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# Dogs and Tails: Remedies in Administrative Law

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# Dogs and Tails: Remedies in Administrative Law

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## I. Introduction

From time to time, one hears the criticism that a particular court judgment has allowed the “tail” of the remedy to “wag the dog” of the substantive case. In traditional treatments of administrative law remedies, the metaphor could potentially be carried even further. One has the sense that the “tail” of what is called “judicial review” -- that is, court review of remedies that have been imposed by administrative law agencies and tribunals<sup>1</sup> -- has been allowed to “wag the dog” of the discipline's entire approach to remedies, and even administrative law. Some classic textbooks treat administrative law remedies as if they *begin* at the point at which a party to an administrative action seeks judicial review of that action through the courts.

The legal preoccupation with court action derives, to some extent, from law's discomfort with public decision-making bodies that work differently from courts. Law's role vis-à-vis administrative action is often focused on what tools courts have to police and intervene in administrative agencies' actions, to ensure that those agencies observe the rule of law and basic principles of justice. Legal scholars and practitioners (and, of course, judges) do not always trust administrative agencies to the degree they trust courts. Concerns for justice and the rule of law are legitimate. Yet, a tight focus on court action misses the hugely important first step in real-life administrative action: the varied and sometimes creative remedies that the tribunal itself may impose.

If courts and legal scholars sometimes seem to overemphasize the role of judicial review, legislators often simultaneously try to limit its practical use. One of the themes that runs through this chapter, and indeed this book, is the “dialogue” (some might say tug-of-war) that courts and legislators engage in as they try to steer the course of administrative law.<sup>2</sup> Administrative tribunals, although generally quite independent of the political process, are still products of the executive arm of government. Legislative drafters, in crafting tribunals' enabling statutes, may use various tools to limit or circumscribe the available scope of court intervention in tribunals' decision-making processes. One common mechanism is the privative clause.<sup>3</sup> Another technique, relevant in this chapter, is to provide for avenues of appeal of a decision that are internal to the tribunal itself. This limits recourse to judicial review, because the general (court-developed) rule is that recourse to the courts is only available after a party has exhausted all avenues of appeal, including internal appeals and any appeals to the courts provided for in the statute. By providing for appeal mechanisms, and in particular for internal appeal mechanisms with their own unique and sometimes uncourtlike structures, the executive is able to maintain a greater degree of control over the statutory scheme that it has constructed to address a particular public issue.

This chapter provides an overview of administrative law remedies as a whole, including not only judicial review but also tribunal decisions, internal and external appeals, enforcement mechanisms, and extralegal strategies. Discussing remedies near the beginning of an administrative

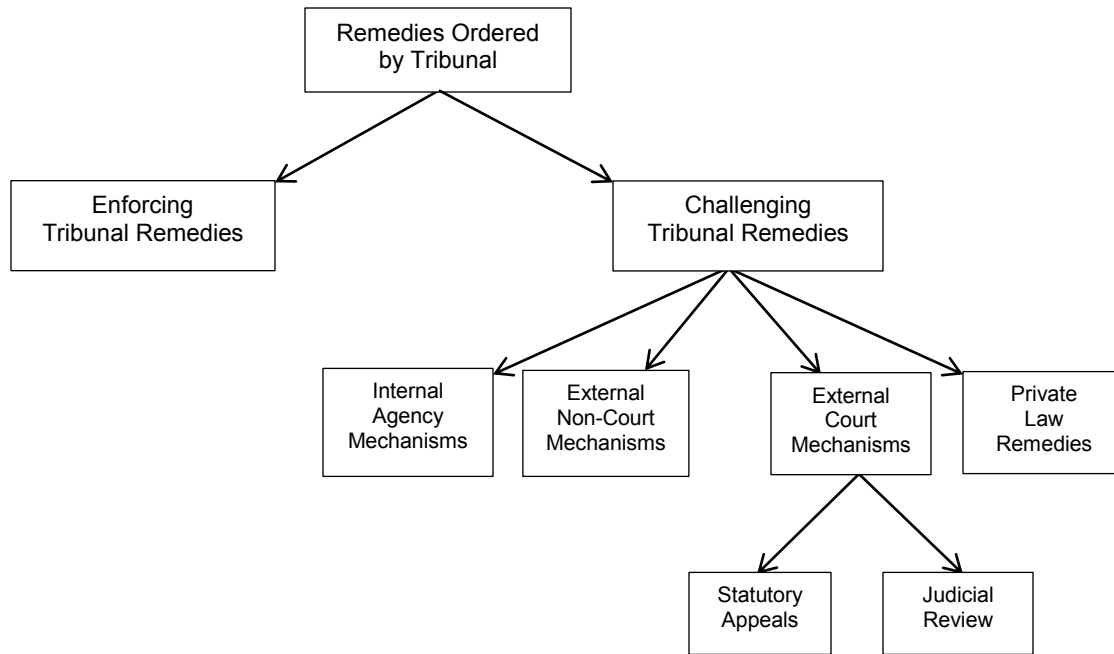
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<sup>1</sup> For simplicity I will use the term “tribunal” throughout to refer to the full range of administrative agencies, commissions, and other bodies. This is an oversimplification, because many administrative decision-makers do not take a tribunal form. Many administrative decisions are made by bureaucrats without a hearing or the court-style structure of a tribunal; administrative agencies also regularly make policy decisions that affect individual and social interests. However, the tribunal is perhaps the prototypical administrative structure for the purpose of understanding the remedies available to a party to tribunal action.

<sup>2</sup> See Mary Liston, Chapter 2.

<sup>3</sup> On privative clauses and substantive fairness, see Sheila Wildeman, Chapter 10, and Audrey Macklin, Chapter 9.

law textbook may seem unconventional. We have chosen this approach because understanding the available remedies is an important part of understanding what one is “getting into” in administrative law, and it provides a broad structural framework on which subsequent chapters can build. This chapter is meant to operate almost as a decision tree, to help guide students through the different stages where remedies issues arise. Figure 3.1 sets out the broad outlines of the chapter.



The chapter is divided into sections, with sections I and V providing an introduction and a conclusion, respectively. Section II, “Remedial Options at the Tribunal Stage,” section III, “Enforcing Tribunal against Parties,” and section IV, “Challenging Administrative Action” have not traditionally been located in the “remedies” chapter of administrative law texts (if they appear at all). As we shall see in section II, remedial options available to administrative agencies at the first stage differ from those available to courts and reflect the different composition of tribunals. The remedies available at the administrative stage are both more limited (in terms of the tribunal’s statute-derived authority to impose them) and, potentially, more expansive (as a consequence of tribunals’ particular expertise and their ability to remain seized of a matter over time). Section III looks at the ability of a party or tribunal to *enforce* a tribunal order against another party, either civilly or criminally. Section IV considers parties’ ability to *challenge* tribunal action. This includes internal appeal options, extralegal options, appeal to the courts, and, finally, the classic administrative law remedy of judicial review. In addressing these three aspects in a single chapter, the goal is to provide the reader, in a systematic and chronological fashion, with a conceptual frame of reference that includes the full range of remedial options available to parties before administrative tribunals.

## II. Remedial Options at the Tribunal Stage

Administrative tribunals are as varied as the topics on which they adjudicate, and it would be unwise to generalize about the remedial powers available to them. However, two general comments about available remedies can safely be made. First, because a tribunal does not have the general jurisdiction that a court does, the power to impose a particular remedy must be provided for in the tribunal's enabling statute. Second, most tribunals' composition, structure, and mandates are different from courts', and their approach to remedies reflects those differences. For example, certain tribunals' expertise with a more limited subject matter may help them to identify systemic problems or recurring patterns across multiple individual disputes. Their ability to stay involved in (that is, to remain "seized" of) a dispute over a longer period of time is well-established, and many tribunals are less constrained by formal rules than courts are in developing remedies. Together, on occasion, these factors allow tribunals to conceptualize and implement novel remedial strategies aimed at addressing the systemic problems they see.

### A. Statutory Authority

As a creature of statute, a tribunal cannot make orders that affect individuals' rights or obligations without authority from its enabling statute.<sup>4</sup> Therefore, the first step in determining a tribunal's remedial options is to look at the statute itself. If a tribunal makes orders outside the scope of its enabling statute, it is exceeding its jurisdiction, and those orders will be void.<sup>5</sup>

Many enabling statutes set out express lists of the remedies a tribunal may order. For example, tribunals often have the power to make declaratory orders, to order a party to repair a problem or to mitigate damage, or to order a party to comply with the tribunal's enabling statute. Licensing powers may also be given to tribunals in statutory regimes designed to protect the public (for example, through professional licensing qualifications or requirements for corporations issuing securities to public investors), or to manage natural resources (for example, fishing and forestry licenses). Some tribunals can appoint conciliators and otherwise assist in settling matters before them.<sup>6</sup> Some enabling statutes empower tribunals to impose significant fines and possible incarceration or provide for more serious quasi-criminal offences that must be prosecuted by the Crown.<sup>7</sup>

Other statutes accord their tribunals' broad, discretionary power to fashion the remedies they see fit. For example, the Ontario *Human Rights Code* gives the Ontario Human Rights Tribunal the discretion to order a party who has been found to discriminate to "do anything that, in the

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<sup>4</sup> *Att. Gen. of Can. v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735, [1980] S.C.J. No. 99 [*Inuit Tapirisat*].

<sup>5</sup> When two tribunals share jurisdiction over a particular statutory provision (e.g. a workers compensation tribunal and a human rights tribunal considering a statutory provision that concerns them both), a tribunal can also be found to exceed its jurisdiction if it deals with a claim that has already been "appropriately dealt with" by the other relevant tribunal. See *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422.

<sup>6</sup> E.g. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 47-48; *B.C. Employment Standards Act*, R.S.B.C. 1996, c. 113, s.78.

<sup>7</sup> See e.g. *B.C. Securities Act* ss. 161, 162, 155.

opinion of the Tribunal, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices.”<sup>8</sup>

Even where a tribunal's remedial power is less certain (that is, its enabling statute does not expressly permit a particular remedy and the tribunal has no broad discretionary power), one may try to argue that, as a matter of practical necessity a tribunal must have the remedial power to do the things its statute requires it to do.<sup>9</sup> However, orders for the payment of money, such as compensation or damages, fines, fees and levies, and costs, can generally only be ordered by tribunals that have the express statutory authority to do so. Tribunals also lack the equitable jurisdiction to order interim injunctions, although they may be given statutory authority to seek an injunction in court to enforce a statute. Finally, whether a tribunal has the power to grant remedies under the *Canadian Charter of Rights and Freedoms* is a separate question. As Evan Fox-Decent & Alex Pless explain in Chapter 12, the common law prescribes a separate test for determining whether particular administrative tribunals can grant remedies under section 24(1) of the Charter.<sup>10</sup> Moreover, some provinces have now enacted statutes that explicitly bar at least some tribunals from considering Charter issues.<sup>11</sup>

## B. Novel Administrative Remedies

Administrative tribunals and agencies vary widely in their structures and functions, but collectively they also differ from courts in important ways. The particular structures and qualities of administrative tribunals equally affect the kinds of remedies they are inclined, and empowered, to grant. This part of the chapter seeks to set out in broad strokes the kinds of remedies that tribunal-type administrative bodies in particular are likely to grant. The kinds of functions performed by tribunal-type administrative bodies -- namely, party-on-party dispute resolution, party-versus-agency enforcement and disciplinary proceedings, and other similar forms of hearings and decision-making -- tend to be the most common ways in which members of the public engage with administrative bodies. These functions also square especially well with the concept of “remedies”, defined by *Black's Law Dictionary* as “the field of law dealing with the means of enforcing rights and redressing wrongs.”<sup>12</sup>

However, the reader should be aware that tribunal-type administrative agencies are only one version of administrative agency operations. Parties may interact, be answerable to, and seek to influence administrative law agencies in other ways. Agencies' policy-making functions, in particular, are outside the scope of this chapter but should not be outside one's field of vision.<sup>13</sup> Through their statutory drafting choices, legislators regularly delegate detailed policy-making decisions to

<sup>8</sup> *Human Rights Code*, R.S.O. 1990, c. H.19, s. 41(1)(a).

<sup>9</sup> *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006]1 S.C.R. 140.

<sup>10</sup> See *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765.

<sup>11</sup> See e.g. the *B.C. Administrative Tribunals Act*, 36 S.B.C. 2004, c. 45, which provides that the majority of provincial tribunals do not have discretion to consider either constitutional questions generally, or at least constitutional questions relating to the Charter. The statute establishes a mechanism for referring constitutional questions to the courts. Sections 46.1- 46.3 of the Act impose similar restrictions on many tribunals' jurisdiction to apply the *B.C. Human Rights Code* to any matter before it on the basis that the Human Rights Tribunal is the more appropriate forum.

<sup>12</sup> *Black's Law Dictionary*, 8th ed., s.v. “remedies.”

<sup>13</sup> See Andrew Green, Chapter 4.

administrative tribunals. Many larger administrative agencies have formal policy-making departments, which generally operate at some remove from their tribunal departments. Administrative policy instruments can range from formal, binding interpretive releases to relatively informal, non-binding administrative guidance. Policy releases and guidelines have a direct impact on regulated entities. They are publicly available, and regulated entities are expected to know about them. Their release can be preceded by formal public consultation, providing those affected with a chance for input in advance.

Moreover, even when acting in their tribunal capacity, administrative tribunals often do, and should, take a broader perspective on a dispute than courts necessarily will. One way to understand the difference is in terms described by an American scholar, Abram Chayes, in the mid-1970s.<sup>14</sup> Chayes talked about courts, not administrative agencies. Nevertheless, his point illuminates the distinction between the two. Chayes described an emerging dichotomy between traditional conceptions of adjudication and an emerging judicial role in what he described as public law litigation. In traditional adjudication, a suit involves only the private parties before the court. It is self-contained and party-initiated. A dispassionate judge identifies the private right at issue on the basis of doctrinal analysis and retrospective fact inquiry. The judge imposes relief, understood as compensation for the past violation of an identifiable existing right. (This portrayal describes party-on-party dispute resolution, but this sort of rights-based approach also underpins tribunal-on-party regulatory action.)

