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What People Want, What They Get, and the Administrative State

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What People Want, What They Get & the Administrative State

Cristie Ford

Table of Contents

What People Want, What They Get & the Administrative State	1
Introduction	2
Remedial Options at the Tribunal Stage	3
<i>Statutory Authority</i>	3
<i>What Makes Administrative Tribunals Unique</i>	5
<i>Systemic Remedies at the Tribunal Level</i>	8
Enforcing Tribunal Orders Against Parties	12
<i>The Tribunal Seeks to Enforce Its Order</i>	12
<i>A Party Seeks to Enforce a Tribunal's Order</i>	14
<i>Criminal Prosecution</i>	14
Challenging Administrative Action Without Going to Court	15
<i>Internal Tribunal Mechanisms</i>	15
<i>External Non-Court Mechanisms</i>	16
V. Going to Court	17
<i>Statutory Rights of Appeal to the Courts</i>	18
Does the Tribunal's Enabling Statute Provide for a Right of Appeal?	18
What Is the Scope of Available Appeal?	18
What is the standard of review that a court should apply on a statutory appeal?.....	19
Is an Appeal Available as of Right, or Is Leave Required? If Leave Is Required, Who May Grant It?	19
Is a Stay of Proceedings Automatic, or Do You Have to Apply for It?	20
<i>Using the Courts: Judicial Review</i>	20
Discretionary Bases for Refusing a Remedy	21
Is Judicial Review Available? Threshold Eligibility Questions.....	24
Remedies on Judicial Review.....	27
<i>Private Law Remedies</i>	32
Conclusion	34
Suggested Additional Readings	36
Secondary Sources	36

Introduction

We are living through a difficult time. Destabilizing tides of change, conflict, illness, and anxiety are sweeping across many societies. The seemingly staid, even nerdy world of administrative law is not immune. On the contrary, administrative law is where abstract policy hypotheticals are forced to engage with unavoidable “real world” situations. Even seemingly innocuous administrative law issues cannot help but channel the debates that are taking place within society.

Social perceptions of the state and of regulation are badly polarized right now. On one hand, the modern administrative state is under attack. Some modern populists criticize the modern state for being antidemocratic, unaccountable, even tyrannical. Paradoxically, others criticize it for very different reasons: because it is ineffective, or because it binds economies and societies up in “red tape”.

On the other hand, the need for a modern, properly-resourced, effective administrative state is also clearer than ever. The financial crisis taught hard lessons about the limits of self-regulation and the need for public sector actors to safeguard the public interest. We have begun to recognize the awesome and alarming size of private, for-profit tech companies. It is also clear that states that were capable of coordinated, science-driven action fared better during the 2020 global pandemic. And meanwhile, injustice and systemic discrimination continue on their intractable ways, as the protests and unrest of the summer of 2020 reminded us yet again. Reconciliation with Indigenous peoples in Canada, also, requires meaningful public action, including at the level of the administrative state.

One thing that is clear is that the administrative state is neither the nightmare that its critics fear, nor the silver bullet that its strongest advocates dream of. In particular, when it comes to administrative law and tribunal action, there is a limit to what tribunals can actually accomplish, and what kinds of remedies they can order. What you want out of administrative law, and what you can get, may be two very different things.

This chapter provides an overview of administrative law remedies as a whole, including not only the “judicial review” stage that receives so much attention, but also front-line tribunal remedies, internal and external appeals, enforcement mechanisms, and extralegal strategies. Discussing remedies near the beginning of an administrative 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. The remedies that administrative law historically offered have been a driver and catalyst in administrative law generally, good chunks of which have been reverse engineered starting from the remedies that were possible. As such, setting out a framework of remedies also 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 its broad outlines.

Figure 3.1 *[Insert]*

This chapter is divided into four main sections. As we shall see in Section II, "Remedial Options at the Tribunal Stage," the remedies that administrative agencies can order differ, in important and interesting ways, from the ones that courts can order. Administrative tribunal remedies are both more limited (because tribunals only have the powers and jurisdiction that their enabling statutes give them) and, potentially, more expansive (because of tribunals' particular expertise, their mandates, and their ability to remain seized of a matter over time). Section III, "Enforcing Tribunal Orders Against Parties," looks how a party or a tribunal can *enforce* a tribunal order against another party, either civilly or criminally. Sections IV and V consider parties' ability to *challenge* tribunal action. This includes internal appeal options and extralegal options in Section IV, and recourse to the courts in Section V. Recourse to the courts include appeal to the courts, and, finally, the classic administrative law remedy of judicial review (which, as discussed below, is not the same thing as appeal to the courts). This chapter's goal is to give the reader a conceptual "big picture" view of administrative law, which includes the full range of remedies available to parties at each stage of the process.

Remedial Options at the Tribunal Stage

Administrative tribunals are as varied as the topics they deal with. It is hard to generalize about the remedial powers they may have, beyond two general points (both discussed in more detail immediately below).

First, because a tribunal does not have the inherent jurisdiction that a court does, the power to impose a particular remedy must be provided for in the tribunal's enabling statute. Whether a tribunal can order, for example, money damages, an administrative penalty, or that someone lose their professional licence will depend whether its enabling statute gives it that power.

Second, most tribunals' composition, structure, and mandates are different from courts', and their approach to remedies reflects those differences. For example, tribunals' experience in their fields may help them to identify systemic problems or recurring patterns across multiple individual disputes. Tribunals also sometimes have the ability to stay involved in (that is, to remain "seized" or to "have seizin" of) a dispute over a longer period of time. Tribunals are generally not constrained by *stare decisis*. Together, these factors sometimes allow tribunals to imagine and implement novel remedies, aimed at addressing the systemic problems they see.

Statutory Authority

As a creature of statute, without the inherent jurisdiction that courts have, a tribunal cannot make orders that affect individuals' rights or obligations unless its enabling statute empowers it to do so.¹ Therefore, the first step in determining a tribunal's remedial

¹ *Att Gen of Can v Inuit Tapirisat*, [\[1980\] 2 SCR 735](#), [\[1980\] SCJ No 99](#) .

options is to *read the statute*. If a tribunal makes orders outside the scope of its enabling statute, it is exceeding its jurisdiction and those orders will be void.²

Tribunals also lack the equitable jurisdiction that courts have. This means that they cannot order interim injunctions, although some enabling statutes give some tribunals the authority to seek a court injunction specifically to enforce that statute.

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 a relevant statute. Some tribunals that have obligations to protect the public (for example, professional licensing bodies or securities commissions), or to manage natural resources (for example, fishing and forestry) also have licensing powers. Some tribunals can appoint conciliators and otherwise assist with settling matters.³ Some tribunals have the authority to impose significant fines and incarceration.⁴

Some enabling statutes give their tribunals broad, discretionary power to fashion the remedies they see fit. We see fewer truly broad grants of discretion to tribunals than we did a few decades ago. Litigants have successfully invoked rule of law and certainty principles to question whether broad, discretionary remedial powers should be enforceable. Although substantial remedial discretion has become controversial, agencies and tribunals that have substantial policy-making jurisdiction can still maintain it. The “public interest” powers that provincial Securities Commissions, which allow them to take steps to protect markets or investors even without demonstrating a violation of law, are one example.⁵

Even where a tribunal's remedial power is less certain (such as when its enabling statute does not expressly give it the authority to order a particular remedy, and it has no broad discretionary power), there may be room to argue that, simply as a matter of practical necessity, a tribunal must have the remedial power to do the things its statute requires it to do.⁶ That said, it generally takes express statutory authority for a tribunal to order that money be paid, for example for compensation or damages, fines, fees and levies, or costs.

² When two tribunals share jurisdiction over a particular statutory provision, 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 SCR 422](#).

