

The Path to the Federal Court of Appeal and What to do When You Get There

Appeals to the Federal Court of Appeal in Citizenship and Immigration Legislation Selected Bibliography

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A. WHEN CAN YOU APPEAL?

1) Legislative authority permitting appeal to FCA

Federal Courts Act, R.S.C. 1985, c. F-7, s. 27

2) IRPA decisions: only if serious question of general importance stated at judgment

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 74(d)

Huynh v. Canada, [1996] 2 F.C. 976, 134 D.L.R. (4th) 612; 36 C.R.R. (2d) 93; 112 F.T.R. 240
<http://www.canlii.org/en/ca/fca/doc/1996/1996canlii4047/1996canlii4047.html>

Mata Aldana v. Canada (Citizenship and Immigration), 2008 FCA 176
<http://www.canlii.org/en/ca/fca/doc/2008/2008fca176/2008fca176.html>

3) No appeal from interlocutory judgment

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 72(2)(e), s. 75(2)

4) Jurisprudence

i) Test for Certification

Liyanagamage v. Canada (Minister of Citizenship and Immigration) (1994), 176 N.R. 4

Varela v. Canada (Minister of Citizenship and Immigration), 2009 FCA 145; 2009 CAF 145; [2009] F.C.J. No. 549; [2009] A.C.F. no 549; 391 N.R. 366; 80 Imm. L.R. (3d) 1 (F.C.A. May 06, 2009)
<http://www.canlii.org/en/ca/fca/doc/2009/2009fca145/2009fca145.html>

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ii) When question(s) should not have been certified

Boni v. Canada (Minister of Citizenship and Immigration), 2006 FCA 68; 357 N.R. 326
<http://www.canlii.org/en/ca/fca/doc/2006/2006fca68/2006fca68.html>

Canada (Minister of Citizenship and Immigration) v. Zazai, 2004 FCA 89; 318 N.R. 365
<http://www.canlii.org/en/ca/fca/doc/2004/2004fca89/2004fca89.html>

Canada (Minister of Citizenship and Immigration) v. Okoloubu, 2008 FCA 326; 301 D.L.R. (4th) 591
<http://www.canlii.org/en/ca/fca/doc/2008/2008fca326/2008fca326.html>

Parshottam v. Canada (Minister of Citizenship and Immigration), 2008 FCA 355, [2009] 3 F.C.R. 527
<http://www.canlii.org/en/ca/fca/doc/2008/2008fca355/2008fca355.html>

Varela v. Canada (Minister of Citizenship and Immigration), 2009 FCA 145; 2009 CAF 145 [2009] F.C.J. No. 549; [2009] A.C.F. no 549; 391 N.R. 366; 80 Imm. L.R. (3d) 1
<http://www.canlii.org/en/ca/fca/doc/2009/2009fca145/2009fca145.html>

Kunkel v. Canada (Minister of Citizenship and Immigration), 2009 FCA 347; [2009] F.C.J. No. 1700
<http://www.canlii.org/en/ca/fca/doc/2009/2009fca347/2009fca347.html>

iii) Cases where questions certified

Somodi v. Canada (Citizenship and Immigration), 2008 FC 1356 (CanLII) • 337 F.T.R. 265
<http://www.canlii.org/en/ca/fct/doc/2008/2008fc1356/2008fc1356.html>

Zeng v. Canada (Citizenship and Immigration), 2009 FC 466
<http://www.canlii.org/en/ca/fct/doc/2009/2009fc466/2009fc466.html>

Toussaint v. Canada (Citizenship and Immigration), 2009 FC 873
<http://www.canlii.org/en/ca/fct/doc/2009/2009fc873/2009fc873.html>

Gebreab v. Canada (Minister of Public Safety & Emergency Preparedness), 2009 FC 1213
<http://www.canlii.org/en/ca/fct/doc/2009/2009fc1213/2009fc1213.html>

Tjjueza v. Canada (Public Safety and Emergency Preparedness), 2009 FC 1247
<http://www.canlii.org/en/ca/fct/doc/2009/2009fc1247/2009fc1247.html>

Rashid v. Canada (Citizenship and Immigration), 2010 FC 157
<http://www.canlii.org/en/ca/fct/doc/2010/2010fc157/2010fc157.html>

Sapru v. Canada (Citizenship and Immigration), 2010 FC 240
<http://www.canlii.org/en/ca/fct/doc/2010/2010fc240/2010fc240.html>