By contrast, in public law litigation, Chayes argued that the debate is more focused on the vindication of broader statutory or constitutional policies. The lawsuit is not self-contained. The judge must manage complex trial situations involving not only the parties to the dispute but also the many and shifting parties not before the court who nevertheless may be affected by the suit's outcome. Fact inquiry is predictive, not retrospective. Through a combination of party negotiation and continuing judicial involvement, the judge fashions relief that is ad hoc, ongoing, and prospective. On the Chayes model, judges can become change agents under whose management specific cases can have far-reaching effects.

Like Chayes's public law adjudicatory model, administrative agencies -- even when acting as tribunals rather than policy-making bodies -- may have a broader mandate, and the ability to leverage a broader range of tools than a traditional assertion of rights-based claims provides. Many administrative bodies are explicitly charged with managing complex and often "polycentric" problems in a comprehensive manner. The Supreme Court of Canada has recognized this, pointing out that "while judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems [assigned to tribunals by their enabling statutes] require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties."<sup>15</sup> This has a few implications. First, it means that administrative tribunals have stronger theoretical justifications for remaining seized of a case over a longer period of time.<sup>16</sup> Second, it means that administrative tribunals may try

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<sup>14</sup> Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281; see also D.M. Gordon, "'Administrative' Tribunals and the Courts" (1933) 49 Law Q. Rev. 94 (defining a judicial function as one that determines "pre-existing" rights and liabilities by reference to a "fixed objective standard," as contrasted with an administrative function, in which rights and liabilities are created by "policy and expediency").

<sup>15</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46 at para. 36 (S.C.R.), (advising curial deference where the purpose of the enabling statute as a whole and the provision in question present the tribunal with this sort of question).

<sup>16</sup> See e.g. *Ontario (Ministry of Correctional Services) v. Ontario (Human Rights Comm.)* (2001), 39 C.H.R.R.

to develop remedies that address underlying structural or systemic problems, in a forward-looking rather than retrospective, rights-oriented way. This is not to say that courts do not also craft systemic, forward-looking remedies. Indeed, Chayes's point is that they do.<sup>17</sup> However, relative to courts, administrative tribunals may be especially well-placed to develop and implement novel remedies thanks to their subject-specific expertise, their field sensitivity, and their particular statutory mandates.

Just as important, administrative tribunal members are a more diverse group than judges are, especially in terms of their training and expertise. Some tribunals' enabling statutes stipulate that a certain portion of their tribunal members should be laypersons. For example, the federal *Competition Tribunal Act*<sup>18</sup> stipulates that the tribunal shall consist of not more than six members who are Federal Court judges and not more than eight other "lay" members. The statute goes on to stipulate that the governor in council should establish an advisory council, "to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs,"<sup>19</sup> to advise the Minister of Industry with respect to the appointment of lay members. The result is a tribunal with substantial expertise in economics and in commerce.<sup>20</sup> The tribunal's expertise also makes it more likely that its members will devise remedies that reflect their training and perspective and that may be more economic than legal.

Sometimes, the composition of tribunal membership reflects an explicit attempt to represent different interest groups; perhaps especially in subject areas where there is a perception that judges historically have been unsympathetic or not alive to some of the issues at stake. A classic example is a tripartite labour board, on which a representative of labour, a representative of management, and a third member must sit. A further example of a tripartite structure is the B.C. Review Board, charged under the *Criminal Code* of Canada with making dispositions with respect to individuals found unfit to stand trial or not criminally responsible on account of mental disorder. The B.C. *Mental Health Act* requires that each panel of the Review Board consists of a doctor, a lawyer, and a person who is *neither a doctor nor a lawyer*.<sup>21</sup> The kinds of remedies that such boards devise are likely to reflect the particular priorities and assumptions of its members and may not be limited to the set of strictly legal remedies that spring most easily to the legally trained mind.

Administrative law has also been affected by what is variously called "new public management" theory, neoliberalism, or administrative structures that "span the public-private divide." Effectively, these are mechanisms by which public structures, such as administrative tribunals, retain ultimate accountability for their programs but "outsource" the implementation of those programs to private or third-party actors. For example, hundreds of standards developed by private bodies are incorporated into law and used for enforcement and compliance purposes.<sup>22</sup>

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D/308 (Ont. Sup. Ct.), aff'd [2004] O.J. No. 5051 (C.A.) (holding that the Human Rights Tribunal of Ontario had extensive supervisory jurisdiction over its orders and could remain seized of a matter to recast its orders to deal with ongoing systemic racism at correctional facilities).

<sup>17</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 provides justification for structural injunction style remedies by courts.

<sup>18</sup> R.S.C. 1985, c. 19 (2nd Supp.), s. 3(2).

<sup>19</sup> *Ibid.*, s. 3(3).

<sup>20</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

<sup>21</sup> R.S.B.C. 1996, c. 288, s. 24.1 (3). Additional guidelines on qualifications for part-time members of the board can be found in "Recruitment, Screening and Appointment Procedures" (Vancouver: British Columbia Review Board, 2004), online: British Columbia Review Board <<http://www.bcrb.bc.ca/BCRB%20Recruitment%20ProceduresFinal.pdf>>.

<sup>22</sup> E.g. since 1927, the Canadian Standards Association's Canadian Electrical Code, Canadian Standards Association



Regulators also delegate enforcement and compliance functions to private bodies. For example, the Technical Standards and Safety Association (TSSA) is a delegated administrative authority for Ontario safety regulation covering elevating devices, amusement rides, boilers, and other products. The various provincial securities commissions also delegate the regulation of investment dealers and mutual fund dealers to their respective self-regulated organizations, the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association (MFDA). Many professionals, including doctors and lawyers, are regulated in Canada by their self-governing professional bodies, which are not government agencies.

These are deeply embedded features of Canadian law, especially in fields where there are highly technical product or process issues to be regulated. They are also controversial, particularly as their use becomes more widespread and it becomes clear that “technical” standards are not so easily divorced from larger social and policy consideration. Proponents of “new governance” style approaches argue that delegated implementation is the best way forward for administrative agencies that are otherwise at risk of being ineffective and out of touch; that it allocates action to those bodies best equipped and with the greatest information to perform tasks effectively; that public-private partnerships are capable of accomplishing public ends more efficiently than the public sector could acting alone; and that such partnerships do not eliminate the public state, but rather “save” it from its own bureaucratic flaws.<sup>23</sup> Those opposed argue that these mechanisms are privatization by another name; that they reduce accountability and the public sector’s responsibility for what should be publicly provided goods and services; and that they “hollow out” the state in potentially irretrievable ways.<sup>24</sup> We must leave this important debate for another day. At a practical level, though, parties to administrative actions should be aware that a constellation of ostensibly private actors may play more or less formal roles in real life public administration.

A combination of these factors -- ongoing seisin, a broad mandate, different expertise, and the trend toward crossing the public-private divide -- have led some tribunals to create innovative remedies. One cluster of innovations incorporates an independent third party in trying to develop and implement remedial measures within a subject organization or corporation where systemic problems seem to be significant. These remedies try to effectuate meaningful systemic change within the organization through sustained engagement with the problem by an impartial outsider. They have become fairly common among securities regulators in particular, in both Canada and the United States.<sup>25</sup> An important function of the third party in this context is to facilitate a deliberative

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Standard C22.1-06, has provided the standards for addressing shock and fire hazards of electrical products in Canada. It has been incorporated by reference into provincial regulations across the country: see e.g. Electrical Safety Regulation. B.C Reg. 100/2004. s. 20.

<sup>23</sup> Jody Freeman, “Private Parties, Public Functions, and the New Administrative Law” (2000) 52 Admin. L. Rev. 813; Richard Stewart, “Administrative Law in the Twenty-First Century” (2003) 78 N.Y.U. L. Rev. 437.

<sup>24</sup> See e.g. Harry Arthurs, “Public Law in a Neoliberal Globalized World: The Administrative State Goes to Market (and Cries ‘Wee, Wee, Wee’ All the Way Home)” (2005) 55 U.T.L.J. 797.

<sup>25</sup> Canadian examples include Settlement Agreement, Mackie Research Capital Corporation, 2010 BCSEC-COM 646 (22 November 2010), online:

<[http://www.bsc.bc.ca/comdoc.nsf/0/599572db2a73de48882577ed00618775/\\$FILE/2010%20BCSECCOM%20646.pdf](http://www.bsc.bc.ca/comdoc.nsf/0/599572db2a73de48882577ed00618775/$FILE/2010%20BCSECCOM%20646.pdf)>; Settlement Agreement, *In the Matter of Union Securities Ltd. and John P. Thompson* (18 April 2006), online:

<<http://docs.iroc.ca/DisplayDocument.aspx?DocumentID=71522FD9816A452F8246B58D8776B613&Language=fr>>

Order, *In the Matter of Agnico-Eagle Mines Limited* (28 April 2005), online: Ontario Securities Commission <<http://www.osc.gov.on.ca/en/10499.htm>>. In the United States, corporate monitorships have been imposed on dozens of corporations under the terms of deferred criminal prosecution agreements or regulatory enforcement settlements. On the effectiveness of corporate monitorships in that context, see Cristie Ford & David Hess,

process within the organization itself -- that is, to help the troubled organization confront and work through its problems internally. Some scholars argue that transparent, accountable, and broadly participatory dialogue of this nature, potentially facilitated by such third parties, is the most legitimate and most effective mechanism for making decisions in complex organizational structures.<sup>26</sup>

One effort at creating such a deliberative, third-party facilitated process took place within Ontario's Ministry of Correctional Services, as a response to a long-standing human rights complaint by an employee of the Ministry.<sup>27</sup> The complainant in that case, Michael McKinnon, was a person of native Canadian ancestry and a correctional officer with the Ministry of Correctional Services. In 1998, the Human Rights Tribunal of Ontario (then the Board of Inquiry) found that Mr. McKinnon suffered discrimination and harassment at his workplace, the Toronto East Detention Centre, because of his race, ancestry, and ethnic origin. The tribunal ordered a number of systemic remedies to address a "poisoned atmosphere." Among other things, the tribunal ordered that certain individual respondents be relocated, that the tribunal's order be publicized among Corrections employees, and that a human rights training program be established. The tribunal reconvened the hearing in 2002 because of Mr. McKinnon's allegations that the poisoned work environment had not improved. The issue for the tribunal was not whether the existing systemic remedies had been implemented in a strict sense, but whether they had been carried out in good faith.

After dealing with the question whether it could remain seized of the matter -- finding that it could, as affirmed later by the Ontario Court of Appeal<sup>28</sup> -- the tribunal ordered an additional range of remedies, including training for ministry and facility management; establishing a roster of external mediators to deal with discrimination complaints; and appointing, at the Ministry's expense, an independent third-party consult nominated by the Ontario Human Rights Commission (OHRC) to develop and oversee the delivery of training programs ordered. The third-party consultant was to be nominated by the OHRC, to be paid for by the Ministry, and to report to the tribunal. What makes these remedies interesting is that they are so different in character from traditional legal remedies, such as damages (in the civil context) or quashing of ministry or facility decisions (in the administrative law context). This looks like Chaye's public law litigation model: these remedies are prospective, open-minded, and subject to ongoing revision and elaboration. The tribunal's remedial orders -- the emphasis on training, and bringing in the expertise of external human rights consultants to work with the Ministry in developing that training -- seem geared less toward redressing the wrongs against Mr. McKinnon in particular, and more toward effecting wide-ranging, permanent, *systemic* change to institutional culture.

The *McKinnon* case became the longest-running human rights case in Canada but ultimately, it had a happy ending. In May 2005, the parties were still arguing over the scope of the third party

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"Corporate Monitorships and New Governance Regulation: In Theory, in Practice, and in Context" (2011) 33:4 Law & Pol'y 509-541. The Australian Competition and Consumer Commission was a pioneer in developing what are known there as "enforceable undertakings": Christine Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commissions Use of Enforceable Undertakings" (2004) 67 Mod. L. Rev. 209-246.

<sup>26</sup> See e.g. Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004); Michael C. Dorf, "Legal Indeterminacy and Institutional Design" (2003) 78 N.Y.U.L. Rev. 875; Lisa Blomgren Bingham, Tina Nabatchi & Rosemary O'Leary, "The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government" (2005) 65 Pub. Admin. Rev. 547.

<sup>27</sup> *McKinnon and Ontario Human Rights Commission v. Ontario (Ministry of Correctional Services) et al.*, [2002] O.H.R.B.I.D. No. 22 (22 November 2002), online: <<http://www.opseu.org/legal/MichaelMcKinnonDecision.pdf>>.

<sup>28</sup> *Ontario v. McKinnon*, [2004] O.J. No. 5051 C41678, [2004] CarswellOnt 5191 (C.A.).

consultant's responsibilities, with the consultant alleging that the Ministry was attempting to gain control over the process. The process of defining the consultant's mandate seemed itself to have become an adversarial contest that did not bode well for the consultant's ability to catalyze the hoped-for meaningful dialogue within the Ministry.<sup>29</sup> By 2007, the tribunal found that the Ministry had not been implementing the tribunal's previous orders in good faith,<sup>30</sup> and in February 2011 the tribunal found that a *prima facie* case had been made out that the Deputy Minister was in contempt for failing to implement the earlier orders. The tribunal exercised its discretion to state a case for contempt to the Ontario Divisional Court.<sup>31</sup> Before that could be heard, however, and after 23 years of litigation, Michael McKinnon and the Ministry finally reached a settlement. Under the August 2011 settlement agreement, the OHRC, the Ministry of Community Safety and Correctional Services, and the Ministry of Government Services all signed on to a three year Human Rights Project, which appears promising in its scope and structure. It establishes what looks like a meaningful training program, imposes high-level responsibility for adhering to human rights obligations, and includes all-important accountability mechanisms.<sup>32</sup>

The *McKinnon* settlement is cause for optimism, perhaps even celebration, but a good result for Mr. McKinnon was not a foregone conclusion. It might not have happened in the absence of a factor external to the tribunal process -- the appointment of a new Deputy Minister of corrections with a mandate to professionalize the service and improve its record.<sup>33</sup> Nor is a 23-year-long litigation action an unalloyed victory, no matter what its outcome. In spite of its resolution, *McKinnon* raised and still leaves us with some challenging questions: is it possible to effect real, substantive "good faith" compliance in a truly recalcitrant employer like Corrections seemed to be (prior to the appointment of a new Deputy Minister)? Is it appropriate to use law to simultaneously enforce rights, redress wrongs, and "cure" systemic problems? Is it appropriate for a tribunal to continue crafting new orders in an effort to achieve an optimal outcome? Can external third parties really change culture and create meaningful dialogue? If not, what legal options do we have left -- through tribunal remedies or otherwise? As a final note, both tribunal-side and policy-side administrative functions have been affected by globalization. The effects of globalization mean that domestic administrative tribunals no longer act entirely free of international and transnational agreements, organizations, standard-setting bodies, and national commitments. Some of the most notable international examples come out of the European Union, whose policy and harmonization directives and court decisions have had a direct impact on European nation states' domestic administrative law. In Canada, as well, international obligations have had an impact on federal labour policies and

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<sup>29</sup> Human Rights Tribunal of Ontario, Interim Decisions and Rulings, *Ontario Human Rights Commission and Michael McKinnon and Ontario Ministry of Correctional Services et al.*, 2005 HRTO 15 (CanLII) ( 19 May 2005), online: <<http://www.canlii.org/en/on/onhrt/doc/2005/2005hrto15/2005hrto15.html>>.