³ E.g. *Canadian Human Rights Act*, RSC 1985, c H-6, ss 47-48; *BC Employment Standards Act*, RSBC 1996, c 113, s 78.

⁴ Some tribunals' enabling statutes provide for quasi-criminal offences which must be prosecuted by the Crown, not the tribunal. See e.g. *BC Securities Act*, RSCBC 1996, c 418, s 155.

⁵ See, e.g., *Securities Act*, RSO 1990, c S.5, s 127; *BC Securities Act*, *supra* note 4, s 16; an early critique was Anita Anand, “Carving the Public Interest Jurisdiction in Securities Regulation: Contributions of Justice Iacobucci” (2007) 57 UTLJ 293.

⁶ *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, [2006 SCC 4, \[2006\] 1 SCR 140](#).

Finally, whether a tribunal has the power to grant remedies under the *Canadian Charter of Rights and Freedoms*,⁷ including under s 24(1), is a separate question that Evan Fox-Decent and Alexander Pless address in Chapter 16.⁸ As well, some provinces have now enacted statutes that explicitly bar at least some tribunals from even considering Charter issues in the first place.⁹

What Makes Administrative Tribunals Unique

Administrative tribunals and agencies vary widely in their structures and functions, but collectively they also differ from courts in important ways. How a particular tribunal is designed and structured also affects the kinds of remedies it is inclined, and empowered, to grant.

We focus on tribunal-type administrative action here —party-on-party dispute resolution, party-versus-agency enforcement, and other similar action—since they 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 a "remedy," defined by *Black's Law Dictionary* as "the means of enforcing a right or preventing or redressing a wrong."¹⁰

However, note that tribunal-type administrative action is only one kind of administrative action. Agencies' policy-making functions are also very important.¹¹ Through their statutory drafting choices, legislators regularly delegate detailed policy-making decisions to administrative tribunals. Many larger administrative agencies have formal policy-making departments, which generally operate independent of their tribunals. At the new Canada Energy Regulator, for example, the Board of Directors provides strategic advice and direction, including based on advice from the regulator's Indigenous Advisory Committee; the Chief Executive Officer manages the regulator; and the CER Commission operates as an arm's length adjudicative body.¹² Tribunal adjudicators, policy staff, government ministers and others can issue administrative releases, which depending on the nature of the agency can range from formal, binding statements to relatively informal, non-binding guidance or interpretive aids. Even informal policy documents matter. They are publicly available, and regulated entities are expected to know about them. They can directly affect the remedies that may be available.

In addition to often having a policy role, many administrative agencies also have specialized expertise in important rights-relevant areas, such as human rights, labour law,

⁷ Part I of the *Constitution Act*, 1982, RSC 1985, app II, no 44.

⁸ See *R v Conway*, [2010 SCC 22](#), [2010] 1 SCR 765.

⁹ See, e.g., the BC *Administrative Tribunals Act*, 36 SBC 2004, c 45 [BC ATA], which provides that most provincial tribunals do not have discretion to consider constitutional or Charter questions. Sections 46.1-46.3 of the Act impose similar restrictions on many tribunals' jurisdiction to apply the BC *Human Rights Code* to any matter before them.

¹⁰ *Black's Law Dictionary*, 11th ed., *sub verbo* "remedy."

¹¹ See Chapter 8, Delegation and Consultation: How the Administrative State Functions.

¹² <https://www.cer-rec.gc.ca/en/about/who-we-are-what-we-do/governance/index.html>.

immigration and refugee protection, mental health, parole, and more. Because they are specialists in a narrower subject matter area, these tribunals are in a better position to identify patterns in the matters that come before them than an all-purpose, generalist court would be.

Just as importantly, administrative tribunal members are a more diverse group than judges are, especially in terms of their training and expertise. Many tribunal members are not legally trained and some tribunals' enabling statutes even require that a certain portion of their tribunal members be laypersons. For example, the federal *Competition Tribunal Act*¹³ 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 also tells the Governor in Council to establish an advisory council, "to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs,"¹⁴ to advise the Minister of Industry on the appointment of lay members. The result is a tribunal with substantial expertise in economics and in commerce. 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, tribunals are composed specifically to represent different interest groups, especially in areas where judges historically have been perceived as unsympathetic to certain parties, or not alive to some of the issues at stake. A classic example is the tripartite labour board, which requires a labour representative, a management representative, and a third party that both agree on. The BC Review Board, charged under the *Criminal Code*¹⁵ with making dispositions with respect to individuals found unfit to stand trial or not criminally responsible on account of mental disorder, also has a tripartite structure. The BC *Mental Health Act*¹⁶ requires that each panel of the Review Board consist of a doctor, a lawyer, and a person who is *neither* a doctor *nor* a lawyer.¹⁷ The kinds of remedies that such boards devise are likely to reflect the priorities and assumptions of its members. They may not be limited to the strictly legal remedies that spring most easily to the legally-trained mind.

For all these reasons, even when acting in their tribunal capacity, administrative tribunals often do (and many believe that they should) take a broader perspective on a dispute than courts necessarily would. One way to understand the difference is in terms described by an American scholar, Abram Chayes, in the mid-1970s.¹⁸ Chayes talked about courts, not administrative agencies. Nevertheless, his point illuminates the distinction between the two.

Chayes described a 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

¹³ *Competition Tribunal Act*, RSCR 1985, c 19 (2d Supp), s 3(2).

¹⁴ *Ibid*, s 3(3).

¹⁵ RSC, 1985, c C-46.

¹⁶ RSBC 1996, c 288.

¹⁷ RSBC 1996, c 288, s 24.1(3).

¹⁸ Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv L Rev 1281; see also DM Gordon, "'Administrative' Tribunals and the Courts" (1933) 49 LQ Rev 94.

and party-initiated. A dispassionate judge identifies the private right at issue, based on doctrinal analysis and retrospective factual inquiry. The judge imposes relief, understood as compensation for the past violation of an identifiable existing right. By contrast, in public law litigation, Chayes argued that the suit is connected to 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 stakeholders not before the court, who nevertheless may be affected by its outcome. Factual inquiry is predictive (“how can this ruling improve the situation going forward?”) not retrospective (“how can we fairly put this particular dispute behind us?”). Through a combination of party negotiation and continuing judicial involvement, the judge fashions relief that is ad hoc, ongoing, and prospective. For Chayes, judges can become change agents under whose direction specific cases can have far-reaching effects.

Compared to courts, tribunals often have different kinds of expertise, more direct connections to policy decisions in their area, and the experience to see broader patterns within their specific field. This means that in the right circumstances, administrative tribunals, like public interest litigation for Chayes, can be change agents too.¹⁹ Tribunals that are responsible for trying to address the broader patterns they see are also probably more entitled than courts to remaining seized of a case over a longer period of time.²⁰ All of this means that administrative tribunals may be justified in trying to develop remedies that address underlying structural or systemic problems in a forward-looking way.

As we have read in the Introduction to this Volume and as described more fully by Paul Daly in Chapter 12, a majority of the Supreme Court in *Vavilov* has stepped back from the idea that administrative tribunals’ particular and unique expertise should be central to determining standard of review. Nevertheless, the court recognizes that:

Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. ... “Administrative justice” will not always look like “judicial justice” ...²¹

Ideologically, this is an important and consequential point. How we understand tribunal expertise affects how we interpret their powers, the remedies they can order, and the respect courts give to them. If courts recognize that tribunals are different from courts in meaningful ways, and that they are entitled to make decisions that look different from judicial decisions, then courts have a good substantive reason, in addition to legislative intent, to demonstrate respect for tribunals’ own remedial decisions.²² If courts do not

¹⁹ For an interesting contemporary take, see Margaret Doyle and Nick O’Brien, *Reimagining Administrative Justice: Human Rights in Small Places* (Cham, CH: Palgrave, 2020) esp. at pp. 117-21; 123-24; 131-38.

