the Federal Courts. (For further discussion of review of administrative decisions by the courts, see chapter 10 (Reviews, Reconsiderations, and Appeals of Administrative Law Decisions) of this manual and chapters following.)

As stated by the court in *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142 (T.D.):

> It is well settled that for the purposes of judicial review, an Indian band council and persons purporting to exercise authority over members of Indian bands who act pursuant to provisions of the *Indian Act* constitute a "federal board, commission or other tribunal" as defined in section 2 of the *Federal Court Act* [now the *Federal Courts Act*].

(See also "Indigenous Governing Bodies" in this chapter.)

This chapter sets out the types of decision-makers governed by administrative law principles and the types of decisions they make.

II. TYPES OF DECISION-MAKERS GOVERNED BY ADMINISTRATIVE LAW PRINCIPLES [§2.2]

A person may be an administrative decision-maker in some contexts and not in others. For example, ministers of the Crown are frequently given administrative decision-making powers under an act or regulations, and they are, in that context, acting as administrative decision-makers. But that does not mean the minister becomes an administrative decision-maker and subject to judicial review for all purposes. The minister is not an administrative decision-maker when making policy choices (see "The Delicate Interplay between Administrative Decision-making and Policy" in this chapter), providing advice to Cabinet, or voting on legislation in the Legislative Assembly, and such decisions are not subject to judicial review. Moreover, when the minister makes a policy decision, the principles of natural justice do not apply. There are instances when a statute requires public consultation prior to a policy decision, but even those instances do not import the principles of natural justice into the decision-making process (*Carpenter Fishing Corp. v. Canada*, 1997 CanLII 6391 (FCA)).

Similarly, government officials or tribunals are often given administrative decision-making powers, but that does not mean that they are administrative decision-makers for all purposes. For example,

a tribunal is not acting as an administrative decision-maker when selecting and signing leases for office space (*Air Canada v. Toronto Port Authority*, 2011 FCA 347 at paras. 52–81). Another example is *Get Acceptance Corp. v. British Columbia (Registrar of Mortgage Brokers)*, 2008 BCCA 404. In that case, the question was whether a statutory appeal lay from a decision of the registrar to publish a notice of an upcoming hearing. The court held that the decision to publish a notice was not a statutory power that was appealable under the legislation.

While it is always necessary to look carefully at the relevant act and regulations to determine if a person is acting as an administrative decision-maker in respect of a particular matter, there are certain categories of people and entities, described from "Ministers (and Cabinet, in Rare Cases)" to "Officers of the Legislature" in this chapter, of people and entities that are most commonly entrusted with administrative decision-making responsibilities.

A. MINISTERS (AND CABINET, IN RARE CASES) [§2.3]

Ministers are often given statutory powers of decision under provincial or federal law. For example, under Part 3 of the *Cannabis Act*, S.C. 2018, c. 16, the minister may decide whether to issue, renew, or amend several types of licences and permits. Under s. 18 of the *Environmental Management Act*, S.B.C. 2003, c. 53, the minister may cancel a permit or approval for various reasons, including the minister's belief that the permit or approval is not "in the public interest".

It should be noted that whenever administrative decision-making power is given to a minister, that power also rests with the deputy minister (and, at times, an assistant deputy minister), by virtue of s. 23 of the *Interpretation Act*, R.S.B.C. 1996, c. 238. Section 23 states, in part:

> **23** (1) Words in an enactment directing or empowering a minister of the government to do something, or otherwise applying to the minister by his or her name of office, include a minister designated to act in the office and the deputy or associate deputy of the minister.
>
> (2) If a deputy minister is absent or unable to act, an assistant deputy minister, or some other official authorized by the minister, has the powers and must perform the duties of the deputy minister.
>
> …

> (5) Subsection (1) does not authorize a deputy or an associate deputy of a minister to exercise an authority conferred on the minister to enact a regulation as defined in the *Regulations Act*.

A similar provision can be found in s. 24(2) of the federal *Interpretation Act*, R.S.C. 1985, c. I-21. Unlike the provincial Act, s. 24(2)(d) expressly incorporates the "*Carltona*" doctrine, which stands for the principle that responsible officials other than the minister and deputy minister may possess implicit decision-making power under a statute (*Carltona, Ltd. v. Commissioners of Works*, [1943] 1 All E.R. 560 (C.A.)) (see also "Delegates" in this chapter). Although the provincial *Interpretation Act* does not expressly codify the *Carltona* doctrine, and there may be some significance to the legislative intent behind that decision, the common law in British Columbia appears to permit lesser officials to make decisions where it would be administratively impracticable for the minister to make every such decision, and where one can interpret the Act in question as implicitly permitting that. This means that the *Carltona* doctrine can have application in British Columbia, but its application will be determined on a statute-by-statute and power-by-power basis (*Fahrenbruch v. British Columbia (Attorney General)*, 2009 BCSC 1128).