<sup>30</sup> *McKinnon v. Ontario (Minister of Correctional Services)*, 2007 HRTO 4.

<sup>31</sup> *McKinnon v. Ontario (Correctional Services)*, 2011 HRTO 263.

<sup>32</sup> The Human Rights Project Charter that forms the backbone of the settlement is available online: Ontario Human Rights Commission <<http://www.ontla.on.ca/library/repository/mon/25008/312240.pdf>>.

<sup>33</sup> Note that the Toronto East Detention Centre is not the only facility at which correctional officers have alleged that they suffer discrimination and harassment based on their race or ancestry. In February 2012, a correctional officer at Toronto's Don Jail named Leroy Cox filed a complaint with the Ontario Human Rights Tribunal, alleging a campaign of hate mail is coming from fellow correctional officers going back to 2004. Mr. Cox claims that the mail is coming from fellow correctional officers. Like Mr. McKinnon, Mr. Cox alleges that his employer has not taken adequate affirmative steps to respond to the problem, and that the majority of Don Jail correctional officers do not participate in its ostensibly mandatory human rights training program. He also alleges, *inter alia*, that the Ontario Public Service Employees Union actively undermined an earlier investigation into the incidents. See <http://www.cbc.ca/news/pdf/Affidavit-LeroyCox.pdf>.

their subsequent administration through a variety of public bodies,<sup>34</sup> and international human rights norms have influenced the substantive review of administrative decisions.<sup>35</sup> Relevant international or transnational standards are sometimes set by governments acting together (such as the North American Free Trade Agreement [NAFTA] and its associated side agreements) and sometimes by independent, private, or non-governmental bodies filling lacunae in international law (as is the case with forest practices certification).<sup>36</sup> Looking at these developments, some scholars have even begun to herald the birth of a “global administrative law.”<sup>37</sup>

The conversation about proper tribunal action spans multiple disciplines -- law, public policy, and organizational and political theory -- and it is taking place at the levels of practice and theory, both within tribunals and with respect to them. The forces that influence tribunals produce remedies that can be more dynamic and varied than the ones we are accustomed to seeing in the courts. Court review of tribunal remedies by means of judicial review serves a valuable “sober second thought” function, based on important rule of law values, but court action is only one facet of administrative law.

### III. Enforcing Tribunal Orders Against Parties

After a tribunal makes a decision and imposes an order, assuming no one challenges that decision,<sup>38</sup> another set of administrative law remedies becomes available: the enforcement powers. These may be invoked where a tribunal needs to enforce its order against a party that is not complying with the order. This is not uncommon among self-regulatory organizations such as professional licensing bodies, where the tribunal acts against particular individuals rather than adjudicating disputes between parties. Alternatively, a party to a multiparty dispute before a tribunal may want to enforce the tribunal's order against another party on which the order was imposed. Criminal prosecution is also a possibility. Of course, regardless of any broader social patterns or systemic factors operating, tribunal orders can only be enforced against the parties on which they are imposed.

#### A. The Tribunal Seeks to Enforce Its Order

Rarely, a tribunal may enforce its own orders. One tribunal that has the power to enforce its own orders -- for example, an order for civil contempt -- is the federal Competition Tribunal.<sup>39</sup>

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<sup>34</sup> Canada, Commission on Labour Standards Review, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau: Human Resources and Skills Development Canada, 2006) at 51 -52, online: [http://www.hrsdc.gc.ca/eng/labour/employment\\_standards/fls/pdf/final\\_report.pdf](http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/final_report.pdf)

<sup>35</sup> See Gerald Heckman, Chapter 14.

<sup>36</sup> Errol Meidinger, “The Administrative Law of Global Private-Public Regulation: The Case of Forestry” (2006) 17 E.J.I.L. 47.

<sup>37</sup> Benedict Kingsbury, Nico Krisch & Richard B. Stewart, “The Emergence of Global Administrative Law” (2005) 68 Law & Contemp. Probs. 15.

<sup>38</sup> See section IV.

<sup>39</sup> *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 8(1). See *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, [1992] S.C.J. No. 64, 92 D.L.R. (4th) 609 [*Chrysler Canada*] (holding that clear and unambiguous statutory language can override the common-law rule that only superior courts have the

Some other tribunals are also given the authority to enforce monetary obligations, such as requiring unpaid wages or family maintenance to be paid, imposing liens, making garnishment orders, seizing assets, or even suspending driving privileges.<sup>40</sup> However, any enforcement powers a tribunal has must be granted to the tribunal in its enabling statute, and that delegation of enforcement power must pass constitutional scrutiny. For example, a provincially created tribunal cannot have criminal (and therefore federal) enforcement powers.<sup>41</sup>

In British Columbia, certain sections of the *Administrative Tribunals Act* (ATA)<sup>42</sup> are intended to assist tribunals in obtaining compliance with their orders. For example, s. 18 permits certain tribunals to schedule a hearing, make a decision, or dismiss an application if a party fails to comply with an order (presumably, an order to appear). Section 31 (1)(e) permits some tribunals to dismiss an application if the applicant fails to comply with a tribunal order. Section 47, which permits some tribunals to make orders for payment of costs, also allows some tribunals, under s. 47(1)(c), to require a party to pay the *tribunal's* actual costs “if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive.” Orders for costs, on being filed in the court registry, have the same effect as a court order for the recovery of a debt (s. 47(2)).

More commonly, the tribunal must make an application in court to enforce any order it makes. . Where a party has disobeyed a tribunal order, the statute provides that the tribunal may apply to court for an order requiring the person to comply.<sup>43</sup> The tribunal's order is presumed to be valid and correct if the party disobeying it failed to file an appeal (if one is available) or if the party appealed and lost.<sup>44</sup> Other statutes allow tribunal orders to be registered with the court, sometimes only with leave.<sup>45</sup> In Québec, a distinct procedure known as homologation gives courts the authority to compel individuals to fulfill tribunal orders. Courts can only access homologation if it is expressly provided for in the tribunal's enabling statute.<sup>46</sup> The omnibus *Statutory Powers Procedure Act* in Ontario allows tribunals to state a case for contempt to the Ontario Divisional Court, as happened in the *McKinnon* case in 2011.

Once a tribunal has successfully converted its order into a court order through one of the mechanisms above, the order can be enforced in the same manner as a court judgment. Among other things, this means that the court can initiate contempt proceedings if the party continues to disregard the order.<sup>47</sup> Contempt proceedings may be available if a party fails to abide by a tribunal's

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power to punish for contempt and that the wording of the *Competition Tribunal Act*, s. 8(1) (as it then was), which conferred on the tribunal jurisdiction “to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto,” constituted such clear and unambiguous statutory language).

<sup>40</sup> E.g. *Employment Standards Act*, R.S.B.C. 1996, c. 113, ss. 87-101; *Maintenance Enforcement Act*, S.N.S. 1994-95, c. 6, ss. 19,27-30.

<sup>41</sup> *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, [1996] 2 W.W.R. 1 (S.C.C.); *United Nurses of Alberta v. Alberta (Attorney General)*, [1992]1 S.C.R. 901, [1992] S.C.J. No. 37, 89 D.L.R. (4th) 609.

<sup>42</sup> S.B.C. 2004, c. 45 [ATA].

<sup>43</sup> See e.g. *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 13 and 19, respectively.

<sup>44</sup> *British Columbia (Provincial Agricultural Land Commission) v. Pickell*, 1980 CanLII 509 (1980), 109 D.L.R. (3d) 465 at 473 (B.C.S.C.); *Estevan Coal Corp. v. Estevan (Rural Municipality No.5)*, [2000] 8 W.W.R. 474, (2000), 199 Sask. R. 57 (C.A.).

<sup>45</sup> See e.g. *Administrative Tribunals Act*, *supra* note 11, ss. 47, 54.

<sup>46</sup> See e.g. *Regulation respecting the conciliation and arbitration procedure for the accounts of members of the Corporation professionnelle des physiothérapeutes du Québec*, R.R.Q., c. C-26, r. 141.1. For a more in-depth discussion on homologation, see René Dussault & Louis Borgeat, *Administrative law: A Treatise*, 2d ed., vol. 2, trans. by Murray Rankin (Toronto: Carswell, 1985) at 283.

<sup>47</sup> Tribunals themselves may have the power to make orders for *in facie* contempt (contempt “in the face of” the court during the proceedings) because this power is implicit in the designation of a tribunal as a court of record. If a

procedural order (for example, by failing to appear as a witness or to produce documents) or a tribunal's final substantive order.<sup>48</sup> Contempt can be civil or, where the conduct constitutes an intentional public act of defiance of the court, criminal.<sup>49</sup> In a contempt proceeding, the judge does not inquire into the validity of the tribunal's underlying order. However, only violations of "clear and unambiguous" tribunal orders will form the basis of a contempt order.<sup>50</sup> A court can also refuse to hold a party in contempt until an appeal or judicial review application (discussed in section IV below) is completed, although parties can be required to pay moneys into court in the meantime.<sup>51</sup>

Note that legislators seem content to house tribunal order enforcement powers in the courts, even while using privative clauses to try to limit the availability of judicial review from administrative tribunals. For the legislative drafter, then, recourse to courts to *enforce* tribunal orders seems to be acceptable, although recourse to courts to *challenge* tribunal orders is less so. There is history at work here, along with separation of powers concerns and the legislator's appreciation for courts' existing enforcement powers. Arguably, this drafting choice also signals that legislators may be most concerned about conserving scarce judicial resources, when those judicial resources might be deployed to undermine, rather than buttress and reinforce the authority of the tribunals the legislation creates.

## B. A Party Seeks to Enforce a Tribunal's Order

A party to an administrative action may also bring an action against another party in court, to enforce the tribunal's order. For example, a group of teachers may seek to enforce an arbitrator's order that a school board annually set aside certain funds for teachers' professional development.<sup>52</sup> Sara Blake has suggested that the party's success "may depend on whether the tribunal order is of a type that a court would enforce, and whether the court believes it should enforce the tribunal order in the absence of any statutory procedure for obtaining court assistance."<sup>53</sup> In other words, courts may be more likely to grant a private application to enforce tribunal order where the court recognizes the tribunal's order as similar to the kind of order that a court might make. However, the private applicant will first have the difficult task of convincing the court that it should intervene in this way, even though there may be no statutory provision explicitly empowering it to do so.

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tribunal is not designated as such, then the power to punish for *in facie* contempt, like the power to punish for *ex facie* contempt (contempt outside the proceedings), must be explicitly conferred by the enabling statute. *Chrysler Canada*. *supra* note 38.

<sup>48</sup> See e.g. *Statutory Powers Procedure Act*, *supra* note 42, s. 13.

<sup>49</sup> *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, [1992] S.C.J. No. 37, 89 D.L.R. (4th) 609.

<sup>50</sup> *Chrysler Canada*, *supra* note 38; *United Food & Commercial Workers, local 1252 v. Western Star*, [1995] N.J. No. 334, 130 D.L.R. (4th) 538 (S.C.(T.D.)); *Toronto Transit Commission v. Ryan*, [1998] O.J. No. 51, 37 D.R. (3d) 266 (Gen. Div.).

<sup>51</sup> *Boucher v. Logistik Unicorp Inc.*, [2001] J.Q. No. 64 (C.A.), leave to appeal to S.C.C. refused [2001] C.S.C.R. No. 115; *Sodema Inc. v. Sarafian*, [2006] J.Q. No. 5460 (C.A.).

<sup>52</sup> *Melia v. Moose Jaw Roman Catholic Separate School District No. 22*, [1979] S.J. No. 568, 108 D.L.R. (3d) 113 (C.A.); *Twentieth Century-Fox Corp. Ltd. v. Broadway Theatres Ltd.*, [1951] 3 D.L.R. 105 (Sask. C.A.).

<sup>53</sup> Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham: LexisNexis Butterworths, 2006) at 226.

### C. Criminal Prosecution

Many statutes provide for quasi-criminal prosecution of persons who disobey tribunal orders. Quasi-criminal offences are prosecuted by the federal or provincial Crown, as appropriate, and they carry penalties that include fines and imprisonment. For example, a person who commits an offence under s. 155 of the B.C. *Securities Act*<sup>54</sup> is liable to a fine of not more than \$3 million, to imprisonment for no more than three years, or both. Indictable offences under the federal *Fisheries Act* may attract, at their upper end, fines of up to \$500,000 or imprisonment for up to two years, or both.<sup>55</sup>

In the absence of other provisions, it is a criminal offence to disobey a lawful order of a federal or provincial tribunal. The federal *Criminal Code* states:

127 (1) Everyone who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, Other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding two years;

or

(b) an offence punishable on summary conviction.<sup>56</sup>

The *Criminal Code* provision is only available where no other penalty is expressly provided by law. What does this mean? Superior courts' own contempt powers do not count as an "other mode of proceeding" for purposes of this section.<sup>57</sup> Most administrative tribunals do not have the ability to make contempt orders on their own. Therefore, the *Criminal Code* provisions should apply where no "punishment or other mode of proceeding" is explicitly set out in the *tribunal's enabling statute*. This has been held not to violate the constitutional separation of powers, even when dealing with provincial tribunals, on the basis that the provincial tribunal is still making orders that are non-criminal. Parliament, acting within its sphere, is the one that has decided that breach of those provincial provisions is a criminal offence.<sup>58</sup>

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<sup>54</sup> R.S.B.C. 1996, c. 418.