²⁰ See e.g. *Hughes v. Elections Canada*, 2010 CHRT 4 at paras 64-78; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4 at paras 21-54.

²¹ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 92.

²² See also *CMRRA-SODRAC Inc v Apple Canada*, 2020 FCA 101 at para 49.

recognize that tribunals' unique characteristics are significant and valuable, then courts have less reason to defer.

In particular, how courts think about tribunals' unique memberships and their remedial powers directly affects the viability of tribunal orders for systemic remedies, aimed at addressing patterns of discrimination. Systemic remedies – in which tribunals order ongoing and broader remedies including, such as training, special programs, or monitoring, in order to address pervasive structural or ethical problems – are controversial, and tribunals do not order them often. But while these kinds of orders are relatively rare, there is arguably a need for these kind of remedial orders to address, for example, structural patterns of discrimination, including those based on Indigeneity and race, are still deeply embedded in Canadian society. Potentially, one of the most important strategies we may have for dislodging them will be through administrative action.

The section below discusses three cases in which human rights tribunals have imposed systemic remedies. The fact that these tribunal-ordered remedies look different from what courts might have ordered highlights why, in order to understand administrative law, we need to understand much more than just judicial review.

Systemic Remedies at the Tribunal Level

Unlike most other tribunals, many human rights tribunals have the authority, under their enabling statutes, to impose remedies geared toward addressing systemic problems.²³ One effort at creating a structure- and system-oriented process took place within Ontario's Ministry of Correctional Services, as a response to a longstanding human rights complaint by an employee of the Ministry.

The complainant in that case, Michael McKinnon, was a correctional officer of Indigenous ancestry. In 1998, ten years after Mr. McKinnon's complaint was initiated, the Human Rights Tribunal of Ontario (then called 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. In response, the tribunal ordered a number of systemic remedies to address the "poisoned atmosphere" at the facility, Toronto East, and within Corrections generally. 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 Mr. McKinnon asserted that the poisoned work environment had not improved. The issue for the tribunal at that point was not whether the existing systemic remedies had been implemented, strictly speaking, 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 Appeal²⁴—the tribunal ordered additional remedies, including training for Ministry and Facility management; establishing a roster of external mediators to deal with discrimination complaints; and

²³ See, e.g., *Canadian Human Rights Act*, RSC 1985, c H-6, s 53(2)(a); *Ontario Human Rights Code*, RSO 1990, c H.19, ss. 45.3(1), (2); *BC Human Rights Code*, RSBC 1996, c 210, s 37(2)(c)(ii).

²⁴ *Ontario v McKinnon*, [2004] OJ No 5051 .

appointing an independent third-party consultant to develop and oversee the training programs. The third-party consultant was to be nominated by the Ontario Human Rights Commission (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 Chayes's public law litigation model: these remedies are prospective, open-ended, 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.

In 2005, the parties were still arguing over the scope of the third-party consultant's responsibilities.²⁵ By 2007, the tribunal found that the Ministry had not been implementing the tribunal's previous orders in good faith.²⁶ Remarkably, in 2011, the tribunal exercised its discretion to state a *prima facie* case for *contempt* to the Ontario Divisional Court, against the Deputy Minister, for failing to implement its earlier orders.²⁷ (As we see below, this is a tribunal's last resort in trying to get its orders followed.)

Before that case could be heard, however, and after 23 years of litigation, Michael McKinnon and the Ministry finally reached a settlement. Mr. McKinnon's personal case was done, the tribunal wrapped up its work, and the project entered a new phase. 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 established mechanisms targeting accountability, operations, learning, and complaint management within Correctional Services.²⁸ They made some progress, even while “organizational culture” remained a barrier to effecting “long-term, systemic, or broad-based human rights improvements.”²⁹ In 2014, the agreement's final year, the parties formulated another multi-year human rights action plan aimed at addressing discrimination and harassment within Correctional Services,

²⁵ Human Rights Tribunal of Ontario, Interim Decisions and Rulings, *Ontario Human Rights Commission and Michael McKinnon and Ontario Ministry of Correctional Services*, 2005 HRTO 15 (19 May 2005), online: [It]<http://www.canlii.org/en/on/onhrt/doc/2005/2005hrto15/2005hrto15.html>[gt].

²⁶ *McKinnon v Ontario (Correctional Services)*, 2007 HRTO 4.

²⁷ *McKinnon v Ontario (Correctional Services)*, 2011 HRTO 263.

²⁸ “Organizational change in Correctional Services—the MCSCS Human Rights Project Charter” [It]<http://www.ohrc.on.ca/en/annual-report-2012-2013-rights-partners-actions/organizational-change-correctional-services-%E2%80%93-mcscs-human-rights-project-charter>[gt]; “Correctional Services: update on the MCSCS Human Rights Project Charter” [It]<http://www.ohrc.on.ca/en/annual-report-2011-2012-human-rights-next-generation/correctional-services-update-mcscs-human-rights-project-charter>[gt].

²⁹ “Organizational change in Correctional Services—the MCSCS Human Rights Project Charter”, *ibid.*

with a special focus on the needs and concerns of Indigenous Peoples.³⁰ The plan is scheduled to conclude in August 2021.

The *McKinnon* settlement and the efforts that follow it are cause for some optimism, but genuine reform at the systemic level was never, and is still not, a foregone conclusion. The 2011 settlement might never have happened if a new Deputy Minister of Corrections had not been appointed with a mandate to professionalize the service and improve its record.³¹ Nor is a 23-year-long litigation matter ever really a victory, no matter how it ends. Thus, *McKinnon* raised and still leaves us with some challenging questions: was it acceptable that Mr. McKinnon bore the burden of trying to force change for so many years? Did we really have to get to the point where a tribunal was willing to bring a contempt case against a Deputy Minister? Can human rights tribunals or other administrative actors ever effect real, substantive "good faith" compliance in a truly recalcitrant employer? 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 better systemic outcomes? Can external third parties, like the various consultants involved in this matter over the years, really change culture and create meaningful dialogue? If not, what legal options do we have left—through tribunal remedies or otherwise?

The Canadian Human Rights Tribunal has been dealing with another important string of systemic discrimination cases since 2007: the *Caring Society* cases, concerning the ongoing underfunding of the on-reserve child welfare system. The complainants in these cases argue that because on-reserve child welfare is underfunded, Indigenous children are removed from their families in disproportionately and unacceptably high numbers. After the tribunal found on a *prima facie* basis that Canada had systemically discriminated against on-reserve children and families by denying them equal child and family services,³² the battle pivoted to the question of what remedies the tribunal had the authority to order, and how to implement them. As in *McKinnon*, these questions have been the subject of multiple long judgments and several judicial review applications in the years since.³³ In some ways, the *Caring Society* cases are simpler than *McKinnon* was, because the discrimination is about funding for services and compensation for harm, not about changing organizational culture. All the same, the tribunal has not yet issued a final compensation order because of ongoing challenges around compensation models, funding principles, and the scope of the tribunal's remedial authority. Some of these challenges seem to be the product of stalling on Canada's part; others stem from

30 "Reaching new milestones with the Human Rights Project Charter" [It] <https://www.mcscs.jus.gov.on.ca/english/Corrections/Policiesandguidelines/CorrectionsHumanRightsPlanQsand.html>[gt].