At the same time, it must be noted that when ministers are acting as members of Cabinet, for example, developing new policy (see "The Delicate Interplay between Administrative Decision-making and Policy" in this chapter) or deciding on what legislation to introduce into the Legislative Assembly, these functions are typically viewed as executive powers that are not considered administrative decision-making. Indeed, there are very few Cabinet functions that would be considered administrative decision-making. An exception is discussed at "Legislative Decisions" in this chapter.

B. STATUTORY COURTS [§2.4]

The Provincial Court of British Columbia derives its powers from legislation, which outlines and limits its power. It is bound by the principles of administrative law, and in situations in which there is no statutory right of appeal from the Provincial Court, its processes can be supervised through judicial review to the Supreme Court of British Columbia. Note the inclusion of the Provincial Court in the definition of "statutory power of decision" in s. 1 of the *JRPA*:

> "**statutory power of decision**" means a power or right conferred by an enactment to make a decision deciding or prescribing
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
>
> (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,
>
> and includes the powers of the Provincial Court[.]

C. TRIBUNALS [§2.5]

Dozens of federal and provincial tribunals operate in British Columbia. They include provincial tribunals such as the Labour Relations Board, the Property Assessment Appeal Board, and the Human Rights Tribunal. They include federal tribunals such as the National Energy Board, the Specific Claims Tribunal, and the Immigration and Refugee Board of Canada. They also include modern-day treaty First Nation tribunals such the Huu-ay-aht Tribunal.

Tribunals make numerous types of administrative decisions related to both the procedure and the substance of their decision-making. Examples include decisions to order production of documents, decisions to withhold the publication of certain information, and the issuance of orders respecting the final disposition of the matters before them. For some modern-day treaty First Nations, their tribunal or judicial council has the authority, on request of a court, to provide recommendations on sentencing, in a criminal proceeding, involving a member of that First Nation (*Tribunal Act*—Official Consolidation, HFNA 13/2011, as amended by HFNA 2/2018, s. 30 and HFNA 3/2021, s. 30; *Administrative Review and Judicial Proceedings Act*, TFN, 2009, s. 8).

D. GOVERNMENT OFFICIALS [§2.6]

Many government officials exercise administrative decision-making responsibilities. These include, for example, a "regional manager" under the *Wildlife Act*, R.S.B.C. 1996, c. 488, or a "Director" under the *Adoption Act*, R.S.B.C. 1996, c. 5. It is important to note that these people do not have such powers simply because they work

for government—they must be able to trace their authority to some specific provision in a statute and any related appointment orders.

The manner in which people are given administrative decision-making powers in such cases varies considerably, and legislative drafting practice has changed from time to time. In some cases, the statute simply provides that the minister may designate a person as a particular statutory official (see, for example, the appointment of the director under s. 175 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2). In other cases, the statute defines an administrative decision-maker as a person holding a particular position within the public service (for example, s. 1 of the *Wildlife Act* defines a "regional manager" to mean "a regional manager of the recreational fisheries and wildlife programs"). In still other cases, it can be a combination of both. For example, the *Wildlife Act* defines a "director" for the purposes of that Act to mean "the director of the Wildlife Branch and, for matters relating to fish, [a director] includes a person designated by regulation of the Lieutenant Governor in Council". Although there is considerable variability in terms of how people are designated administrative decision-makers under law, the common theme is that they must be able to show where their authority comes from and demonstrate that they are the subject of the requisite designation instrument.

E. INDIGENOUS GOVERNING BODIES [§2.7]

Indigenous decision-making bodies are treated as federal decision-makers in judicial review applications at the Federal Court; see www.fct-cf.gc.ca/en/pages/about-the-court/jurisdiction/aboriginal-law. Indigenous governing bodies may be subject to judicial review in the Federal Court in cases where they are acting as a "federal board, commission or other tribunal" (as defined in s. 2 of the *Federal Courts Act*) and exercising powers conferred by an act of Parliament (including the *Indian Act*, R.S.C. 1985, c. I-5), among others). The extent of the Federal Court's judicial review authority under these principles was considered in *George v. Heiltsuk First Nation*, 2022 FC 1786, where the court dismissed an application to summarily dismiss the application for judicial review and directed the issues be decided at the full hearing of the matter on the merits.