<sup>55</sup> R.S.C. 1985, c. F-14, s. 78(b).

<sup>56</sup> R.S.C. 1985, c. C-46, s. 127(1) (emphasis added).

<sup>57</sup> Unless the court's contempt powers are laid out comprehensively in the Rules of Court: *R. v. Clement*, [1981] 2 S.C.R. 468, [1981] S.C.J. No. 93; *R. v. Mulhall*, [2001] O.J. No. 5237 (Ct. J.). But see *Telus Communications Inc. v. Telecommunications Workers Union*, [2007] B.C.A. 413, 2007 Carswell BC 1851.

<sup>58</sup> *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901.

## IV. Challenging Administrative Action

A party to an administrative action may also decide to challenge that administrative action directly. The possible bases for a party's challenge are described in other chapters in this text. For example, a party may challenge the tribunal's jurisdiction, its procedure, its impartiality, its exercise of discretion, or the substance of its final decision. Each of these usually amounts to a direct or indirect challenge to the remedies or orders the tribunal imposes. Sometimes, these challenges are made through applications for judicial review. However, judicial review is only one method challenging administrative action. Applications for judicial review, like litigation generally, can be expensive and drawn-out affairs. Moreover, it is important to be realistic about what can be achieved through judicial review. In order to bring a successful judicial review application, a challenger must be aware of the specific remedial mechanisms available and how those mechanisms will help him or her achieve the result that he or she wants. For example, a motion to quash a tribunal decision for lack of procedural fairness, if successful, will likely lead to the court sending the matter back to the original tribunal for rehearing.<sup>59</sup> This result may not satisfy the challenger. Even assuming that procedural fairness is observed the second time, there is no guarantee that the party will receive the substantive outcome he or she seeks.

For these reasons, parties seeking to challenge administrative action should consider their options carefully. This part of the chapter outlines the various mechanisms available, including both non-court mechanisms and court-based mechanisms. We begin first with mechanisms that are internal to the administrative apparatus itself, then move to mechanisms that exist externally to both the administrative agency and courts (for example, ombudspersons), finally turning to court-based mechanisms. Here we distinguish between appeals and judicial review and discuss private law remedies that may exist against tribunals.

### A. Internal Tribunal Mechanisms

A party considering a challenge to tribunal action will need to understand the particular tribunal's structure and capacity, as established by its enabling statute. All tribunals can fix certain things, such as clerical errors or factual errors due to mistake or dishonesty, without express statutory authority. This is sometimes called the "slip rule."<sup>60</sup> Tribunals can also "change their minds" until the time a final decision is made. Therefore, what constitutes a "final decision" is important. For example, if a statute provides that final decisions must be in writing, then only written decisions will constitute final decisions. Preliminary rulings can also be changed until the final decision on a matter has been made.<sup>61</sup>

Some enabling statutes specifically provide tribunals with the ability to reconsider and rehear decisions they have made. This is most common where a particular tribunal has ongoing regulatory responsibility over a particular domain, such as public utilities regulation or employer-employee relations. For example, the *Public Service Labour Relations Act* provides, "[s]ubject to subsection (2)

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<sup>59</sup> See Grant Huscroft, Chapter 5.

<sup>60</sup> See e.g. *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at 861; *Muscillo Transport Ltd. v. Ontario (Licence Suspension Appeal Board)* (1997), 149 D.L.R. (4th) 545 at 553 (Ont. Gen. Div.), aff'd [1998] O.J. No. 1488 (C.A.).

<sup>61</sup> *Comeau's Sea Foods Limited v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12.



[prohibiting retroactive effect of any rights acquired], the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.”<sup>62</sup> Absent such express statutory authority, however, for policy reasons that favour finality of proceedings, a tribunal cannot reconsider or alter a final decision made within its jurisdiction. Once it has made a final decision, the tribunal is *functus officio*.<sup>63</sup>

Some administrative tribunals are part of multitiered administrative agencies. Those tribunals’ enabling statutes may provide for appeals internal to the administrative agency itself. For example, parties appearing before Canada’s Immigration and Refugee Board Immigration Division may appeal to its Immigration Appeal Division.<sup>64</sup> Similarly, provincial *Securities Acts* across the country provide that persons directly affected by decisions made by Securities Commission staff may appeal to (or, in some statutes, seek “review” from) the commission itself, to which staff reports.<sup>65</sup> Again, parties should be aware that internal appellate structures may not look much like courts.

These internal review proceedings do not preclude subsequent appeals to the courts. Indeed, both the *Immigration and Refugee Protection Act* and the various *Securities Acts* mentioned above provide for appeals under limited conditions from their internal appellate bodies to the courts. These are called “statutory appeals” where the statute does not provide for an appeal to the courts, the parties’ only access to the courts is by means of judicial review. However, as discussed in more detail below, where a statute provides for reconsideration or appeals, a challenger should generally exhaust those avenues before making an application for judicial review.

One of the more interesting innovations in internal administrative appeals was created in 1996, with the passage of Québec’s *Act Respecting Administrative Justice*.<sup>66</sup> The statute creates the Tribunal administratif du Québec (TAQ), a supertribunal that hears “proceedings” brought against almost all administrative tribunals and public bodies in the province, including government departments, boards, commissions, municipalities, and health-care bodies.<sup>67</sup> As a practical matter, this means that there is now one main appellate/review body for administrative matters in the province. According to the Act, the tribunal’s purpose is “to affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility and to safeguard the fundamental rights of citizens.”<sup>68</sup> It is an administrative (that is, executive branch) institution, not a judicial one, but its remedial powers include judicial review-style options and, surprisingly, the ability to substitute its decision for an original tribunal’s: “[i]n the case of the contestation of a decision, the Tribunal may confirm, vary or quash the contested decision and, if appropriate, make the decision which, in its opinion, should have been made initially.”<sup>69</sup> Where the TAQ has jurisdiction to

<sup>62</sup> *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 43.

<sup>63</sup> *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Because rights of appeal from tribunals tend to be more limited than from courts, the *functus officio* doctrine should be more flexible and less formalistic for such tribunals.

<sup>64</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 62-71, 174-175. Recourse to the courts is only available with leave of the Federal Court: *ibid.*, s. 72.

<sup>65</sup> See e.g. *Ontario Securities Act*, R.S.O. 1990, c. S.5, s. 8(2); *Alberta Securities Act*, R.S.A. 2000, c. S-4, s. 35(1); *British Columbia Securities Act*, *supra* note 49, ss. 165(3), 167(1).

<sup>66</sup> R.S.Q. c. J-3.

<sup>67</sup> *Ibid.*, s. 14. The use of the word “proceedings” rather than “appeal” or “review” indicates that the tribunal can hear appeals in the traditional sense, but it can also hear various demands that look more or less like review or *révision*. The scope and nature of the available proceedings depend on the wording of each tribunal’s enabling statute.

<sup>68</sup> *Ibid.*, s. 1.

<sup>69</sup> *Ibid.*, s. 15.

consider a proceeding, claimants should exhaust the remedies available from it rather than trying to circumvent the administrative process.<sup>70</sup> Avenues of appeal from the TAQ to the Superior Court of Québec are limited.<sup>71</sup>

## B. External Non-Court Mechanisms

A party considering a challenge to administrative action should not overlook non-legal avenues. For example, ombudspersons or similar positions exist by statute in every Canadian province. There is no overarching federal ombudsperson, but some federal departments and subject areas have their own specialized ombudspersons. For example, in 2007 and 2008 respectively, the federal government created a Federal Ombudsman for Victims of Crime and a Taxpayers' Ombudsman.<sup>72</sup> Generally, the mandate of an ombudsperson is to provide a forum for citizens to bring their complaints regarding the way that government departments and agencies have dealt with them. There is no charge to make a complaint to an ombudsperson. Ombudspersons have discretion as to whether or not they will investigate a complaint.

An ongoing issue has been the degree to which an ombudsperson can assert jurisdiction with respect to administration tribunal decisions and processes (as opposed to the general run of government departments and ministries -- that is, public servants not possessing the statutorily created decision-making structure that tribunals have). Most legislation defines the ombudsperson's jurisdiction as being over "matters of administration," and courts have tended to define "administration" expansively as involving generic administrative processes, not simply as the antonym of "judicial" processes.<sup>73</sup> Among the tribunals themselves, the range of bodies subject to an ombudsperson's investigatory powers can be quite broad. In Ontario, for example, the courts have held that even largely independent bodies can be subject to ombuds review if the government pays its members' wages.<sup>74</sup> However, most ombuds statutes provide that an ombudsperson is not authorized to investigate a tribunal's decision until after any right of appeal or review on the merits has been exercised or until after the time limit for doing so has expired.<sup>75</sup>

<sup>70</sup> *Okwuobi et al. v. Lester B. Pearson School Board; Casimir v. Québec (Attorney General); Zorrilla v. Québec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257.

<sup>71</sup> The tribunal is composed of four divisions (social affairs, immovable property, territory and environment, and economic affairs), but, per s. 159 of the Act, an appeal to the Québec court is only available from the immovable property division and from decisions regarding the preservation of agricultural land. This tracks the appeals that were available from those tribunals before the TAQ was created; the TAQ replaced a plethora of administrative appeal bodies, but was not intended to increase the number of available appeals to the courts.

<sup>72</sup> Their respective websites are online: Federal Ombudsman for Victims of Crime <<http://www.victimsfirst.gc.ca/index.html>> and Taxpayers' Ombudsman <<http://www.oto-boc.gc.ca/menu-eng.html>>. The gender-neutral term "ombudsperson" seems to have become the standard term in Canada, although the word "ombudsman" is an old Scandinavian word, not a gender-specific English word. Other gender-neutral terms include "ombuds office" and simply "ombuds."

<sup>73</sup> For example, in *British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447, the SCC ruled that policy-making activities of provincial Crown corporations were "matters of administration" for the purposes of the *Ombudsman Act*. The Ontario Court of Appeal has interpreted the ombudsperson's jurisdiction over "administration of a government agency" to include investigations into matters determined by administrative tribunals: *Ombudsman of Ontario v. Ontario (Labour Relations Board)* (1986), 44 D.L.R. (4th) 312 (Ont. C.A.).

<sup>74</sup> *Ontario (Ombudsman) v. Ontario (Health Disciplines Board)* (1979), 104 D.L.R. (3d) 597 (Ont. C.A.).

<sup>75</sup> See e.g. the *Yukon Ombudsman Act*, R.S.Y. 2002, c. 163, s. 12. The *Manitoba Ombudsman Act*, C.C.S.M. c. O45, s. 18(d) and the *Saskatchewan Ombudsman and Children's Advocate Act*, R.S.S. 1978, c. O-4, s. 15(1)(d) provide

Several other public officials similar to ombudspersons also exist, including freedom of information and privacy commissioners, the auditor general, provincial auditors, and human rights commissioners. While harder for individuals to instigate, public inquiries are another mechanism for challenging government conduct.<sup>76</sup>

### C. Using the Courts: Statutory Appeals

The ability to challenge administrative action in the courts is a mixed, but necessary, blessing. On the downside, courts may be reluctant to embrace novel, noncourtlike, yet potentially effective remedies devised by specialized tribunals. The richness and creativity that characterize administrative law remedies could be stifled by over-judicialized, overly interventionist court scrutiny. This is one reason that the internal appeal mechanisms described above make sense. On the other hand, there are times – for example, during national emergencies -- when executive action unquestionably needs to be subject to the rule of law, as applied by independent courts.<sup>77</sup> As with so many things in administrative law, context matters in thinking about the legitimacy of each alternative. There may be times when it makes sense to maintain the integrity of the administrative regime through all internal appeal stages. There may also be times when what is required is faster and unapologetic recourse to the courts -- for example, allowing a party to “leapfrog” the internal appeals and proceed directly to judicial review.

There are two main ways by which a party to a tribunal action can access the courts to challenge that action: appeal and judicial review. Appeal mechanisms -- either to internal administrative appellate bodies or to courts -- are the norm. Judicial review is the exception.<sup>78</sup> Significantly, is also discretionary. The scope of a possible appeal is confined to what the statute expressly provides. This means that, even though courts struggle sometimes with knotty issues in taking appeals from administrative tribunals, relative to judicial review it is easier to predict the availability and likely outcome of an appeal. By contrast, judicial review doctrine is the product of decades of contentious court battles, modified from time to time by statute, directly pitting “legal” values of justice and the rule of law against “democratic” values and legislative intent, as well as “bureaucratic” values such as efficiency and expertise. Even the seemingly basic questions of whether judicial review is available in a particular situation, and what remedies are available through judicial review, have been shaped by this debate.

#### *1. Is an Appeal Available?*

Below are the major questions a party must ask to determine whether an appeal from a tribunal to the courts is available to him or her.

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that rights of appeal or review preclude an ombudsperson’s intervention “unless the Ombudsman is satisfied that in the particular case it would have been unreasonable to expect the complainant to resort to the tribunal or court,” although the time limitation for appeal or review must still have run.

<sup>76</sup> See Peter Carver, Chapter 16.

<sup>77</sup> See Mary Liston, Chapter 2, The national security context is also treated differently: consider *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 [*Khadr*].

<sup>78</sup> David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 462.

a. Does the Tribunal's Enabling Statute Provide for a Right of Appeal?

Courts have no inherent appellate jurisdiction over administrative tribunals.<sup>79</sup> A right to appeal must be provided for in a tribunal's enabling statute. If a statute does not so provide, a dissatisfied party will have to access the courts by way of judicial review. Moreover, parties generally may not appeal interlocutory rulings (for example, on jurisdiction, procedural or evidentiary issues, or bias).<sup>80</sup> To be appealable, the tribunal's decision must decide the merits of the matter or otherwise be a final disposition of it.<sup>81</sup>

Usually, a tribunal's enabling statute will also set out the court to which tribunal orders may be appealed. For federal tribunals, appeals are usually taken to the Federal Court or the Federal Court of Appeal.<sup>82</sup> Appeals from provincially constituted tribunals may be taken to the province's trial court of general jurisdiction,<sup>83</sup> to a divisional court,<sup>84</sup> or to the court of appeal.<sup>85</sup> Rarely, a statute will provide a right (seldom exercised) to appeal a tribunal decision to Cabinet itself.<sup>86</sup>

b. What Is the Scope of Available Appeal?