31 The Toronto East Detention Centre is not the only Ontario facility at which correctional officers have alleged that they suffer discrimination and harassment based on their race or ancestry. See, e.g. *Cox v Ontario (Community Safety and Correctional Services)*, 2014 HRTO 286, an ongoing matter involving an alleged hate mail campaign directed at African-Canadian corrections officers at the Toronto Jail going back to 2004.

32 *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.

33 For discussion, see Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Hum Rts 1.

genuinely difficult questions about how, essentially, to design a just, effective, and culturally safe process for compensating those that have been and continue to be harmed.

Note that courts are not always very comfortable with tribunals ordering broad remedies that aim to address systemic problems. From a rule of law perspective, while it is important that courts be able to judicially review tribunals' decisions, both the prospect and fact of judicial review also introduce some difficult tensions. When courts engage with systemic issues they run quickly into public policy choices, separation of powers concerns, and legitimacy concerns. Tribunals, too, may quickly run into the limits of their statutory authority. This is as it should be. And yet, for these reasons, judicial review may always serve as a brake on tribunals' more ambitious efforts to effect systemic change.

For example, *Moore v British Columbia (Education)*³⁴ is a case representing the final step in a judicial review of the BC Human Rights Tribunal's decision that in failing to provide educational support, both the province and the North Vancouver School District had discriminated against Jeffrey Moore, a child with dyslexia. In making its decision, the tribunal addressed not only the impact on Jeffrey and his family (his parents sent him to an expensive private school for children with language-based learning disabilities), but also the fact that the BC Ministry of Education had implemented a fixed cap on special education funding, which was below what it would have cost to address the actual numbers of special needs students in the province. The tribunal also considered the School District's decision to close its Diagnostic Centre without providing an adequate substitute. The District had closed the Centre, which provided support to dyslexic students, in response to the Ministry's funding constraints while leaving other discretionary programs, like a popular "Outdoor School" program, intact. The tribunal ordered damages to Jeffrey's family. It also ordered that the Province allocate funding based on actual incidence levels of special needs; that both the Province and the District establish mechanisms to ensure that students with severe learning disabilities are taken care of in public schools; and that the tribunal remain seized of the matter to oversee the implementation of its remedial orders.

At the Supreme Court of Canada, writing for a unanimous court, Abella J upheld the Human Rights Tribunal's findings of discrimination against Jeffrey by the District, and the personal damages it awarded. However, the tribunal's systemic remedies were held to be too remote from the scope of the complaint.³⁵ They were "quashed," or invalidated. The court observed that a remedy afforded by the tribunal to an individual claimant could still have a systemic impact, but that

The remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire

³⁴ *Moore v British Columbia (Education)*, [2012 SCC 61](#), [\[2012\] 3 SCR 360](#) [Moore].

³⁵ *Ibid.* at para 57. The relevant standard of review was patent unreasonableness, which exists in British Columbia under the BC ATA, *supra* note 9. [Production Editor: Please check all *supra* references.]

*provincial administration of special education in order to determine whether Jeffrey was discriminated against. **The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.***³⁶

Abella J also set aside the tribunal's remedial orders against the Ministry on the basis that the connection between province-wide fixed cap funding and closure of the Diagnostic Centre was too remote. Moreover, Abella J found no need for the tribunal to remain seized "on behalf of an individual student who has finished his high school education and will not re-enter the public school system."³⁷ Some human rights tribunals have distinguished *Moore* based on the way it was pleaded.³⁸ Certainly, the sharp contrast in *Moore* between the tribunal's conception of its mandate, which was broadly consistent with the *McKinnon* tribunal's approach, and the Supreme Court's retrospective, party-focused analysis underscores the boundaries that courts can impose around tribunal-ordered systemic remedies.

Enforcing Tribunal Orders Against Parties

After a tribunal makes a decision and imposes an order, 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 dispute before a tribunal may want to enforce the tribunal's order against another party on which the order was imposed. 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.

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.³⁹ 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.⁴⁰ However, a tribunal only has the enforcement powers that its enabling statute gives it, and those enforcement powers must be in keeping with the constitution.

³⁶ *Supra* note 34 at para 64 (emphasis added).

³⁷ *Ibid* at para 66.

³⁸ See, e.g., *Desmarais v Correctional Service of Canada*, 2014 CHRT 5.

³⁹ *Competition Tribunal Act*, *supra* note 13, s 8(2). See *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 (4th) [*Chrysler Canada*]; also *Lymer v Jonsson*, 2016 ABCA 76 at paras 11-13.

⁴⁰ E.g. *Employment Standards Act*, RSBC 1996, c 113, ss 87-101; *Maintenance Enforcement Act*, SNS 1994-95, c 6, ss 19, 27-30.

For example, a provincially-created tribunal cannot have criminal (and therefore federal) enforcement powers.⁴¹

In British Columbia, certain sections of the *Administrative Tribunals Act*⁴² are intended to help tribunals obtain 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)).

Outside these situations, tribunals must generally apply to the courts to have their orders enforced. For example, 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. Where a party has disobeyed a tribunal order, the statute also provides that the tribunal may apply to court for a compliance order.⁴³ The tribunal's order is presumed to be valid and correct, unless the party disobeying the tribunal's order filed and won an appeal from the order (if one is available).⁴⁴ Other statutes allow tribunal orders to be registered with the court, sometimes only with leave.⁴⁵ In Quebec, a distinct procedure known as homologation gives courts the authority to compel individuals to fulfill tribunal orders.⁴⁶

Once a tribunal has successfully converted its order into a court order through one of the mechanisms above, the order can be enforced like any other court order. Among other things, the court can initiate contempt proceedings if the party continues to disregard the order.⁴⁷ Contempt proceedings may be available to enforce a tribunal's procedural order (for example, failing to appear as a witness or to produce documents) or a tribunal's final substantive order.⁴⁸ Contempt can be civil or, where the conduct constitutes an intentional public act of defiance of the court, criminal.⁴⁹ In a contempt proceeding, the judge does not inquire into whether the tribunal's underlying order is valid. However, the order must

⁴¹ *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, [1996] 2 WWR 1; *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, 89 DLR (4th) 609.

⁴² BC ATA, *supra* note 9.

⁴³ See e.g. *Statutory Powers Procedure Act*, RSO 1990, c S 22, ss 13 and 19, respectively.

⁴⁴ *Estevan Coal Corp v Estevan (Rural Municipality No 5)*, [2000] 8 WWR 474.

⁴⁵ See e.g. BC ATA, *supra* note 9, ss 47, 54.

⁴⁶ See, e.g., *Code of Civil Procedure*, CQLR c C-25.01, s 72.

⁴⁷ Tribunals may have the power to make orders for *in facie* contempt (contempt "in the face of" the court during the proceedings) if their enabling statute designates them as a "court of record," meaning they have the powers of a statutorily created court. If a tribunal is not designated as a court of record, then its enabling statute would have to explicitly give it the power to punish for *in facie* contempt, like the power to punish for *ex facie* contempt (contempt outside the proceedings). *Chrysler Canada*, *supra* note 39.

⁴⁸ See e.g. *Statutory Powers Procedure Act*, *supra* note 43, s 13.

⁴⁹ *Carey v Laiken*, 2015 SCC 17 at paras 31-32.

be clear and unambiguous, the party must have known about it, and the party must have intentionally violated it.⁵⁰ A court can also refuse to hold a party in contempt until an appeal or judicial review application (discussed below) is completed, although parties can be required to pay money into court in the meantime.⁵¹

A Party Seeks to Enforce a Tribunal's Order

Very rarely, a party that has succeeded before a tribunal may also be able to bring its own action against another party, in court, to enforce an administrative order. For example, a group of teachers successfully enforced an arbitrator's order that a school board annually set aside certain funds for teachers' professional development.⁵² 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."⁵³ In other words, courts may be more likely to grant a private application to enforce a 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.

