunal is not bound to follow its own previous decisions on similar issues. Its decisions may reflect changing circumstances in the field it governs. Though not binding, previous decisions should be reviewed to provide an

¹³¹ *Godin c. Québec (Société de l'assurance automobile)*, [2003] J.Q. no 9567, 6 Admin. L.R. (4th) 284 (C.A.); *Bourassa v. Commissions des lésions professionnelles*, [2003] J.Q. no 10630 (C.A.), leave to appeal to S.C.C. refused [2003] C.S.C.R. no 461.

¹³² *Canadian Union of Public Employees, Local 41 v. Alberta (Board of Industrial Relations)*, [1978] A.J. No. 632, 84 D.L.R. (3d) 710 at 714 (C.A.).

¹³³ *Al Yamani v. Canada (Minister of Citizenship & Immigration)*, [2003] F.C.J. No. 1931 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 62; *New Brunswick (Executive Director of Assessment) v. Ganong Bros. Ltd.*, [2004] N.B.J. No. 219, 240 D.L.R. (4th) 687 (C.A.); *Manitoba Food & Commercial Workers Union v. Canada Safeway Ltd.*, [1981] 2 S.C.R. 180, 123 D.L.R. (3d) 512, adopting dissenting reasons of Monnin J.A. [1981] M.J. No. 89, 120 D.L.R. (3d) 42 at 46-48 (C.A.).

¹³⁴ *Canadian Red Cross Society v. United Steelworkers of America*, [1991] N.B.J. No. 314, 115 N.B.R. (2d) 10 (C.A.).

¹³⁵ *New Brunswick (Executive Director of Assessment) v. Ganong Bros. Ltd.*, [2004] N.B.J. No. 219, 240 D.L.R. (4th) 687 (C.A.); *Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America* (1980), 115 D.L.R. (3d) 197 at 212 (Ont. Div. Ct.), leave to appeal to C.A. refused (1980), 30 O.R. (2d) 29n (C.A.).

¹³⁶ *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, 105 D.L.R. (4th) 385; *Halifax Employers Assn. v. International Longshoremen's Assn., Local 269*, [2004] N.S.J. No. 316, 243 D.L.R. (4th) 101 at 126 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 464.

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analytical framework and reduce the risk of arbitrariness.¹³⁷ The tribunal should be open to argument as to why a previous decision ought not to be followed.¹³⁸ If it does depart from its previous ruling, it should provide an explanation.¹³⁹

If, in another case, a court determined the correct interpretation of a statutory provision, the tribunal must apply the court's interpretation. However, if a court has merely upheld an earlier tribunal's interpretation of the provision as reasonable, the tribunal need not follow that interpretation if it prefers another interpretation that is also reasonable.¹⁴⁰

Immigration and mental health statutes require periodic reviews of the detention of individuals. Though, the issue on review is whether, in the current circumstances, continued detention is warranted, the tribunal should have regard to and should not depart from previous detention decisions without compelling reasons.¹⁴¹

4.6 TWO TRIBUNALS WITH JURISDICTION AND ATTEMPTS TO RE-LITIGATE

Sometimes two tribunals have jurisdiction under different statutes over the same subject matter. For example, both a human rights commission and a labour arbitrator may have jurisdiction over a complaint of discrimination filed by a unionized employee. Both a municipal board and a Superior Court may have jurisdiction to review a municipal by-law.

If one tribunal has exclusive jurisdiction over the subject matter of the dispute, it should be litigated before that tribunal. The subject matter of the dispute is determined, not by the legal characterization of the claim as one relating to human rights, but rather by the factual context, such as employee discipline.¹⁴² This issue is not determined according to which

¹³⁷ *Canadian Union of Public Employees, Local 2745 v. New Brunswick (Board of Management)*, [2004] N.B.J. No. 110, 269 N.B.R. (2d) 141 at 157-58 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 215.

¹³⁸ *Dominion Stores Ltd. v. Retail, Wholesale and Department Store Union, Local 414* (1981), 128 D.L.R. (3d) 262 (Ont. Div. Ct.).

¹³⁹ *J.D. Irving, Ltd. v. International Longshoremen's Assn., Local 273*, [2003] F.C.J. No. 951, 228 D.L.R. (4th) 620 at 632 (C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 393.

¹⁴⁰ *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Assn.*, [2001] O.J. No. 3602, 56 O.R. (3d) 85 (C.A.); *Nova Scotia Nurses' Union v. Camp Hill Hospital*, [1989] N.S.J. No. 409, 66 D.L.R. (4th) 711 (C.A.), leave to appeal to S.C.C. refused (1990), 110 N.R. 80n (S.C.C.).

¹⁴¹ *Canada (Minister of Citizenship & Immigration) v. Thanabalasingham*, [2004] F.C.J. No. 15, 236 D.L.R. (4th) 329 (C.A.).

¹⁴² *Weber v. Ontario Hydro*, [1995] S.C.J. No. 59, [1995] 2 S.C.R. 929; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] S.C.J. No. 35, 240 D.L.R. (4th)

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