Unlike judicial review, however, at least where there is a broadly worded statutory right of appeal, courts are not expected to defer to tribunals "because of the mere fact that the *legislature designated them* – and not the courts – as the decision-makers of first instance."<sup>87</sup> That scope varies enormously from tribunal to tribunal. Some statutes permit complete *de novo* review of a tribunal's decision, while others will be limited to issues of law base entirely on the record. In other words, an appellate court's jurisdiction in reviewing *tribunal* decisions may be different in scope from an appellate court's jurisdiction in reviewing lower *court* decisions. Appellate courts generally review trial court decisions for error of law or, more rarely, for palpable and overriding error in a finding of fact. By contrast, a court that has been designated to take appeals from a tribunal's decision must look to the tribunal's enabling statute to determine the breadth and scope of its appellate powers.

Arguably, the scope of an available appeal is determined by how closely the tribunal's subject matter, and its expertise, mirror the mandate and expertise of general courts. Statutes are more likely to provide a right of appeal to the courts where the tribunal has the power to affect individuals' common-law rights (for example, human rights tribunals, land-use planning tribunals, and

<sup>79</sup> *Medora v. Dental Society*, [1984] N.B.J. No. 236, 56 N.B.R. (2d) 145 at 147 (C.A.).

<sup>80</sup> *Mary & David Goodine Dairy Farm v. New Brunswick (Milk Marketing Board)*, [2002] N.B.J. No. 177, 217 D.L.R. (4th) 708 (C.A.); *Roosma v. Ford Motor Co. of Canada Ltd.* (1988), 66 O.R. (2d) 18 (Div. Ct.); *Newfoundland Transport Ltd. v. Newfoundland (Public Utilities Board)*, [1983] N.J. No. 92, 45 Nfld. & P.E.I.R. 76 at 78 (C.A.); *contra*, *Fox v. Registered Nurses' Assn.*, [2002] N.S.J. No. 376, 207 N.S.R. (2d) 330 (C.A.).

<sup>81</sup> *Ontario (Human Rights Commission) v. Ontario Teachers' Federation*, [1994] O.J. No. 1585, 19 O.R. (3d) 371 (Gen. Div.); *Prince Albert (City) v. Riocan Holding Inc.*, [2004] S.J. No. 337, 241 D.L.R. (4th) 308 (C.A.).

<sup>82</sup> Respectively, see e.g. *Trade-marks Act*, R.S.C 1985, c. T-13, s. 56; *Competition Tribunal Act*, R.S.C 1985 (2<sup>nd</sup> Supp.), c. 19, s. 13.

<sup>83</sup> See e.g. *Nunavut's Travel and Tourism Act*, R.S.N.W.T. 1988, c. T-7, s. 8.

<sup>84</sup> See e.g. *Ontario's Expropriations Act*, R.S.O. 1990, c. E.26, s. 31.

<sup>85</sup> See e.g. *Newfoundland and Labrador's Law Society Act*, 1999, S.N.L. 1999, c. L-9.1, s. 55.

<sup>86</sup> See e.g. *Broadcasting Act*, S.C. 1991, c. 11, s. 28.

<sup>87</sup> *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 at para. 108 [emphasis added].

professional licensing). Labour relations and employment related matters, which have long been adjudicated by tripartite boards with specialized expertise and which involve claims by organized labour to which courts were historically perceived to be hostile, cannot generally be appealed to the courts.<sup>88</sup> The same considerations affect the scope of available appeal. For example, statutes generally provide for a broad power to appeal from certain professional disciplinary tribunals on questions of fact and law, where professionals risk losing their ability to practice their profession,<sup>89</sup> and from human rights tribunals adjudicating on violations of human rights codes.<sup>90</sup> Yet even where the appeal rights are broad, courts will show some deference to a tribunal's findings of fact on the assumption that the tribunal had the evidence before it and was in a better position to make those findings.<sup>91</sup>

c. Is an Appeal Available as of Right, or Is Leave Required? If Leave Is Required, Who May Grant It?

Appeals can be as of right or require leave. Where leave must be obtained, it can be the leave either of the original decision-maker or, more frequently; of the appellate body (that is the court). For example, British Columbia's *Forest Practices Code* provides for an appeal as of right from the Forest Appeals Commission to the B.C. Supreme Court on questions of law or jurisdiction. By contrast, a person affected by a decision of the B.C. Securities Commission may appeal to the B.C. Court Appeal only with leave of a justice of that court.<sup>92</sup> Sometimes, additional statutory criteria must also be met before such leave will be granted.<sup>93</sup>

d. Is a Stay of Proceedings Automatic, or Must One Apply for It?

The rules governing stays of proceedings vary between jurisdictions and even tribunals. Specific enabling statutes may expressly empower their tribunals or the appellate bodies (internal or court) to which they appeal to stay enforcement of the tribunal order pending appeal.<sup>94</sup> The Ontario *Statutory Powers Procedure Act* establishes a default rule that an appeal operates as a stay of a tribunal's

<sup>88</sup> David J. Mullan et al., *Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond Montgomery, 2003) at 23.

<sup>89</sup> See e.g. *Ontario College of Teachers Act*, 1996, S.O. 1996, c. 12, s. 35(4). See also *Re Reddall and College of Nurses of Ontario* (1983), 149 D.L.R. (3d) 60 (Ont. C.A.). Ontario statutes in particular tend to provide explicitly for appeal from various tribunals "on questions of law or fact or both."

<sup>90</sup> See e.g. *Ontario Human Rights Code*, *supra* note 8, s. 42(3); also *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 336-38 [Zurich].

<sup>91</sup> *Zurich, ibid.*

<sup>92</sup> Compare *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, s. 141 with *Securities Act*, R.S.B.C. 1996, c. 418, s. 167.

<sup>93</sup> For example, an appeal to the Federal Court of Appeal from judicial review by the Federal Court on immigration matters may be made only if the Federal Court judge certifies that "a serious question of general importance" is involved. *Immigration and Refugee Protection Act*, *supra* note 63, s. 74.

<sup>94</sup> See e.g. *Re Hampton Court Resources Inc.*, 2006 ABASC 1447 (June 13, 2006) (holding that, taken together, s. 38(5) of the *Alberta Securities Act* and the provisions of the Alberta Rules of Court require that a stay of a commission decision be sought in the first instance from the commission).

proceedings.<sup>95</sup> The BC *Administrative Tribunals Act*, by contrast, provides that “the commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.”<sup>96</sup> In the Federal Court, as well, stays of proceedings are usually discretionary.<sup>97</sup> Unless a statute specifically excludes it, as B.C.’s ATA does, the superior court that is the tribunal’s designated appellate court has the inherent authority to grant a stay.<sup>98</sup>

Like the legislative decision to permit appeals as of right or only with leave, a legislative decision to make a stay automatic or not says something about how the legislature views the tribunals in question. Requiring potential appellants to apply for leave to appeal places is an additional hurdle before them. Automatically staying a tribunal’s decision holds its powers in abeyance while a court checks the tribunal’s decision. Where the legislature decides that stays will not be automatic, the legislature may choose to allocate the power to order a stay either to the tribunal or to a court. These statutory drafting decisions reflect the legislature’s assessment of the proper balancing of “due process” and efficiency concerns, the balance between tribunal expertise and judicial oversight, and the legislature’s comfort with granting broad autonomy to the relevant tribunal.

#### D. Using the Courts: Judicial Review

Now, finally, we discuss the tail of judicial review that sometimes wags the dog of administrative law remedies. Judicial review has long been the fixation of administrative law, at the expense of tribunal-based and extralegal mechanisms and statutory appeals -- not to mention the hugely important arena of administrative rulemaking -- in part because administrative law is created primarily by judges, lawyers, and legal scholars. The legal training these individuals receive is, understandably, preoccupied with legal mechanisms and in particular, with courts and the common law.

Having situated judicial review in its broader context, it nonetheless deserves careful attention. Judicial review can be conceptually and logistically complex, and it differs from a straightforward appeal. As we shall see throughout this volume, the basic nature of judicial review is different from statutory or internal tribunal appeals because, at its root, judicial review is about the inherent jurisdiction of courts to oversee and check administrative (that is, executive) action in the interest of the rule of law. This makes it a potentially sweeping remedy. Unlike appeals from tribunals, which are statutorily created, judicial review is the review of executive action *beyond* what the legislature provided for. Thus, only on judicial review will courts investigate a tribunal’s procedural fairness or the alleged bias of its members.

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<sup>95</sup> *Statutory Powers Procedure Act*, *supra* note 42, s. 25.

<sup>96</sup> *Administrative Tribunals Act*, *supra* note 11, s. 25.

<sup>97</sup> *Federal Courts Act*, R.S.C 1985, c F-7, s. 50(1); but see s. 50.1 concerning mandatory stays of claims against the Crown under certain conditions. In a case in which the Minister of Citizenship and Immigration was seeking to stay an order that a potential refugee be released from detention on the basis that the refugee represented a danger to the public, the Court noted that the granting of a stay requires (1) a serious issue to be tried; (2) that irreparable harm would be suffered if no stay were granted; and (3) that the balance of convenience favour r granting the order. The Court also noted that the serious issue threshold “cannot automatically be met simply by formulating a ground of judicial review which, on its face, appears to be arguable.” *Cardoza Quinteros v. Canada (Citizenship and Immigration)*, 2008 FC 643 at paras. 10, 13.

<sup>98</sup> *Kooner v. College of Physicians and Surgeons of Ontario* (2002), 213 D.L.R. (4th) 707 (Ont. Div. Ct.).

### 1. *Discretionary Bases for Refusing a Remedy*

A court's decision whether to grant judicial review is intimately bound up with the core tension that underlies all of administrative law -- what the Supreme Court recently called "an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers."<sup>99</sup> Courts are the indispensable guardians of the rule of law, but they still need to operate within their sphere of authority. This means respecting the fact that, through enabling statutes, legislatures grant authority over certain things to administrative tribunals, *and not to the courts themselves*. A lot of administrative law jurisprudence is devoted to trying to negotiate a path through the difficult territory on the borders of the branches' spheres of authority. What concerns us here is the threshold question of whether to grant judicial review at all -- before considering the merits of the case, before figuring out the standard of review, and before determining the degree of procedural fairness a party is entitled to. Judicial review is fundamentally discretionary in a way that appeals are not. A court has the discretion to refuse to grant a remedy even where one seems clearly warranted by the facts of a case.<sup>100</sup>

Interestingly, courts' handling of courts' *own* discretion in granting judicial review is following a different trajectory than the case law dealing with administrative tribunals' exercises of *their* discretion, conferred on them via statute. As Geneviève Cartier discusses in Chapter 11, there was a time when statutorily conferred administrative discretion was understood to be "beyond law." Its exercise could be subject to judicial review only if it amounted to an abuse of discretion. A number of specific heads of "abuse of discretion" existed, and getting judicial relief depended on falling into one of them. Anything short of the abuse-of-discretion threshold would not attract review, even if the administrative decision was seriously flawed, because the legislature had conferred discretion on the administrative decision maker. This changed with the *Baker case*,<sup>101</sup> which rejected the conceptual distinction between discretion and law. That case held that reviewing courts should subject exercises of administrative discretion to the same evaluative process -- what we now call the "standard of review analysis" -- to which they subject *nondiscretionary* administrative decisions. This shifted the approach from review based on a series of specific "abuse of discretion" grounds, to review based on a more flexible, context sensitive array of factors.

When it comes to courts' *own* discretionary decision to grant judicial review, recent cases from the Supreme Court of Canada seem to be doing something quite different. Put frankly, the Court seems to be moving away from an institutional dialogue-based view of the rule of law toward something more court-centred. It is affirming courts' own power (as opposed to the power of legislatures) to establish the terms on which it will grant judicial review, while also trying to corral lower courts' discretion into the kinds of discrete categories that the *Baker case* moved away from with respect to administrative discretion. In the process, the Court is reaffirming the courts' mantle as guardians of the rule of law, validating the concept of the rule of law, and holding lower courts more closely to it. The Court seems to be moving away from a real humility about the rule of law and the role of the courts in defining it, which characterized some of the jurisprudence from the 1990s. The evolution can be discussed in terms of three broad stages.

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<sup>99</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 27.

<sup>100</sup> *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326.

<sup>101</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

The original set of discretionary grounds for refusing relief derives from common law and equity and survived the statutory reform of judicial review. They are reminiscent of similar equity-based grounds in civil procedure, such as laches, and (with the possible exception of one point one below) are fairly intuitive in the same way that laches is:

1. The most important basis for refusing to grant a remedy in judicial review is discussed above: that *adequate alternative remedies are available*. Parties should exhaust all prescribed avenues of appeal before proceeding to the “last resort” of judicial review.
2. Second, judicial review applications that are brought before tribunal proceedings have been concluded are usually dismissed as being *premature*. This includes challenges to the tribunal’s interim procedural and evidentiary rulings. The policy rationales that underlie dismissals for prematurity include: (1) that administrative action is meant to be more cost-effective than court proceedings, and interim judicial review fragments and protracts those proceedings; (2) that preliminary complaints may become moot as the proceedings progress; and (3) that the court will be in a better position to assess the situation once a full and complete record of tribunal proceedings exists.<sup>102</sup> To obtain judicial review of a tribunal’s preliminary or interim ruling, an applicant must show special circumstances, which mean one cannot wait until the conclusion of the proceeding. A challenge to the legality of the tribunal itself, a clear question of law about the tribunal’s jurisdiction, or the absence of an appropriate remedy at the end of the proceedings may constitute special or exceptional circumstances.<sup>103</sup>
3. Third, even if statutory time limits for filing a judicial review application have been met, parties must be aware that *delay and acquiescence* may be grounds for a reviewing court to refuse a remedy.<sup>104</sup> Parties should object promptly to any perceived impropriety on the part of the tribunal. Similarly, choosing not to attend a hearing could waive any right to judicial review.
4. Fourth, a remedy in judicial review will not be granted where the issues are moot. This may be the case where a dispute is over or has not yet arisen, where a tribunal’s order has expired or no longer affects the applicant, or where the litigant no longer the remedy that the tribunal might have granted had it not erred.<sup>105</sup> The court may also refuse to provide the remedy the tribunal would have granted if present circumstances make doing so impossible, or if the court believes the tribunal’s error did not affect its overall conclusion.<sup>106</sup>

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<sup>102</sup> See e.g. *Sherman v. Canada (Canada Customs and Revenue Agency)*, [2006] F.C.J. No. 912; *Zündel v. Canada (Human Rights Commission)*, [2000] 4 F.C. 255 (C.A.); *Québec (Procureur general) v. Boulaine*, [2004] J.Q. no. 4883 (C.A.), leave to SCC refused [2004] C.S.C.R. No. 290.