Criminal Prosecution

Many statutes provide that persons who disobey tribunal orders may be prosecuted quasi-criminally. 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 BC *Securities Act*⁵⁴ is liable to a fine of not more than \$5 million, to imprisonment for not more than five years, or both. Indictable offences under the federal *Fisheries Act* may attract fines of up to \$500,000 or imprisonment for up to two years, or both.⁵⁵

In the absence of other provisions, and in particular where the tribunal's enabling statute does not expressly provide for any other penalty, it is an offence punishable on summary conviction to disobey a federal or provincial tribunal's lawful order, other than an order for the payment of money.⁵⁶

⁵⁰ *Ibid.* at paras 33-35.

⁵¹ *Boucher v Logistik Unicorp Inc*, [2001] JQ No 64 (CA), leave to appeal to SCC refused, [2001] CSC No 115; *Sodema Inc v Sarafian*, [2006 QCCA 816](#), [\[2006\] JQ No 5460](#).

⁵² *Melia v Moose Jaw Roman Catholic Separate School District No 22* (1979), [108 DLR \(3d\) 113](#), [\[1979\] SJ No 568](#) (CA).

⁵³ Sara Blake, *Administrative Law in Canada*, 6th ed (Markham, Ont: LexisNexis Butterworths, 2017) at ¶9.25.

⁵⁴ *Supra* note 4.

⁵⁵ *Fisheries Act*, RSC 1985, c F-14, s 78(b).

⁵⁶ *Criminal Code of Canada*, RSC 1985, c C-46, s 127(1) (emphasis added); see also *R v Gibbons*, [2012 SCC 28](#), [\[2012\] 2 SCR 92](#), *United Nurses of Alberta v Alberta (Attorney General)*, *supra* note 41.

Challenging Administrative Action Without Going to Court

A party that is unhappy with how an administrative proceeding is going may also decide to challenge that administrative proceeding. For example, a party could challenge the tribunal's jurisdiction, its procedure, its impartiality, 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 what in administrative law is called “judicial review.” However, applications for judicial review, like litigation generally, can be expensive and drawn-out. It is also important to be realistic about what judicial review can accomplish. It may not get you what you want. For example, a motion to quash a tribunal decision, if successful, will often only lead to the court sending the matter back to the original tribunal for rehearing.⁵⁷ There is no guarantee that the party will get the substantive outcome they want the second time around.

Parties that want to challenge administrative action should therefore consider their options carefully. There may be non-court options for getting a desired result more easily, more quickly, and more cheaply. Most people who appear before tribunals now are unrepresented by counsel; the same is true in the courts. Putting people first, whether they are represented or not, means working to find the most effective way to achieve a desired result. Some ways to challenge a tribunal decision are internal to the administrative apparatus itself, and others are outside both the administrative agency and courts.

Internal Tribunal Mechanisms

A party that wants to challenge a tribunal action will need to understand the tribunal's structure and capacity, as set out in 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.”⁵⁸ Tribunals can also “change their minds” until the time a final decision is made. Therefore, it is important to work out what constitutes a “final decision”. 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.⁵⁹

Some enabling statutes specifically give tribunals 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 that, subject to some conditions, “the Board may review, rescind or amend any of its orders or decisions, or may rehear any application before making an order in respect

⁵⁷ See Kate Glover, Chapter XX.

⁵⁸ See e.g. *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 861 [Chandler]; *Muscillo Transport Ltd v Ontario (Licence Suspension Appeal Board)* (1997), 149 DLR (4th) 545 at 553 (ONSC), *aff'd* [1998] OJ No 1488 (CA).

⁵⁹ *Comeau's Sea Foods Limited v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12.

of the application."⁶⁰ Without this kind of express statutory authority, however, a tribunal cannot reconsider or alter a final decision made within its jurisdiction. Finality is important too. Once it has made its final decision, the tribunal is *functus officio*.⁶¹

As a next-best alternative for challenging a tribunal decision, consider that some administrative tribunals are part of multi-level administrative agencies. Those tribunals' enabling statutes may provide for internal appeals, within the administrative agency itself. For example, parties appearing before Canada's Immigration and Refugee Board Immigration Division may appeal to its Immigration Appeal Division.⁶² 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 overarching commission itself, to which staff report.⁶³ Again, parties should be aware that internal appellate structures may not look much like courts.

A party that is unhappy with the outcome of these kinds of internal review proceedings could still seek further review from the courts, as discussed below in Section V. However, a challenger will generally be expected to exhaust all its internal avenues, such as internal appeals within a multilevel agency, first.

External Non-Court Mechanisms

As heralded earlier, a party considering a challenge to administrative action should also 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. 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.

There is some limit to how much an ombudsperson can assert jurisdiction over administrative tribunal decisions and processes (as opposed to government departments and ministries). Most legislation defines the ombudsperson's jurisdiction as being over "matters of administration," and courts have tended to define "administration" expansively to include generic administrative processes.⁶⁴ However, most ombuds statutes provide that an ombudsperson can only investigate a tribunal's decision after any

⁶⁰ *Public Service Labour Relations Act*, SC 2003, c 22, s 43.

⁶¹ *Chandler*, *supra* note 58.

⁶² *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 62-71. See also Paul Daly, "Les appels administratifs au Canada" (2015) 93 Can Bar Rev 71.

⁶³ See e.g. *Ontario Securities Act*, RSO 1990, c S 5, s 8(2); *Alberta Securities Act*, RSA 2000, c S-4, s 35(1); *BC Securities Act*, *supra* note 8, ss 165(3), 167(1).

⁶⁴ *British Columbia Development Corporation v Friedmann (Ombudsman)*, [1984] 2 SCR 447; *Ombudsman of Ontario v Ontario (Labour Relations Board)* (1986), 44 DLR (4th) 312 (Ont CA); *Alberta (Ombudsman) v Alberta (Human Rights and Citizenship Commission)*, 2008 ABQB 168.

right of appeal or review on the merits has been exercised, or after the time limit for doing so has expired.⁶⁵

Several other public officials similar to ombudspersons also exist, including freedom of information and privacy commissioners, the auditor general, and provincial auditors.

Going to Court

Finally, there are the courts. The ability to challenge administrative action in the courts is a mixed, but necessary, blessing. On the downside, even leaving aside some very serious concerns about costs and access to justice, courts may be reluctant to embrace novel, non-courtlike, yet potentially effective remedies devised by specialized tribunals. The richness and creativity that may characterize administrative law remedies could be stifled by potentially over-judicialized, overly interventionist court scrutiny. This is one reason why internal appeal mechanisms, which permit decisions to be reviewed by higher-level bodies within the administrative agency structure itself, make sense. On the other hand, there are times, such as during national emergencies, when executive action unquestionably needs to be subject to the rule of law, as applied by independent courts.⁶⁶ As with so many things in administrative law, context matters. 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 needed 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—only exist where the statutory scheme provides for them. As well, the scope of a possible appeal is confined to what the statute expressly provides. By contrast, judicial review is an exceptional remedy that goes beyond what the statute provides for.⁶⁷ Significantly, judicial review is also discretionary. 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, have been shaped by these contests.

Regardless of whether a party exercises a statutory right of appeal, where available, or seeks judicial review, that court decision can be appealed further up the judicial hierarchy in keeping with those courts' appeal provisions.

⁶⁵ See e.g. the Yukon *Ombudsman Act*, RSY 2002, c 163, s 12; but see the Manitoba *Ombudsman Act*, CCSM c O45, s 18(d) and the Saskatchewan *Ombudsman Act, 2012*, SS 2012, c O-3.2, s 18(2), which give the ombuds some discretion to intervene.