An Indigenous governing body may also be a statutory decision-maker under the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 ("*DRIPA*"), if it is an "Indigenous governing body"

(as defined in s. 1(1) of *DRIPA* and incorporated by reference in s. 1 of the *JRPA*) and has entered into an agreement with government under s. 6 or s. 7 of the *DRIPA* regarding joint statutory decision-making or prior consent requirements before the exercise of certain statutory authorities.

In this regard, the *JRPA* was amended on November 24, 2022 by the *Judicial Review Procedure Amendment Act*, 2022, S.B.C. 2022, c. 39 to create a new s. 22, which confirms that the exercise of a decision about whether to give such consent is subject to the procedural requirements of the *JRPA*, as follows:

> **Application of Act in relation to consent of Indigenous governing body**
>
> **22**(1) If under an enactment the consent of an Indigenous governing body is required to be sought or obtained in accordance with an agreement entered into under section 6 or 7 of the *Declaration on the Rights of Indigenous Peoples Act* before the exercise of a statutory power,
>
> (a) subject to subsection (2), this Act applies in relation to the decision whether to give consent as if that decision were a statutory power,
>
> (b) the Indigenous governing body is deemed for the purposes of section 15(1) of this Act to be one person,
>
> (c) section 15(2) of this Act does not apply in relation to the decision whether to give consent, and
>
> (d) service, if required to be made on the Indigenous governing body, is effectively made by a person if made in accordance with the agreement relating to the consent of the Indigenous governing body before the exercise of the statutory power, as if the person were a party to the agreement.
>
> (2) If under an enactment the consent of an Indigenous governing body is required to be sought or obtained in accordance with an agreement entered into under section 7 of the *Declaration on the Rights of Indigenous Peoples Act* before the exercise of a statutory power of decision, this Act applies in relation to the decision whether to give consent as if that decision were a statutory power of decision.

For more information, see “Agreements with First Nations” in chapter 11.

F. DELEGATES [§2.8]

There are cases in which a person is not designated under law as an administrative law decision-maker, but has been duly delegated such powers from another administrative law decision-maker, in circumstances where a power to delegate exists.

The express power to delegate can be found in many statutes. For example, s. 30 of the *Ombudsperson Act*, R.S.B.C. 1996, c. 340, allows the Ombudsperson to delegate in writing most of their powers and duties to any person, subject to the terms and conditions the Ombudsperson considers appropriate.

In the case of ministers, the situation is somewhat more complex. Some statutes specifically say the minister may delegate their powers. But some do not.

Courts will sometimes read in a ministerial power to delegate even if it is not express in the statute, because courts recognize it is not practicable for ministers personally to make all administrative law decisions entrusted to them under all legislation (*Carltona, Ltd. v. Commissioners of Works*, [1943] 1 All E.R. 560 (C.A.); see also *R. v. Harrison*, 1976 CanLII 3 (SCC)). On the other hand, if a court interprets a particular statute as evidencing the Legislature's intent that certain ministerial decisions not be delegated, it will find the minister cannot delegate those powers. For an excellent discussion of how the courts approach this issue, see *Piccirillo v. British Columbia (Forest & Lands)*, 1988 CanLII 2936 (BC SC) at paras. 15 to 32.[1]

In any case where the functions of an administrative decision-maker have been duly delegated to a person, all of the rules and obligations of the administrative decision-maker apply to that person, and that person's decisions can be challenged on the same administrative law grounds as would apply to the person who delegated the powers. In addition, the delegate is required to comply with any terms and conditions of the delegation, and these should be set out on the delegation instrument itself. Finally, a person to whom statutory powers have been delegated cannot in turn delegate those powers to another person unless the statute expressly provides for such a right. This is referred to as the *delegatus non potest delegare* principle.

G. NON-GOVERNMENTAL ADMINISTRATIVE DECISION-MAKERS DESIGNATED BY STATUTE [§2.9]

Although most administrative decision-makers are government employees or tribunal members, that is not the case for all. For example, the Law Society of British Columbia is not a government body, but it exercises powers under the *Legal Profession Act*, S.B.C. 1998, c. 9. Similarly, the British Columbia Society for the Prevention of Cruelty to Animals exercises some administrative decision-making responsibilities under the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372. Such entities are subject to judicial review in respect of their decisions just as are governmental administrative decision-makers. See, for example, *Marshall v. British Columbia Society for the Prevention of Cruelty to Animals*, 2007 BCSC 1750, and *Ewachniuk v. Law Society of British Columbia*, 1997 CanLII 3535 (BC SC), reversed 1998 CanLII 6469 (BC CA).