Saleh v. Canada (Citizenship and Immigration), 2010 FC 303
<http://www.canlii.org/en/ca/fct/doc/2010/2010fc303/2010fc303.html>

iv) Certification refused

He v. Canada (Public Safety and Emergency Preparedness), 2010 FC 391
<http://www.canlii.org/en/ca/fct/doc/2010/2010fc391/2010fc391.html>

Nzegwu v. Canada (Citizenship and Immigration), 2010 FC 107
<http://www.canlii.org/en/ca/fct/doc/2010/2010fc107/2010fc107.html>

Jin v. Canada (Citizenship and Immigration), 2009 FC 1234
<http://www.canlii.org/en/ca/fct/doc/2009/2009fc1234/2009fc1234.html>

Jama c. Canada (Citoyenneté et Immigration), 2009 CanLII 67697
<http://www.canlii.org/fr/ca/cfpi/doc/2009/2009canlii67697/2009canlii67697.html>

Cherkhovskiy v. Canada (Citizenship and Immigration), 2009 FC 1084
<http://www.canlii.org/en/ca/fct/doc/2009/2009fc1084/2009fc1084.html>

Gittens v. Canada (Public Safety and Emergency Preparedness), 2008 FC 526
<http://www.canlii.org/en/ca/fct/doc/2008/2008fc526/2008fc526.html>

5) No appeal from refusal to certify

Chekhovskiy v. Canada (Citizenship and Immigration), (March 2, 2010), Docket: A-469-09, (F.C.A.)

6) Scope of Appeal

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 at para. 25
<http://www.canlii.org/en/ca/scc/doc/1998/1998canlii778/1998canlii778.html>

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para. 12
<http://www.canlii.org/en/ca/scc/doc/1999/1999canlii699/1999canlii699.html> Where questions certified

7) Citizenship Appeals

i) Appeal from decision of Citizenship Judge to FC not FCA

Citizenship Act, R.S.C. 1985, c. C-29, s. 14(5)

ii) Decision of FC final - No FCA appeal

Citizenship Act, R.S.C. 1985, c. C-29, s. 14(6)

B. STANDARDS OF APPELLATE REVIEW

1) Leading cases

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 30, 50, 59, 128, 162, 164
<http://www.canlii.org/en/ca/scc/doc/2008/2008scc9/2008scc9.html>

Canada (M.C.I.) v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339
<http://www.canlii.org/en/ca/scc/doc/2009/2009scc12/2009scc12.html>

Housen v. Nikolaisen, [2002] 2 S.C.R. 235 at paras. 1, 7, 10, 26-28, 33 and 36
<http://www.canlii.org/en/ca/scc/doc/2002/2002scc33/2002scc33.html>

Nagalingam v. Canada (M.C.I.), 2008 FCA 153, [2009] 2 F.C.R. 52 at paras. 30 and 31
<http://www.canlii.org/en/ca/fca/doc/2008/2008fca153/2008fca153.html>

Sketchley v. Canada (Attorney General), 2005 FCA 404 (CanLII) • 263 D.L.R. (4th) 113 • 44
Admin. L.R. (4th) 4 • 56 C.H.R.R. 490
<http://www.canlii.org/en/ca/fca/doc/2005/2005fca404/2005fca404.html>

Sing v. Canada (M.C.I.), 2005 FCA 125, 253 D.L.R. (4th) 606 at para. 18, leave to appeal to the
S.C.C. refused [2005] S.C.R. viii
<http://www.canlii.org/en/ca/fca/doc/2005/2005fca125/2005fca125.html>

Appendix

Extracts from Relevant Legislation and Rules

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, c. 27

Judicial Review

Contrôle judiciaire

Application for judicial review

Demande d'autorisation

72. (1) 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.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Application

Application

(2) The following provisions govern an application under subsection (1):

(2) Les dispositions suivantes s'appliquent à la demande d'autorisation:

...

(e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

...

e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

Judicial review

Demande de contrôle judiciaire

74. Judicial review is subject to the following provisions:

74. Les règles suivantes s'appliquent à la demande de contrôle judiciaire:

...

(d) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

...

d) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

Inconsistencies

Incompatibilité

75. (2) In the event of an inconsistency between this Division and any provision of the Federal Courts Act, this Division prevails to the extent of the inconsistency.

75. (2) Les dispositions de la présente section l'emportent sur les dispositions incompatibles de la *Loi sur les Cours fédérales*.