⁶⁶ See Chapter 3, Everything You Ever Needed to Know: The Canadian Rule of Law. The national security context is also treated differently: consider *Canada (Prime Minister) v Khadr*, [2010 SCC 3, \[2010\] 1 SCR 44](#) [*Khadr*].

⁶⁷ David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 462.

Statutory Rights of Appeal to the Courts

Not all tribunals are subject to statutory appeals. As well, not all statutory rights of appeal are created equal. Below are the five major questions a party must ask to determine whether and what kind of appeal is available to them, from a tribunal to the courts.

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

This is a yes/no question. Courts have no inherent jurisdiction to take appeals from administrative tribunals.⁶⁸ If a tribunal's enabling statute provides for a right to appeal from the tribunal to a court, a statutory right of appeal exists. If there is no right of appeal in the statute, there is no right of appeal. A party that is unhappy with a tribunal decision would still be able to access the courts via judicial review, which is an exceptional remedy. It is described below.

Even where a tribunal's enabling statute provides for a statutory right of appeal, parties may not generally appeal interlocutory rulings (for example, on jurisdiction, procedural or evidentiary issues, or bias).⁶⁹ To be appealable, the tribunal's decision must decide the merits of the matter or otherwise be a final disposition of it.⁷⁰

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.⁷¹ Appeals from provincially constituted tribunals may be taken, depending on what the enabling statute says, to the province's trial court of general jurisdiction,⁷² to a divisional court,⁷³ or to a court of appeal.⁷⁴ Rarely, a statute will provide a right (seldom exercised) to appeal a tribunal decision to Cabinet itself.⁷⁵

What Is the Scope of Available Appeal?

Just as the enabling statute determines whether a statutory appeal is available in the first place, the enabling statute completely determines its scope. That scope varies from tribunal to tribunal. Unlike the question of whether a statutory right of appeal exists, the

⁶⁸ *Re Medora*, 1982 CanLII 4089 (NB CA), cited with approval in *Chalmers v Toronto Stock Exchange*, 1989 CanLII 4122 (ON CA), leave to appeal to SCC denied: February 22, 1990. S.C.C. File No. 21710. S.C.C. Bulletin, 1990, p. 407.

⁶⁹ *Mary & David Goodine Dairy Farm v New Brunswick (Milk Marketing Board)*, [2002 NBCA 38, 217 DLR \(4th\) 708, \[2002\] NBJ No 177](#); *Roosma v Ford Motor Co of Canada Ltd* (1988), [66 OR \(2d\) 18](#) (Div Ct); *Newfoundland Transport Ltd v Newfoundland (Public Utilities Board)*, [1983] NJ No 92, 45 Nfld & PEIR 76 at 78 (CA); *contra*, *Fox v Registered Nurses' Assn*, [2002 NSCA 106, 207 NSR \(2d\) 330](#).

⁷⁰ *Ontario (Human Rights Commission) v Ontario Teachers' Federation*, [19 OR \(3d\) 371, \[1994\] OJ No 1585](#) (Gen Div); *Prince Albert (City) v Riocan Holding Inc*, [2004 SKCA 73, 241 DLR \(4th\) 308](#) (CA).

⁷¹ Respectively, see e.g. *Trademarks Act*, RSC 1985, c T-13, s 56; and *Competition Tribunal Act*, *supra* note 13, s 13.

⁷² See e.g. Nunavut's *Tourism Act*, RSNWT 1988, c T-7, s 8.1.

⁷³ See e.g. Ontario's *Expropriations Act*, RSO 1990, c E26, s 31.

⁷⁴ See e.g. BC *Securities Act*, *supra* note 4, s 167(1).

⁷⁵ See e.g. *Broadcasting Act*, SC 1991, c 11, s 28.

question of the scope of the appeal is not a yes/no question. To determine scope, one must read the relevant provisions in the tribunal's enabling statute.

For example, some statutes permit complete *de novo* review of a tribunal's decision, while others will be limited to issues of law based entirely on the record. Several enabling statutes provide for a statutory right of appeal from an administrative decision-maker only on questions of law or jurisdiction.⁷⁶ The enabling statute may also allow only certain parties to bring an appeal. In other words, the scope of a court's jurisdiction in an appeal from a *tribunal* decision may be different from the scope of an appellate court's jurisdiction in an appeal from a lower *court* decision. Where the scope of a statutory appeal is limited, parties still have the option of bringing a judicial review application on aspects of the tribunal decision where the appeal mechanism does not apply.⁷⁷

What is the Standard of Review that a Court Should Apply on a Statutory Appeal?

Standard of review is covered in depth in other chapters. For now it is enough to know that since *Vavilov*, the default standard of review for a statutory right of appeal is presumed to be the same for courts reviewing tribunal decisions as it is for appellate courts reviewing trial court decisions. That is, in reviewing extricable questions of law, the court would assess the tribunal decision on the standard of correctness, just as it would for a trial court. If there is an error of law, the tribunal's decision will be overruled. On questions of fact, the standard of review would be palpable and overriding error, just as it is for a trial court. But these are just defaults. Since these are statutory appeals, the legislature could also choose to specify a particular standard of review on the appeal, and in that case what the statute says would prevail.⁷⁸

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

The statute may provide that appeals are as of right, or the statute may require leave (i.e., permission to appeal). Where leave is required, it may 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 and Range Practices Act* provides for an appeal as of right from the Forest Appeals Commission to the BC Supreme Court on questions of law or jurisdiction. By contrast, a person affected by a decision of the BC Securities Commission may appeal to the BC Court of Appeal only with leave of a justice of that court.⁷⁹ Sometimes, additional statutory criteria must also be met before leave will be granted.⁸⁰

⁷⁶ For a discussion, see *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 (CanLII), [2018] 2 FCR 573.

⁷⁷ *Vavilov*, *supra* note 27 at para 52.

⁷⁸ *ibid.* at para 37.

⁷⁹ Compare *Forest and Range Practices Act*, SBC 2002, c 69, s 140.7 with *BC Securities Act*, *supra* note 8, s 167.

⁸⁰ 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 62, s 74.

Is a Stay of Proceedings Automatic, or Do You Have to Apply for It?

A stay of proceedings pauses the tribunal's decision until the appeal is decided. The rules governing stays vary between jurisdictions and tribunals. Some enabling statutes empower their tribunals or appellate bodies (internal or court) to stay enforcement of the tribunal order pending appeal or other conditions.⁸¹ Others may not. Bodies created by statute, like tribunals and their internal appeal divisions, have no inherent jurisdiction to order a stay, so once again it matters what the enabling statute says on the matter.⁸² This is true of Federal Court, too, though stays of proceedings are provided for in its enabling statute.⁸³ The omnibus statutes that operate in some provinces are also relevant: the Ontario *Statutory Powers Procedure Act*⁸⁴ establishes a default rule that an appeal to the courts operates as a stay of a tribunal's proceedings.⁸⁵ The BC *ATA*, by contrast, provides that commencing an appeal does not operate as a stay, unless the tribunal orders otherwise.⁸⁶ Unless a statute specifically excludes it, as BC's *ATA* does, the court that is designated to take appeals from the tribunal has the inherent authority to grant a stay.⁸⁷

Like the legislative decision to permit appeals as of right or only with leave, a legislative decision to make a stay automatic or not may say something about how the legislature views the tribunals in question. Requiring potential appellants to apply for leave to appeal places 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 comfort with granting broad autonomy to the tribunal and its determination of how best to balance rule-of-law with efficiency concerns as well as tribunal expertise with judicial oversight.