The leading Federal Court decision on this issue is *Onuschak v. Canadian Society of Immigration Consultants*, 2009 FC 1135. In that case, the court held that the Canadian Society of Immigration Consultants was a "federal board, commission or other tribunal" under s. 2 of the *Federal Courts Act* because its purpose was to regulate immigration consultants in the public interest and it was incorporated under the *Canada Corporations Act*. See also *Douglas v. Canada (Attorney General)*, 2014 FC 299, where the court held that members of the Canadian Judicial Council, when exercising the authorities provided to the council under the federal *Judges Act*, R.S.C. 1985, c. J-1, are acting as members of administrative tribunals conducting an inquiry and are therefore a "federal board, commission or other tribunal".

H. OTHER ADMINISTRATIVE DECISION-MAKING AND THE LIMITS OF JUDICIAL REVIEW [§2.10]

The availability of judicial review for other decision-makers was addressed by the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 ("*Highwood*"). In this case, the applicant sought judicial review as he alleged his right to procedural fairness was violated by his religious association's decision to exclude him for inappropriate behaviour. Ultimately, the application for judicial review failed as the religious association was not a public decision-maker.

While in the past some Canadian courts had allowed judicial review of decisions made by private bodies, in *Highwood*, the Supreme Court took a critical stance against such past jurisprudence for failing to recognize that judicial review concerns the legality of state decision-making. It was clarified that judicial review is available only where there is an exercise of state authority and where that exercise is sufficiently public. A decision has a public character where it "involves questions about the rule of law and the limits of an administrative decision maker's exercise of power" (*Highwood* at para. 20). It follows that public bodies will make decisions that are private in nature, such as hiring, which are not subject to judicial review. Likewise, "public" decisions made by private bodies are not subject to judicial review for simply affecting a broad segment of the public.

Courts in British Columbia have also expressly recognized that not all exercises of state authority that can be subject to judicial review derive from statute. The court in *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 referred to para. 14 of the decision in *Highwood* and then commented that "it is important to recognize that public authorities can also function based on powers that do not owe their existence to enactments" (para. 22) and that "[p]ressures to reduce the number of enactments seems to have resulted in increased reliance by public authorities on their non-statutory powers" (para. 23). The court concluded, tracking the language in *Highwood*, that while remedies under s. 2(2)(b) of the *JRPA* will not be available where a public authority is operating under powers that do not arise from an enactment, judicial review and the remedies under s. 2(2)(a) of the *JRPA* "will remain available if the public authority's activities have a sufficiently public character" (para. 24). For another example of where the actions of a non-statutory body were found to be subject to judicial review, see *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia*, 2022 BCCA 247 at paras. 48 to 56.

See also *J.W. v. Canada (Attorney General)*, 2019 SCC 20, where judicial review was not available under public law principles but arose under principles of contract law. The Independent Assessment Process ("IAP"), constituting a procedure for settling individual claims as part of the *Indian Residential Schools Settlement Agreement* ("Agreement") (the negotiated settlement of thousands of individual and class action lawsuits relating to the operation of residential schools in Canada), describes which harms are compensable. The Agreement includes a system of internal reviews with no right of appeal to the

courts. However, supervising judges from each province oversee the administration and implementation of the Agreement. In overturning the decision of the Manitoba Court of Appeal, the Supreme Court of Canada observed that, while parties went to significant lengths to make the Agreement a complete code by including levels of internal review and choosing not to include any provision granting court access, there is a foundational link between judicial supervision and the Agreement. The existence of the Agreement was contingent on judicial approval, and judicial approval, in turn, was contingent on ongoing judicial supervision.

I. OFFICERS OF THE LEGISLATURE [§2.11]

Officers of the Legislature play a traditional, unique role in the British Columbia government. They are appointed by and accountable only to the Legislative Assembly. Their respective enabling statutes set out the mandate and duties of each officer. While the officers' specific mandates vary, their positions have in common the following features:

(1) independence from the government;
(2) fixed-term appointments and budget; and
(3) oversight mechanisms that differ from those of most government agencies.

The current British Columbia officers of the Legislature are the Auditor General, the Conflict of Interest Commissioner, the Chief Electoral Officer, the Information and Privacy Commissioner, the Ombudsperson, the Police Complaint Commissioner, the Human Rights Commissioner, the Representative for Children and Youth, and the Merit Commissioner. The Ombudsperson's role in particular is to hear complaints about the administration of government, which necessarily involves the oversight of many statutory and other types of decisions undertaken through the administration of government.

III. TYPES OF DECISIONS GOVERNED BY ADMINISTRATIVE LAW PRINCIPLES [§2.12]

The types of decisions governed by the principles of administrative law can be grouped into several categories, discussed at "Adjudicative Decisions" to "Legislative Decisions" in this chapter. All decisions made under the authority of a statute, regardless of the type, must be within the jurisdiction conferred by the relevant statute.