<sup>103</sup> *Secord v. Saint John (City) Board of Police Commissioners*, [2006] N.B.J. No. 84 (Q.B.); *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.).

<sup>104</sup> *Immeubles Port Louis*, *supra* note 98.

<sup>105</sup> *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353; *Bago v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1565.

<sup>106</sup> *Moose Jaw Central Bingo Assn. Inc. v. Saskatchewan (Liquor & Gaming Authority)* (1994), 123 Sask. R. 47 (C.A.); *Mobil Oil Canada Ltd. v. Canada-Nfld. Offshore Petroleum Board*, [1994] 1 S.C.R. 202.



5. Last, the court will use its discretion to refuse to grant a remedy on judicial review where the party making the judicial review application does not come with clean hands. This could include seeking a remedy to facilitate illegal conduct or obtain an unfair advantage, or flouting the law or making misrepresentations.<sup>107</sup>

By the 1990s, these longstanding grounds for refusing relief came to be over-layered with a different vision of judicial review, which reflects a new sensitivity to separation of powers issues and increased deference toward administrative tribunals. The overarching principle of curial deference toward administrative decision-making percolated throughout the judicial review process, reaching the discretionary grounds for granting relief in the first place. In other words, even where the five original grounds above were not present, courts began to recognize that it may be appropriate to refuse to grant judicial review out of deference to tribunals' unique institutional roles. Perhaps the most forceful statement about the contingent nature of judicial review remedies from this era comes from *Domtar Inc. v. Québec*.<sup>108</sup> In deciding not to intervene to resolve a conflict in legal interpretation between two tribunals construing the same statutory language, the Supreme Court of Canada stated, "[t]he advisability of judicial intervention in the event of conflicting decisions among administrative tribunals, even when serious and unquestionable, cannot, in these circumstances, be determined solely by the 'triumph' of the rule of law."<sup>109</sup> The Court goes on, in what amounts to a striking acknowledgement that even the most deeply cherished legal values will not always point the way to the only, or perhaps even the most appropriate, response to a problem in administrative law:

[C]ertainty of the law and decision-making consistency are chiefly notable for their relativity. Like the rules of natural justice, these objectives cannot be absolute in nature regardless of the context. The value represented by the decision-making independence and autonomy of the members of administrative tribunals goes hand in hand here with the principle that their decisions should be effective. In light of these considerations we must conclude that *for purposes of judicial review, the principle of the rule of law must be qualified*. This is consistent with the continuing evolution of administrative law itself.<sup>110</sup>

Consistent with this, in 1999 Chief Justice McLachlin set forth a vision of a "new Rule of Law," which would

[make] it possible for institutions other than courts to play key roles in maintaining it. It opens the door to the idea that courts do not necessarily have a monopoly on the values of reasons and fairness...[C]ontrary to Dicey's view that the courts' primary role is to constrain, limit and, if possible eliminate administrative power, the new Rule of Law allows courts to

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<sup>107</sup> *Cosman Realty Ltd. v. Winnipeg (City)* (2001), 157 Man. R. (2d) 117 (Q.B.), aff'd (2001), 160 Man. R. (2d) 32 (C.A.); *Jaouadi v. Canada (Minister of Citizenship and Immigration)* (2003), 257 F.T.R. 161.

<sup>108</sup> *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

<sup>109</sup> *Ibid.* at 795.

<sup>110</sup> *Ibid.* at 799-800 (emphasis added).

respect and advance the roles of administrative tribunals. The courts' role shifts from being a brute guardian of an artificial and restrictive Rule of Law to that of a partner.<sup>111</sup>

Over the last few years, the doctrine seems to have undergone another shift. Beginning in 2008 with *Dunsmuir*, the leading case concerning when courts can review administrative decisions on their merits,<sup>112</sup> the Supreme Court began to reassert the importance of the courts' role in upholding the (not- "new") rule of law, while avoiding "undue interference" with administrative powers.<sup>113</sup> The shift was clear by the time of the Court's decision in *Khosa*.<sup>114</sup> The *Dunsmuir* and *Khosa* cases are discussed in detail later in this textbook. For present purposes it is enough to say that the *Khosa* case stated that the discretion to grant or withhold judicial review "must be exercised judicially and in accordance with proper principles."<sup>114</sup> In setting out those proper principles, the Court identifies the normal standard of review principles that govern administrative law, plus "other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth."<sup>114</sup> Deference to tribunals is understood to be part of normal judicial review analysis, not some freestanding basis for refusing to grant judicial review in the first place. It is difficult to imagine the majority in *Khosa* endorsing the *Domtar* court's equivocal language about the rule of law. The majority makes it clear that *courts* (not legislatures) are the ones with the power to decide whether and when to engage in judicial review and on what grounds, even though in exercising that power they will observe the necessary deference to administrative decision-making, and will operate within the bounds of clear reasons and the rule of law.

In the 1990s, courts moved past the five limited, original grounds for refusing to exercise discretion to grant judicial review. They did so in the service of a more respectful relationship with the other branches of government, and particularly with administrative tribunals. But to the extent that this shift introduced some "X factor" into the decision-making process, it exempted courts from the very ethos of justification that the Supreme Court of Canada said that tribunals had to observe. Respecting, protecting, and adhering to the rule of law implies that judges should rest their discretionary decisions on identifiable reasons. A restrained approach to judicial intervention in administrative law matters suggests that judges should, perhaps, hew more closely to the traditional, discrete grounds for refusing relief identified above. This does seem to be where the Supreme Court is going. In fact, the *Khosa* majority seemed to suggest that the threshold question we are discussing here -- the purely discretionary decision whether to grant judicial review at all -- had largely disappeared, but for the old common law/equitable bases for refusing relief.<sup>115</sup> In other words, the fact that judicial review is discretionary does not mean that courts should refuse to grant judicial review solely on the basis of some notion of partnership with administrative tribunals, or a relative and qualified rule-of-law value.

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<sup>111</sup> Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999) 12 C.J.A.L.P. 171-89 at 175. This article is also an early statement of the Chief Justice's concept of the "ethos of justification" that underlies the rule of law, and this concept continues to be a vital part of contemporary jurisprudence.

<sup>112</sup> See Sheila Wildeman, Chapter 10, and Audrey Macklin, Chapter 9.

<sup>113</sup> See esp. *Dunsmuir*, *supra* note 97 at paras. 20-24.

<sup>114</sup> *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 [*Khosa*]; at paras. 40 and 51.

<sup>115</sup> The majority said it would "presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (as well as other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth)." *Khosa*, *supra* note 112 at para. 51. As Rothstein J. points out in a strongly worded set of concurring reasons, doing so conflates the standard of review analysis with the granting of relief in the first place. *Khosa*, *ibid.* at para. 134.

The overall result of recent cases such as *Dunsmuir* and *Khosa* has been a resurgence of the original common law bases for refusing relief, accompanied by a willingness to consider other, analogous and clearly defined, grounds. In *Mining Watch* (per coram with Rothstein J. writing), the Court added another consideration to the original five mentioned above. It is one that has been rising in salience since *Khosa*: the balance of convenience to the various parties.<sup>116</sup> In that case, the balance of convenience justified reducing impact of the remedy granted, from relief in the order of certiorari and mandamus to a declaration. (The specific forms of relief are discussed below.) In an interesting juxtaposition to the *Domtar* language, which had proposed that the rule of law must sometimes be qualified, the Court now tells us that, because the discretionary power to refuse judicial review “may make inroads upon the rule of law, it must be exercised with the greatest care.”<sup>117</sup> It seems that now, the concern is that *courts themselves* not undercut the rule of law in exercising their discretion to grant, or not to grant, judicial review. The shift may be designed in part to simplify and clarify judicial review doctrine and, if it sticks, it may succeed in that. But, as with many other shifts taking place right now in administrative law, it remains to be seen whether these reforms will produce more, or less, deference toward the kinds of administrative tribunal decision-making we saw at work in the *McKinnon* case.

This chapter suggests, above, that the traditional court-centric approach has perpetuated a somewhat limited understanding of administrative law, focused on judicial review at the expense of attention to tribunal-level practices. This is the first way in which the tail of judicial review can be seen to have wagged the administrative law dog. But there is a second way, which we turn to now: it turns out that the historical development of the remedies available through judicial review, and especially their limitations, has actively shaped the possibilities and potential of judicial review itself. In spite of statutory reform and evolving case law, the ancient prerogative writs that were the original forms of judicial review continue to haunt its present forms. Keep each of these effects in mind as you read the sections below, which consider whether and when judicial review is available, the roots of judicial review in the prerogative writs, more recent statutory reform efforts, and the private law remedies that have sprung up around judicial review.

## ***2. Is Judicial Review Available?***

Leaving to one side what *Domtar* and *Mining Watch* have said about the discretionary nature of judicial review writ large, the differences in the history, purpose, and function of judicial review also mean that whether it will be available as a remedy in any particular situation depends on a set of considerations unique to administrative law.

One of the key threshold questions is whether the tribunal whose actions are being challenged is, in fact, a public body. Judicial review is available to check executive action. Therefore, only public bodies can be subject to judicial review.<sup>118</sup> While this may sound straightforward, some organizations in Canadian society operate at considerable remove from government, yet exercise some degree of “public” function. Others seem private, but have some connection to public authority. For example, stock exchanges regulate the conduct of their members and issue and revoke

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<sup>116</sup> *Mining Watch Canada v. Canada (Fisheries and Oceans)*, [2010] SCC 2 at para. 52, 2010 CarswellNat 55 at para. 52; see also *Khosa*, *supra* note 112 at paras. 36, 133-135 [*Mining Watch*].

<sup>117</sup> *Mining Watch* at para.52.

<sup>118</sup> Private actors may also owe a duty of fairness that can be enforced through the private law remedies of declaration and injunction; however, these remedies are outside the scope of this chapter.

licences, and their operations clearly go to the protection of the public. However, their authority to act as they do derives from a compact with their members rather than from any statutory grant of authority. What about corporations incorporated under the *Canada Business Corporations Act* (CBCA)? Corporations are the prototypical “private” institution, yet CBCA companies only come into existence by virtue of government action under that statute. Similarly, one should distinguish between government action qua government, and government action qua private contracting party. As a general matter, a private party will have difficulty seeking judicial review of a government board's decision not to award it a particular contract.<sup>119</sup>

Various factors go into determining whether a particular tribunal is a private body or a public one. Relevant considerations include the tribunal's functions and duties and the sources of its power and funding, whether the government directly or indirectly controls the body, and whether government would have to “occupy the field” if the body were not already performing the functions it does. A body or tribunal will be subject to public law, and therefore judicial review, if it is “part of the machinery of government.”<sup>120</sup>

In addition to determining whether a tribunal is a sufficiently “public” body, a party seeking to challenge administrative action should determine whether he or she has standing to challenge a tribunal decision. The answer will be straightforward for individuals who are actual parties to an administrative action, but other persons may have a collateral interest in the same matter and may want to challenge a tribunal order that does not directly affect them.<sup>121</sup> The question standing, including “public interest” standing, is discussed by Lorne Sossin in Chapter 7.

Third, a party seeking to challenge administrative action should determine to which court he or she should apply for judicial review. Both the provincial superior courts and the Federal Courts have judicial review jurisdiction. Although a tribunal's enabling statute will generally set out which court has jurisdiction to hear a statutory *appeal*, this is not the case for judicial review. (This makes sense, because judicial review is an extraordinary remedy that does not come out of the enabling statute in the first place.) Typically, the choice of courts is determined by whether the source of the impugned authority's power is provincial or federal.<sup>122</sup> Some overarching provincial statutes, such as Ontario's *Judicial Review Procedure Act*, stipulate the particular provincial court to which judicial review applications should be brought.<sup>123</sup>

Fourth, a party should ensure that he or she has not missed any deadlines. Some statutes impose time limits within which a party must file an application for judicial review. For example, the *Federal Courts Act* states that a judicial review application from a federal tribunal to the Federal Court

<sup>119</sup> But consider the improper purpose doctrine: *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231.

<sup>120</sup> *McDonald v. Anishinabek Police Service et al.* (2006), 83 O.R. (3d) 132 (Div. Ct.).

<sup>121</sup> See, e.g., *Globalive Wireless Management Corp. v. Public Mobile Inc.* 2011 FCA 194.

<sup>122</sup> There are some exceptions. Provincial superior courts have concurrent or exclusive jurisdiction over some specific aspects of federal statutory regimes, due to both the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11, and the *Federal Courts Act*, *supra* note 95. In particular, provincial superior courts have concurrent jurisdiction where Charter issues are raised in attacks on federal legislative regimes (*Reza v. Canada*, [1994] 2 S.C.R. 394) and -- although this is private law, not judicial review -- over damages actions in which relief is sought against the federal Crown (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585) [*TeleZone*].