Using the Courts: Judicial Review

Judicial review has long been the main administrative law obsession. Tribunal-based and extralegal mechanisms and statutory appeals—not to mention the hugely important arena of administrative rulemaking discussed by Andrew Greene in Chapter 4—have been sidelined by comparison. In part this is because administrative law is often viewed through a prism of legal analyses created by judges, lawyers, and legal scholars. Legally trained people tend to be preoccupied with legal mechanisms and, in particular, with courts and the common law. This makes for an overly narrow lens. And yet, having placed judicial review in its broader context, it does deserve careful attention.

Judicial review is fundamentally different from statutory or internal tribunal appeals because, at its root, judicial review is about the inherent jurisdiction of courts to oversee

⁸¹ See e.g. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 69 et seq.

⁸² See, e.g., *S. W. v Canada Employment Insurance Commission and Health Canada*, 2018 SST 672 at paras 12-22.

⁸³ *Federal Courts Act*, RSC 1985, c F-7, ss 50, 50.1.

⁸⁴ *Statutory Powers Procedure Act*, *supra* note 43.

⁸⁵ *Ibid*, s 25.

⁸⁶ BC *ATA*, *supra* note 9su, s 25.

⁸⁷ *Kooner v College of Physicians and Surgeons of Ontario* (2002), [213 DLR \(4th\) 707 \(Ont Div Ct\)](#).

and check administrative (that is, executive) action, to safeguard the “rule of law” (for more on what the rule of law is, see Mary Liston in Chapter 4). This makes it a potentially sweeping remedy. Unlike appeals from tribunals, which the statute specifically permit, judicial review is the review of executive action *beyond* what the legislature provided for. For this reason, even if it happens fairly often these days, judicial review is still often referred to as an “extraordinary” remedy.

Here are four things to know about judicial review. First, courts always and fundamentally retain the discretion to hear, or not to hear, an application for judicial review. Second, in addition to overcoming the discretionary nature of judicial review, an applicant will need to cross specific thresholds in order to be heard. Third, the historical development of the remedies available through judicial review has actively shaped, and limited, 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. And finally, in response to the apparent disconnect between what some parties may want by way of remedies and what they can obtain on judicial review, some interesting private law and monetary damages-oriented remedies have sprung up around the edges of judicial review. Each of these points is developed further below.

Discretionary Bases for Refusing a Remedy

A court's decision on whether to grant judicial review is intimately bound up with the core tension that underlies all of administrative law—what the Supreme Court has 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.”⁸⁸

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*. 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 hear a matter or to grant a remedy, even where one seems clearly warranted on the facts.⁸⁹

The original set of discretionary grounds for refusing relief derive from common law and equity, and they have survived the statutory reform of judicial review. They are

⁸⁸ *Dunsmuir v New Brunswick*, [2008 SCC 9, \[2008\] 1 SCR 190](#) at para 27 [*Dunsmuir*]; affirmed in *Vavilov*, *supra* note 27 at para 2.

⁸⁹ *Strickland v Canada (Attorney General)*, [\[2015\] 2 SCR 713](#) [*Strickland*] at paras 37-45; *Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2020 FCA 122 at para 41.

similar to some of the equity-based grounds in civil procedure, such as laches (unreasonable delay), or unconscionability:

1. The most important basis for refusing to grant a remedy in judicial review is discussed in more detail below: that *adequate alternative remedies are available*.⁹⁰ Parties should exhaust all other legal avenues for review before proceeding to the "last resort" of judicial review.
2. Judicial review applications that are brought before a tribunal has finished its proceedings are usually dismissed for being *premature*. This includes challenges to the tribunal's interim procedural and evidentiary rulings. The policy rationales that underlie dismissals for prematurity include: (a) that administrative action is meant to be more cost-effective than court proceedings, and interim judicial review fragments and prolongs those proceedings; (b) that preliminary complaints may become moot as the proceedings progress; and (c) that the court will be in a better position to assess the situation once a full and complete record of tribunal proceedings has been made.⁹¹ A judge on judicial review retains the discretion to hear an early application. However, the threshold is high.⁹² To obtain judicial review of a tribunal's preliminary or interim ruling, an applicant must generally show exceptional circumstances, which would justify deviating from the usual rule. Evidence of irreparable harm, prejudice, costs, or the absence of an appropriate remedy at the end of the proceedings may constitute special or exceptional circumstances.⁹³ The fact that a matter has taken an exceptionally long time to resolve can also encourage courts to find exceptional circumstances.⁹⁴ Concerns that do not qualify as exceptional include those about procedural fairness or bias, jurisdictional issues, the presence of an important legal or constitutional issue, or the fact that all parties have consented to seeking judicial review early.⁹⁵
3. 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.⁹⁶ Parties should object promptly to any perceived impropriety on the part of the tribunal.

⁹⁰ See *infra* notes 122 to 125 [check referenced footnotes] and accompanying text.

⁹¹ *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, [2012 SCC 10, \[2012\] 1 SCR 364](#); *Sagkeeng v. Government of Manitoba et al.*, [2020 MBQB 83 at paras 39-41](#).

⁹² *Thielmann v The Association of Professional Engineers and Geoscientists of the Province of Manitoba*, [2020 MBCA 8 \[Thielmann\]](#) at paras 22-28.

⁹³ *Ibid* at paras 38-50.

⁹⁴ See, e.g., *Ewert v Canada*, [2018 SCC 30 at paras 83-90](#); *Peters First Nation Band Council v Peters*, [2019 FCA 197 at paras 35-42](#).

⁹⁵ *Thielmann*, *supra* note 92; *Canada (Border Services Agency) v CB Powell Limited*, [2010 FCA 61, \[2011\] 2 FCR 332](#), leave to appeal to SCC refused, [2011 SCCA No 267](#), at para 33.

⁹⁶ *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [\[1991\] 1 S.C.R. 326 \[Immeubles Port Louis\]](#); *2122157 Ontario Inc v Tarion Warranty Corporation*, [2016 ONSC 851](#) (Div Ct).

Similarly, failing to attend a tribunal hearing could waive any right to judicial review, since it seems to suggest that the party is acquiescing.

4. 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 actually wants the remedy that the tribunal might have granted had it not erred.⁹⁷ But note that mootness concerns can be more easily overcome in applications for habeas corpus, discussed below.⁹⁸
5. 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 to obtain an unfair advantage, or flouting the law or making misrepresentations.⁹⁹

By the 1990s, these long-standing grounds for refusing relief came to be overlaid with a different vision of judicial review that reflected a new sensitivity to separation of powers issues, and increased deference toward administrative tribunals. The overarching presumption of judicial deference toward administrative decision-making percolated throughout the judicial review process, eventually 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 could sometimes be appropriate to refuse to grant judicial review out of deference to tribunals' unique institutional roles. Perhaps the most forceful statement from this era comes from *Domtar Inc. v Quebec*.¹⁰⁰ 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."¹⁰¹ The court went on to articulate what was then a novel, and striking, notion: that even the most deeply cherished rule-of-law values will not always point the way to the only, or perhaps even the most appropriate, response to a problem in administrative law, because administrative tribunals' independence and autonomy must also be taken into account. Sometimes, the rule of law must be "qualified".¹⁰²

⁹⁷ *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353; but see *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 [*Khela*] at paras 13-14; *Attawapiskat First Nation v Canada*, 2012 FC 948 [*Attawapiskat First Nation*] at paras 41-48.

⁹⁸ *Khela*, *ibid.*, at paras 13-14; *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at para 15.

⁹⁹ See e.g. *DeJesus v. Sharif*, 2010 BCCA 121, paras 83-86. Courts may still exercise their discretion to grant judicial review even if an applicant does not come with clean hands: *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14, 263 DLR (4th) 51.

¹⁰⁰ *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756.

¹⁰¹ *Ibid* at 795.