**JURISDICTION OF FEDERAL COURT OF
APPEAL**

**COMPÉTENCE DE LA COUR D'APPEL
FÉDÉRALE**

Appeals from Federal Court

Appels des jugements de la Cour fédérale

27. (1) An appeal lies to the Federal Court of Appeal from any of the following decisions of the Federal Court:

- (a) a final judgment;
- (b) a judgment on a question of law determined before trial;
- (c) an interlocutory judgment; or
- (d) a determination on a reference made by a federal board, commission or other tribunal or the Attorney General of Canada.

27. (1) Il peut être interjeté appel, devant la Cour d'appel fédérale, des décisions suivantes de la Cour fédérale :

- a) jugement définitif ;
- b) jugement sur une question de droit rendu avant l'instruction;
- c) jugement interlocutoire;
- d) jugement sur un renvoi d'un office fédéral ou du procureur général du Canada.

Powers of Federal Court of Appeal

Pouvoirs de la Cour d'appel fédérale

52. The Federal Court of Appeal may

- (a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;
- b) in the case of an appeal from the Federal Court,
 - (i) dismiss the appeal or give the judgment and award the process or other proceedings that the Federal Court should have given or awarded,
 - (ii) in its discretion, order a new trial if the ends of justice seem to require it, or
 - (iii) make a declaration as to the conclusions that the Federal Court should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in light of that declaration; and

52. La Cour d'appel fédérale peut:

- a) arrêter les procédures dans les causes qui ne sont pas de son ressort ou entachées de mauvaise foi;
- b) dans le cas d'un appel d'une décision de la Cour fédérale :
 - (i) soit rejeter l'appel ou rendre le jugement que la Cour fédérale aurait dû rendre et prendre toutes mesures d'exécution ou autres que celle-ci aurait dû prendre,
 - (ii) soit, à son appréciation, ordonner un nouveau procès, si l'intérêt de la justice paraît l'exiger,
 - (iii) soit énoncer, dans une déclaration, les conclusions auxquelles la Cour fédérale aurait dû arriver sur les points qu'elle a tranchés et lui renvoyer l'affaire pour poursuite de l'instruction, à la lumière de cette déclaration, sur les points en suspens;

Citizenship Act, R.S.C. 1985, c. C-29
Loi sur la citoyenneté, L.R.C. 1985, c. C-29

Appeal

14. (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the day on which

...

(6) A decision of the Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.

16. Notwithstanding section 28 of the *Federal Courts Act*, the Federal Court of Appeal does not have jurisdiction to hear and determine an application to review and set aside a decision made under this Act if the decision may be appealed under section 14 of this Act.

Appel

14. (5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours suivant la date, selon le cas :

...

(6) La décision de la Cour rendue sur l'appel prévu au paragraphe (5) est, sous réserve de l'article 20, définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel

16. Nonobstant l'article 28 de la *Loi sur les Cours fédérales*, la Cour d'appel fédérale n'a pas compétence pour entendre et juger une demande de révision et d'annulation d'une décision rendue sous le régime de la présente loi et susceptible d'appel en vertu de l'article 14.

Federal Courts Immigration and Refugee Protection Rules (SOR/93-22)

Règles des cours fédérales en matière d'immigration et de protection des réfugiés (DORS/93-22)

APPEALS

20. (1) An appeal to the Federal Court of Appeal shall be commenced by filing a notice of appeal in Form IR-4 as set out in the schedule within

(a) 30 days after the pronouncement of the judgment under appeal; or

(b) such further time as may be ordered by a judge of the Federal Court — Trial Division.

(2) A notice of appeal shall be served on all parties and proof of service filed within 15 days after the notice of appeal is filed.

APPELS

20. (1) L'appel à la Cour d'appel fédérale est formé par le dépôt d'un avis d'appel selon la formule IR-4 figurant à l'annexe :

a) soit dans les 30 jours suivant le prononcé du jugement attaqué;

b) soit dans tout autre délai supplémentaire que peut fixer un juge de la Section de première instance de la Cour fédérale.

(2) L'avis d'appel est signifié à toutes les parties et la preuve de la signification est déposée dans les 15 jours suivant le dépôt de l'avis d'appel.

Notice of Appeal Form IR-R

<http://laws.justice.gc.ca/eng/SOR-93-22/page-11.html#anchorsc:1>

AVIS D'APPEL Formule IR — 4

<http://laws.justice.gc.ca/fra/DORS-93-22/page-11.html>