<sup>123</sup> Ontario *Judicial Review Procedure Act* (JRPA), R.S.O. 1990, c. J.1, s. 6 says that judicial review applications shall be made to the Divisional Court, unless “the case is one of urgency and...the delay required for an application to the Divisional Court is likely to involve a failure of justice,” in which case an application may be made to the Superior Court of Justice.

must be made within 30 days of the time the underlying decision or order is first communicated.<sup>124</sup> In Alberta, the rules impose a six-month time limit on all applications for judicial review, except *habeas corpus* applications.<sup>125</sup> Nova Scotia precludes all applications for judicial review after the earlier of six months following the decision, or 25 days after the decision is communicated to the person.<sup>126</sup> In British Columbia, the general time limit is 60 days.<sup>127</sup> Parties should therefore check all applicable statutes, including especially the tribunal's enabling statutes, global procedural and judicial review acts, and rules of court, for time limits affecting judicial review. However, courts are often statutorily empowered to extend the time limit for making a judicial review application -- for example, where there is a reasonable explanation for the delay, where no substantial prejudice or hardship would result from such an extension, or where the party can demonstrate *prima facie* grounds for relief.<sup>128</sup>

The final threshold matter that a party must establish before gaining access to judicial review is that he or she has exhausted all other adequate means of recourse for challenging the tribunal's actions.<sup>129</sup> Depending on the tribunal's enabling statute, this may include almost any of the remedies above: reconsideration by the same tribunal, appeals to internal appellate tribunals and other intra-agency mechanisms such as grievance arbitration, and appeals to a court. However, some factors may render an alternative form of review inadequate. For example, appeal mechanisms provided for by statute will be inadequate where:

1. the appellate tribunal lacks statutory authority over, or is not willing to address, the issues the appellant raises;<sup>130</sup>
2. the appellate tribunal does not have statutory authority to grant the remedy the appellant requests;<sup>131</sup>
3. the appeal must be based on the record before the original tribunal, but that record does not include evidence relevant to the applicant,<sup>132</sup> or includes evidentiary errors that the appellate tribunal lacks authority to correct;<sup>133</sup> or

<sup>124</sup> *Federal Courts Act*, *supra* note 95, s. 18.1(2).

<sup>125</sup> Rule 3.15 of the *Alberta Rules of Court* (Alta. Reg. 124/2010) imposes this time limit where the relief sought is the setting aside of a decision or act.

<sup>126</sup> Rule 7.05(1), *Nova Scotia Civil Procedure Rules*, 2008, imposes the time limit on applications for relief in the nature of certiorari, online: <[http://www.courts.ns.ca/rules/cpr\\_consolidated\\_11\\_03\\_11/cpr\\_consolidated\\_rules\\_11\\_03\\_11.pdf](http://www.courts.ns.ca/rules/cpr_consolidated_11_03_11/cpr_consolidated_rules_11_03_11.pdf)>.

<sup>127</sup> *Administrative Tribunals Act*, *supra* note 11, s. 57(1).

<sup>128</sup> E.g. *Ontario Judicial Review Procedure Act*, *supra* note 121, s. 5; *B.C. Administrative Tribunals Act*, *supra* note 11, s. 57(2). The *Federal Courts Act*, *supra* note 95, does not set out the conditions that must be met in order for the court to grant an extension of time: s. 18.1 (2).

<sup>129</sup> *Harellkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14.

<sup>130</sup> *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1 (per La Forest and Major J.J.) [*Matsqui*]; *Violette v. Dental Society*, [2004] 267 N.B.R. (2d) 205 (C.A.); *Kingsbury v. Heighton* (2003), 230 D.L.R. (4th) 654 (C.A.).

<sup>131</sup> *Evershed v. Ontario* (1985), 50 O.R. (2d) 198 at 200 (C.A.).

<sup>132</sup> *V.S.R. Investments Ltd. v. Laczko* (1983), 41 O.R. (2d) 62 (Div. Ct.).

<sup>133</sup> *Cimolai v. Children's and Women's Health Centre* (2003), 228 D.L.R. (4th) 420 at 443-46 ((B.C.C.A.) [*Cimolai*]).

4. the alternative procedure is too inefficient or costly.<sup>134</sup>

Courts will not find existing non-court appeal mechanisms to be inadequate based only on unproven allegations that an appellate tribunal will suffer from the same errors<sup>135</sup> or biases<sup>136</sup> as the original tribunal. Nor can challenges circumvent available appeals in favour of judicial review by consent, or simply by raising apparent issues with the original tribunal's procedure or jurisdiction.<sup>137</sup> Also, at least in the context of Aboriginal self-government in the taxation field, the fact that appellate tribunal members lack indicia of institutional independence -- that is, they may not be paid, they lack security of tenure, and they are appointed by the people whose claims they have to adjudicate -- will not make that appellate body "inadequate" without concrete evidence that independence is lacking in practice.<sup>138</sup>

Parliament and several provinces have also legislated in this area. For example, the *Federal Courts Act* prohibits *judicial review* by the Federal Court where an available *appeal* of a tribunal's decision to the Federal Court exists. Québec's *Code of Civil Procedure* also prohibits a superior court room applying Québec's version of certiorari to a tribunal decision where an appeal is available, less the tribunal lacked or exceeded its statutory authority. On the other hand, Ontario's *Judicial Review Procedure Act* and Prince Edward Island's *Judicial Review Act* both permit judicial review notwithstanding any right of appeal.<sup>139</sup> Of course, the fact that a court *may* grant judicial review, even where a right of appeal exists, does not mean that it *will* do so. As we might expect, courts are reluctant to do so.<sup>140</sup>

## E. Remedies on Judicial Review

The remedies available on judicial review have their roots in the ancient prerogative writs, discussed further below. Over time, those became unwieldy. In many province they were modified by statute to redress problems arising from the writs' extreme technicality and unjustified narrowness. However, it is still necessary to understand the ancient writs to understand the scope and range of remedies available through judicial review. For example, neither the old writs nor the

<sup>134</sup> *Violette v. Dental Society*, *supra* note 128.

<sup>135</sup> *Harelkin*, *supra* note 127; but see, *contra*, *Cimolai*, *supra* note 131.

<sup>136</sup> *Turnbull v. Canadian Institute of Actuaries* (1995), 129 D.L.R. (4th) 42 (C.A.); but see, *contra*, *Batorski v. Moody* (1983), 42 O.R. (2d) 647 (Div. Ct.).

<sup>137</sup> *Canada (Border Services Agency) v. C.B. Powell Limited* [20 10] F.C.A. 61, at para. 33 ("Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted...[T]he presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.") See also *Bayne (Rural Municipality No. 371) v. Saskatchewan Water Corp.* (1990), 46 Admin. L.R. 23 (Sask. C.A.); *Delmas v. Vancouver Stock Exchange* (1994), 27 Admin. L.R. (2d) 294 (S.C.), *aff'd* (1995), 15 B.C.L.R. (3d) 136 (C.A.).

<sup>138</sup> *Matsqui*, *supra* note 128.

<sup>139</sup> See, respectively, the *Federal Courts Act*, *supra* note 95, s. 185; *Code of Civil Procedure*, R.S.Q. c. C-25, art. 846; *Ontario Judicial Review Procedure Act*, *supra* note 121, s. 2(1); *Judicial Review Act* (JRA), R.S.P.E.I. 1988, c. J-3, s. 4(2).

<sup>140</sup> *Odufowora v. Ontario (Board of Inquiry)* (1994), 76 O.A.C. 385 (Div. Ct.); *McKenna's Furniture Store v. Prince Edward Island (Fire Marshall)*, [1997] 152 Nfld. & P.E.I.R. 212 (P.E.I.S.C. (T.D.)).

reform statutes, which are based on the old writs, permit a court on judicial review to substitute its views on the substance of a matter for the tribunal's views. The old writs also continue to operate in some provinces, albeit in a more limited way.<sup>141</sup>

A party contemplating judicial review should also be aware that, unlike an appeal, an application for judicial review usually does *not* automatically stay the enforcement of the underlying tribunal order, although the tribunal or the court or both may have the power to stay the tribunal's order on application.<sup>142</sup> The legislative decision to make stays automatic for many appeals but not for judicial review applications is consistent with the "last resort" nature of judicial review. The rules regarding stays vary from jurisdiction to jurisdiction and from tribunal to tribunal, so parties seeking a stay should be sure to review the relevant enabling statute, as well as the rules of court and any omnibus statutes governing procedure or judicial review.

The following sections introduce the prerogative writs and subsequent statutory reform. Because judicial review remains a fundamentally discretionary power, the bases on which courts have refused to grant a remedy, are also discussed.

### 1. Introduction to the Prerogative Writs

*Certiorari* is the most commonly used prerogative remedy, both historically and today. *Certiorari* ("cause to be certified") is a special proceeding by which a superior court requires some inferior tribunal, board, or judicial officer to provide it with the record of its proceedings for review for excess of jurisdiction. It was the established method by which the Court of King's Bench in England, from earliest times, checked the jurisdiction of inferior courts and maintained the supremacy of the royal courts. In the United States, the vast majority of applications to the U.S. Supreme Court are still made by way of a petition for *certiorari*. A successful *certiorari* application results in the "quashing" (effectively, the invalidating) of a tribunal's order or decision. It is an *ex post facto* remedy. Note, however, that generally the court cannot substitute its decision for the decision of a tribunal that the court finds had erred, because the court has not been granted the statutory decision-making authority and does not have the expertise that the tribunal has.<sup>143</sup>

<sup>141</sup> For example, the "direct action in nullity" is a judicial review remedy that predates the Québec *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, and is not referred to in it, yet it continues to operate: *Immeubles Port Louis Ltée v. Lafontaine (Village)*, *supra* note 98. In New Brunswick, one cannot apply specifically for the traditional prerogative writs of *certiorari*, *mandamus*, or *prohibition*, which are now available simply as judicial review. However, a range of "alternative" remedies echoing the old prerogative writs continues to exist. See e.g. *Sullivan v. Greater Moncton Planning District Commission* (1993), 132 N.B.R. (2d) 285 (T.D.). Manitoba's Court of Queen's Bench Rules, Man. Reg. 553/88, Rule 68.01 states only that "[a] Judge on application may grant an order of *mandamus*, *prohibition*, *certiorari* or *quo warranto*." Yukon Territory has not enacted any statutory changes to the common-law writs.

<sup>142</sup> See e.g. Ontario *Statutory Powers Procedure Act*, *supra* note 37, s. 25 (an appeal acts as a stay, but judicial review is not an appeal for that purpose); New Brunswick *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9, 18, s. 52(2) (judicial review does not automatically stay an order, but the board itself or the Court of Appeal may stay it). Indeed, one federal statute that establishes securities clearing houses and banking and payment systems stipulates that no stay shall be granted for a judicial review application related to the government's administration of those systems. *Canadian Payments Act*, R.S.C. 1985, c. C-21, s. 46.

<sup>143</sup> In exceptional circumstances, a court will nevertheless make the decision that it finds the original tribunal ought to have made. See e.g. *Renaud v. Québec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855, [1999] S.C.J. No. 70, 184 D.L.R. (4th) 441; *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on*

The related writ of prohibition is another special proceeding, issued by an appellate court to prevent a lower court from exceeding its jurisdiction, or to prevent a non-judicial officer or entity from exercising a power. Prohibition is a kind of common-law injunction to prevent an unlawful assumption of jurisdiction. Unlike certiorari, which provides relief after a decision is made, prohibition is used to obtain relief pre-emptively. It arrests the proceedings of any tribunal, board, or person exercising judicial functions in a manner or by means not within its jurisdiction or discretion.

*Mandamus* (literally, “we command”) is a writ issued by a superior court to compel a lower court or a government agency to perform a duty it is mandated to perform. In practice, it is often combined with an application for certiorari. Certiorari would be used to quash a decision -- for example, for a lack of procedural fairness -- while mandamus would be used to force the tribunal to reconsider the matter in a procedurally fair manner. A variation on mandamus gives the court the ability to send a matter back to a tribunal for reconsideration with directions. Superior courts have the inherent power to order reconsideration with directions, and several provincial statutes and rules of court, as well as the *Federal Courts Act*, also grant this power. If the court issues directions, it must clearly state what the original panel is to do or what it must refrain from doing. These directions may only protect against unfair procedures or excess of power and cannot tell the tribunal how it must decide. In particular, the general rule is that mandamus cannot be sought to compel the exercise of discretion in a particular way, although exercises of discretion must always conform to the Charter.<sup>144</sup>

A *declaration* is a judgment of a court that determines and states the legal position of the parties, or the law that applies to them. There are two kinds of declarations: the public law variety, used to declare some government action ultra vires, and the private law variety used to clarify the law or declare a private party’s rights under a statute. The public law variety is the main concern of administrative law. Declarations are not enforceable, and they cannot require anyone to take or refrain from taking any action. Historically, this made declarations useful in actions against the Crown itself because the traditional common-law position was that relief in the nature of mandamus was not available against the Crown. It was not thought appropriate for a court to order enforcement against the Crown since the Crown was the source of its own authority. (These prohibitions on remedies against the Crown itself were substantially, though not completely, relaxed over the course of the 20th century.) The non-coercive nature of the remedy has not often proven to be a problem, because court declarations against government bodies in particular tend to be respected.<sup>145</sup> Where a declaration does not produce a government response, however, as happened in the *Khadr* case<sup>146</sup>, the declaration may look like a distinctly second-rate remedy relative to

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*Police Services*) (2002), 61 O.R. (3d) 649 (C.A.); *Allman v. Amacon Property Management Services Inc.*, [2007] B.C.J. No. 1144 (C.A.).

<sup>144</sup> In the special circumstances of the so-called *Insite* case, which concerned a safe drug injection site in Vancouver's Downtown Eastside neighbourhood, the Supreme Court of Canada held that the Minister of health had not exercised his discretion consistent with the Charter when he refused to exempt Insite from certain criminal law provisions. The Court found that sending the matter back to the Minister for reconsideration would be inadequate in view of the attendant risks and delays. It therefore took the rare step of issuing an order in the nature of mandamus, compelling the Minister to exercise his discretion so as to issue an exemption to Insite. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

<sup>145</sup> *Lount Corp. v. Canada (Attorney General)*, [1984] 1 F.C. 332 at 365 (T.D.) (noting that “by long tradition, the executive abides by declarations of the Court even though not formally or specifically directed to do so”), aff’d *sub nom. Canada (Attorney General) v. Lount Corp.*, [1985] 2 F.C. 185 (C.A.).

<sup>146</sup> *Khadr*, *supra* note 76. In 2008 the Supreme Court of Canada determined that Omar Khadr had been deprived of his s. 7 Charter rights by Canadian officials operating at the Guantanamo Bay detention facility, who shared transcripts of their interviews of Mr. Khadr with U.S. authorities. The Court ordered that the Canadian authorities



mandamus. At least where the Crown prerogative over foreign affairs is concerned, an aggrieved party may find himself or herself having a right without a remedy -- or, more accurately, having a right for which a meaningful remedy exists only in the political, and not the legal, arena.

Less common these days are the writs *a habeas corpus* and *quo warranto*. *Habeas corpus* (literally, “produce the body”) is a writ employed to bring a person before a court, most frequently to ensure that the person’s imprisonment or detention is not illegal. Like certiorari, habeas corpus continues to live an active life in the United States, where it is the primary mechanism for challenging state death penalty sentences in federal court. In Canada, *habeas corpus* applications are rare. Most are brought by prisoners detained in correctional institutions and by police, immigration, child welfare, and mental health detainees. *Quo warranto* (“by what warrant?” or “by what authority?”) is a writ used to inquire into what authority existed to justify acts by or powers claimed by a public office. It is rarely used today, and some provinces have abolished it by statute.<sup>147</sup> However, *quo warranto* is still used in Québec and New Brunswick to challenge the authority of municipal councillors on the basis of a prohibited conflict of interest.<sup>148</sup>

## 2. Statutory Reform

Over time, each of the prerogative writs above came to be characterized by technical complexity and arcane rules. Potentially meritorious applications were dismissed because the applicant had petitioned for the wrong writ, or because his or her claim was barred by some technical limitation. For example, although court decisions later re-expanded the writ's scope, a number of cases in Canada in the 1960s and 1970s held that certiorari and prohibition were only available to address “judicial” or “quasi-judicial” final decisions that affected the rights of citizens. As the case law became more arcane and the practical injustices more obvious, policy reasons for maintaining the distinction between the various writs eroded.

The result, in many provinces and at the Federal Court,<sup>149</sup> was statutory reform. Some provinces enacted omnibus statutes governing judicial review or statutory/civil procedure,<sup>150</sup> while

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produce those transcripts to Mr. Khadr, which they did, but the Prime Minister refused requests to seek his repatriation from the United States to Canada. In its 2010 decision, the Supreme Court of Canada held that, notwithstanding the violation of Mr. Khadr's s. 7 Charter rights, it would not order the Canadian government to request his repatriation. In light of the Crown prerogative over foreign affairs, the Court concluded that the appropriate remedy was a declaration that Canada had infringed Mr. Khadr's s. 7 rights, leaving it to the government to decide how best to respond. The government did not seek Mr. Khadr's repatriation.

<sup>147</sup> E.g. PEI JRA, *supra* note 137, s. 11; B.C. *Judicial Review Procedure Act* (BC JRPA), R.S.B.C. 1996, c.241, s. 18. These statutes provide that certain remedies for what would have been information in the nature of *quo warranto* are still available.

<sup>148</sup> See e.g. *R. v. Wheeler*, [1979] 2 S.C.R. 650.

<sup>149</sup> *Federal Courts Act*, *supra* note 95, s. 18(1) provides that the Federal Court has exclusive original jurisdiction “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.”

<sup>150</sup> Ontario JRPA, *supra* note 121, B.C. JRPA, *supra* note 145, P.E.I. JRA, *supra* note 137. Québec *Code of Civil Procedure*, R.S.Q. c. C-25. Ontario and British Columbia have enacted the most comprehensive reforms. Be aware that, apart from habeas corpus, terminology in Québec is different. For example, prohibition and certiorari are codified under “evocation” and “revision” in s. 846 of the *Civil Code*. Remedies equivalent to *quo warranto* and mandamus are codified under ss. 838 and 844ff, respectively, and the terms “*quo warranto*” and “mandamus” are used in practice, but they do not appear in the Code. There also exists the “declaratory judgment in motion,” codified at s. 453, which allows a party to have his or her rights “declared.”

others used their rules of court to enact changes.<sup>151</sup> Only Yukon Territory seems to have left the common law untouched. The details vary from one statutory scheme to another, but key statutes that may apply are the *Federal Courts Act*, the Ontario and B.C. *Judicial Review Procedure Acts* (JRPAs), the Ontario *Statutory Powers Procedure Act*, the B.C. *Administrative Tribunals Act*, the P.E.I. *Judicial Review Act*, Québec's *Code of Civil Procedure*, and the rules of court in other provinces and territories. These important statutes have sought to clarify procedure surrounding judicial review. Some have also sought to change the substantive shape of judicial review itself. Therefore, parties considering challenging a tribunal order must be aware of the relevant statutes' provisions, in addition to the provisions of the tribunal's own enabling statutes. Statutory reforms commonly provide for the following:

1. Simplified application procedures. For example, a statute may state that applications for orders "in the nature of" mandamus, prohibition, or certiorari shall be deemed to be applications for judicial review, to be brought by way of an originating notice or petition. The new judicial review application combines, and in the process supersedes, the old writs of certiorari, prohibition, mandamus, public law declaration, and injunction. (Some statutes include quo warranto and habeas corpus within the ambit of the statute; some abolish quo warranto; some provinces have a dedicated Habeas Corpus Act.) It is sufficient for a party to set out the grounds on which relief is sought and the nature of the relief sought, without having to specify under which particular writ he or she might have proceeded at common law.
2. Simplified remedies, including, for example, the power to set aside a decision or direct the tribunal to reconsider its decision, with or without directions. Some statutes also expressly give courts the authority to ignore technical irregularities or defects in form if the court finds no substantial wrong or miscarriage of justice has occurred.
3. Greater clarity as to who may be parties to a hearing -- for example, decision-makers whose exercise of statutory authority is being questioned. Generally, judicial review statutes also provide that notice must be given to the Attorney General, who is entitled as of right to be heard on the application.
4. A right of appeal. Judicial review applications are generally made to provincial superior courts, and the statutes provide for a subsequent right of appeal to the provincial Court of Appeal.
5. Judicial review mechanisms to challenge interlocutory orders and to resolve interim issues. At common law, certiorari was only available with respect to "decisions" -- that is, final orders. However, the B.C. and Ontario *Judicial Review Procedure Acts* use the words "exercise of statutory power," rather than the word "decision," thereby expanding the range of judicial review to include any exercise of statutory power.<sup>152</sup> Other statutes permit a tribunal itself to

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<sup>151</sup> Alberta, Manitoba, New Brunswick, Newfoundland, Northwest Territories, Nova Scotia, Nunavut, and Saskatchewan.

<sup>152</sup> BC JRPA, *supra* note 145, s. 3; Ontario JRPA, *supra* note 121, s. 2.

refer a “stated case” to the courts for determination of a question of law, after which the case can go back to the original tribunal for determination of the ultimate issues.<sup>153</sup> For example, B.C. tribunals that do not have jurisdiction over constitutional questions under the *Administrative Tribunals Act* can issue a stay and refer a constitutional question to a court of competent jurisdiction.<sup>154</sup> Enabling statutes must authorize stated cases.

## F. Private Law Remedies

Private law remedies available to parties, as against administrative agencies, are outside the scope of administrative action and judicial review. At the same time, increasingly frequent attempts to obtain private law remedies from public bodies have put pressure on judicial review doctrines. In some circumstances, unhappy parties would likely prefer monetary relief to any remedy they could receive under judicial review. The key issue is that neither the old prerogative writs, nor the new statutory remedy of judicial review, allow a party to obtain monetary relief through judicial review.

The Crown and its servants can be liable to private parties for monetary relief,<sup>155</sup> although some statutes limit individual administrative tribunal members’ liability.<sup>156</sup> However, to seek monetary relief, an aggrieved party must initiate a separate civil action for restitution or damages alongside, or in lieu of, a judicial review application. The fact that many parties *do* want money damages as a remedy is putting considerable momentum behind the development of the law in this area. It points, again, to how the tail of remedies sometimes wags the dog of legal doctrine.

Government agencies can be sued, for example for breach of contract, for the tort of negligence, or the special tort of misfeasance in (or abuse of) public office. The last one in particular has attracted a lot of attention lately. To succeed in an action for tort of misfeasance in public office, the plaintiff must establish, in addition to the basic elements of negligence, (1) deliberate and unlawful conduct by someone in public office, and (2) the public officer’s subjective knowledge that the conduct was unlawful and likely to harm the plaintiff. Because this tort alleges bad faith on the part of a public official, “clear proof commensurate with the seriousness of the wrong” is required.<sup>157</sup> The underlying purpose of the tort is to protect each citizen’s reasonable expectation that public officials will not intentionally injure members of the public through deliberate and unlawful conduct in the exercise of public functions.<sup>158</sup>

The leading case on the tort of misfeasance in public office, *Odhavji*, involved an action for damages against police officers and the Chief of the Metropolitan Toronto Police by the estate of an

<sup>153</sup> E.g. *Federal Courts Act*, *supra* note 95, 5.18.3; B.C. *Administrative Tribunals Act*, *supra* note 11, s. 43.

<sup>154</sup> B.C. *Administrative Tribunals Act*, *ibid.*, ss. 44, 45.

<sup>155</sup> The Federal Court has concurrent original jurisdiction over all actions for damages against the federal Crown. Individual servants of the Crown, including Ministers, are also liable for breaches of private law duties on the same basis as other individuals. *Federal Courts Act*, *supra* note 95, s. 17; *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)*, [2007] 2 F.C.R. 475 (C.A.).

<sup>156</sup> E.g. B.C. *Administrative Tribunals Act*, *supra* note 11, s. 56.

<sup>157</sup> *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14 at para. 8 (C.A.)

<sup>158</sup> *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263. On the tort’s value as a practical tool for enhancing state accountability, notwithstanding its rather poor fit with the conceptual underpinnings of modern tort law, see John Murphy, “Misfeasance in a Public Office: A Tort Law Misfit?” *Oxford J. Legal Stud.* (forthcoming 2011), online: *Oxford Journal of Legal Studies* <<http://ojls.oxfordjournals.org/content/early/2011/09/21/ojls.gqr018.full.pdf+html>>.

individual shot by the police. The plaintiffs alleged that the police officers involved in the shooting did not promptly or fully comply with their statutory duty to cooperate with an ensuing investigation, and that the chief of police did not adequately compel them to cooperate. The case made its way to the Supreme Court of Canada on the defendant's motion to dismiss the plaintiff's claim, where the Court determined that the plaintiff had made out a cause of action and that the matter should be allowed to proceed. In other words, the Court held that there was such a thing as the tort of misfeasance in public office. Since *Odhavji*, only a few cases have succeeded on a claim of tort of misfeasance in public office. *McMaster v. The Queen*<sup>159</sup> is one of them. There, a prisoner with large feet requested a new pair of properly-fitting shoes when his old shoes became worn out. A long and apparently intentional delay followed in getting him new shoes and, while waiting, he injured his knee exercising in his old shoes. Correctional Services of Canada and prison staff were found liable in tort for misfeasance in public office, for unlawfully delaying Mr. McMaster's new shoe request when they should have known he was at risk of injury.

As these cases make clear, some torts overlap with a potential judicial review application while others do not. Judicial review was not a possibility in *Odhavji* or *McMaster*, because no administrative decision was being challenged in those cases. In other cases, a tribunal's conduct may be precisely what is being challenged. The precise relationship and potential overlap between private rights of action and judicial review applications was a cause for concern for a number of years. Then, in 2010, in a case concerning private law claims for breach of contract, negligence, and unjust enrichment, the Supreme Court of Canada made it clear that parties do not need to seek judicial review *before* they can bring a private law action for damages, and the private law action does not violate the rule against collateral attacks.<sup>160</sup> If a party has a fundamentally private law claim arising from an administrative decision, and primarily wants monetary damages, that party may proceed by way of private action. As Binnie J. points out, though, "no amount of artful ding in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement...The claimant must...be content to take its money (if successful) and walk away leaving the order standing."<sup>161</sup>

## V. Conclusion

A goal of this chapter has been to put judicial review in context, both chronologically and conceptually. Administrative law remedies are the product of multiple forces and priorities, often acting in tension with each other. They need to be considered in light of the tug-of-war between courts and legislators as demonstrated by, for example, legislators' creation of internal appeal mechanisms and courts' periodic circumvention of those internal appeals in favour of immediate judicial review. Another recurring theme is the tug-of-war between tribunals and the courts that oversee them, in terms of courts' willingness to recognize and give effect to potentially creative and uncourtlike tribunal remedies. These tensions are emblematic of a deeper contest between deeply held values around the rule of law on the one hand, and administrative expertise, efficiency, and democratic accountability on the other.

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<sup>159</sup> *McMaster v. The Queen* (2009), F.C. 937, F.C.J. No. 1071.

<sup>160</sup> *Telezone*, *supra* note 120. The courts retain the residual discretion to stay a damages action if the claim being made is actually "in its essential character" an application for judicial review. *TeleZone*, *ibid.* at para. 78; see also *Manuge v. Canada*, 2010 SCC 67, another of the five companion cases released alongside *TeleZone*.

<sup>161</sup> *Telezone*, *supra* note 158 at para. 75.

Administrative law remedies are also path-dependent, meaning that they have been shaped by their historical origins in the prerogative writs and by subsequent, sometimes piecemeal, attempts to modify judicial review. If we were to design a set of remedies out of whole cloth today, it is not obvious that we would decide to set up two separate mechanisms for accessing the courts (that is, statutory appeals and judicial review). We might create an overarching administrative review tribunal like Québec's instead – and then, unlike Québec, we might make it a judicial body rather than an administrative one. The point here is that remedies have been influenced by their historical roots, and remedies in turn have influenced the development of administrative law as a whole.

In part as a corrective to the heavy conventional emphasis on judicial review and its idiosyncrasies, this chapter tries to situate judicial review remedies within a larger context. Myriad other remedies are available at different stages of administrative action. Rich debate exists concerning appropriate tribunal functioning and the proper scope of tribunal action. Tribunals develop remedies that are novel, by court standards, because they are differently constituted than courts are. It is in part the heterogeneity and depth of this experience that underlies the modern instinct that courts should show some respectful deference in exercising judicial review of tribunal decisions. This chapter also counsels respect for that difference. A conversation about administrative law remedies illustrates the larger point that animates much of this volume: judicial review and court-centred processes, which make up the bulk of this book, are nevertheless the tail of administrative law and practice. That tail, fascinating though it is, should not limit our appreciation of, and approach to, the complex and varied species of dog that administrative action represents.

## SUGGESTED ADDITIONAL READINGS

### CASES

*Canada (Attorney General) v. Telezone Inc.*, [2010] 3 S.C.R. 585.

*Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44.

*Domtar v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

*Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.

*McDonald v. Anishinabek Police Service et al.* (2006), 83 O.R. (3d) 132 (Div. Ct.).

*McKinnon v. Ontario*, [2003] O.J. No. 893 (Div. Ct.).

### STATUTES

Students should be familiar with any omnibus statutes or rules of court governing judicial review in their provinces. See IV.E. 2, Statutory Reform, above.