¹⁰² *Ibid* at 799-800; see also Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999) 12 CJALP 171-89 at 175. This article is also an early statement

In this way, courts moved past the restrictive traditional grounds for refusing to exercise discretion to grant judicial review. But the fact that judicial review is discretionary does not mean that courts are entitled to introduce some poorly-defined, deferential "X factor" into the decision-making process. Respecting, protecting, and adhering to the rule of law means that judges must base even discretionary decisions on identifiable reasons. Reason-giving is essential to ensuring that a "culture of justification" exists, not only for tribunals but for courts too.¹⁰³

Over the last ten years or so, the Supreme Court of Canada has tried to both clarify and limit the grounds on which a court can exercise its discretion not to hear a matter on judicial review. While the factors to be considered still "cannot be reduced to a checklist or a statement of general rules,"¹⁰⁴ there is guidance to be had. In *Khosa*, the court stated that the discretion to grant or withhold judicial review "must be exercised judicially and in accordance with proper principles."¹⁰⁵ In setting out those proper principles, the court identified the standard of review principles that govern administrative law generally, and which are discussed in other chapters of this book, plus the traditional grounds as identified and described above: "other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth."¹⁰⁶ In *MiningWatch* (*per coram* with Rothstein J writing), the court added another consideration (and one that has been rising in salience since *Khosa*), namely the balance of convenience to the various parties.¹⁰⁷ In an interesting juxtaposition to the *Domtar* language, which back in 1993 had proposed that the rule of law must sometimes be qualified, *MiningWatch* observes 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."¹⁰⁸

Is Judicial Review Available? Threshold Eligibility Questions

Convincing a court to exercise its discretion to hear a matter on judicial review is not all it takes to get heard on judicial review. The unique history, purpose, and mechanics of judicial review also mean that it will not be available in all situations. There are five main threshold questions that an applicant must cross in order to be eligible.

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. While this may sound straightforward enough, some organizations in Canadian society operate in a grey

of the Chief Justice's concept of the "ethos of justification" that underlies the rule of law, and which continues to be a vital part of contemporary jurisprudence.

¹⁰³ *Vavilov*, *supra* note 27 at paras 2, 14.

¹⁰⁴ *Strickland*, *supra* note 89 at para 45 (in considering whether adequate alternative remedies had been exhausted).

¹⁰⁵ *Canada (Citizenship and Immigration) v Khosa*, [2009 SCC 12](#), [\[2009\] 1 SCR 339](#) [*Khosa*] at para 40.

¹⁰⁶ *Ibid* at para 51.

¹⁰⁷ *MiningWatch Canada v Canada (Fisheries and Oceans)*, [2010 SCC 2](#), [\[2010\] 1 SCR 6](#) at para 52 [*MiningWatch*]; see also *Khosa*, *supra* note 105 at paras 36, 133-35.

¹⁰⁸ *MiningWatch*, *supra* note 153 at para 52.

zone, removed from pure government functions even while exercising some meaningful "public" powers. Others organizations may seem private, but have some connection to public authority. For example, stock exchanges regulate their members' conduct, including issuing and revoking licences, in order to protect the public. However, their authority to act as they do derives from a centuries-old compact with their members, not from any statutory grant of authority. How much does that matter? Similarly, we can distinguish between government-acting-as-state, and government-acting-as-private-contracting-party. A private party will generally have trouble obtaining judicial review of a government board's decision not to award it a particular contract.¹⁰⁹ As well, public employees with employment contracts will generally have their employment relationships governed by private (contract) law, not public (administrative) law.¹¹⁰

Various factors go into determining whether a particular tribunal is a private body or a public one. No one factor is determinative. Relevant considerations include whether the matter at issue is of a more public or more private character; the nature of the decision-maker and the nature of its relationships to a statutory scheme or to government action; whether the decision being challenged was authorized by a public source of law; and whether public law remedies would be "suitable."¹¹¹

In addition to determining whether a tribunal is a sufficiently "public" body, a party seeking to challenge administrative action should determine whether they have *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.¹¹² There is also discretionary "public interest standing," under which an individual or group may be able to challenge administrative action on behalf of others.¹¹³ Since tribunals are expected to maintain their impartiality, courts will also exercise their discretion in deciding whether and to what degree a tribunal should be able to participate on its own behalf, when a party challenges its administrative action.¹¹⁴

Third, a party seeking to challenge administrative action should determine to which court they 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* to the courts, this

¹⁰⁹ But consider the improper purpose doctrine: *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231.

¹¹⁰ *Dunsmuir*, *supra* note 88 at paras 79-83, 112-17 (still good law on this point); also *Makis v Alberta Health Services*, 2020 ABCA 168 at para 48; *Democracy Watch v Ontario Integrity Commissioner*, 2020 ONSC 6081.

¹¹¹ *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 60; see also *McDonald v Anishinabek Police Service* (2006), 83 OR (3d) 132 (Div Ct); *Setia v Appleby College*, 2013 ONCA 753.

¹¹² See e.g. *Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 194, leave to appeal to SCC refused, [2011] SCCA No 349.

¹¹³ See *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, para 37.

¹¹⁴ *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 414, [2015] 3 SCR 147, paras 52-59; but see *The Owners, Strata Plan NW 2575 v Booth*, 2020 BCCA 153 at para 22.

is not the case for judicial review. (This makes sense, because judicial review is an extraordinary remedy that the enabling statute does not provide for in the first place.) Typically, which court to go to is determined by which level of government – provincial or federal – created the tribunal.¹¹⁵ Ontario's *Judicial Review Procedure Act* also sets out which superior court (Divisional or Superior Court) receives judicial review applications from the different provincial tribunals.¹¹⁶

Fourth, a party should ensure that they have not missed any deadlines. Some statutes impose time limits for filing 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 must be made within 30 days of the time the underlying decision or order is first communicated.¹¹⁷ In Alberta, the rules impose a six-month time limit on all applications for judicial review, except *habeas corpus* applications.¹¹⁸ 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.¹¹⁹ In British Columbia, the general time limit is 60 days.¹²⁰ Parties should therefore check all applicable statutes, including the tribunal's enabling statutes, global procedural and judicial review acts, and rules of court, for time limits affecting judicial review. However, courts often have the authority, under statute, to extend the time period for bringing a judicial review application—for example, where there is a reasonable explanation for the delay, where the extension would not cause substantial prejudice or hardship, and/or where the party can demonstrate *prima facie* grounds for relief.¹²¹

The final threshold eligibility matter that a party must establish before gaining access to judicial review is that they have exhausted all other adequate means of recourse for challenging the tribunal's actions.¹²² Depending on the tribunal's enabling statute, other means of recourse may include almost any of the legal 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, not all other

¹¹⁵ There are some exceptions. For example, provincial superior courts have concurrent jurisdiction where Charter issues are raised in attacks on federal legislative regimes (*Reza v Canada*, [1994] 2 SCR 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 SCR 585 [*TeleZone*]). On the Crown prerogative see also *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, and on concurrent jurisdiction more generally, see also *Strickland*, *supra* note 89 at paras 16-33.

¹¹⁶ See, e.g., Ontario *Judicial Review Procedure Act* (JRPA), RSO 1990, c J 1, s 6.

¹¹⁷ *Federal Courts Act*, *supra* note 83, s 18.1(2). The deadline can be extended: see, e.g. *Canada (Attorney General) v Larkman*, 2012 FCA 204.

¹¹⁸ Rule 3.15(2) of the *Alberta Rules of Court* (Alta Reg 124/2010).

¹¹⁹ Rule 7.05(1), *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov 19, 2008, imposes the time limit on applications for relief in the nature of *certiorari*.

¹²⁰ BC ATA, *supra* note 9, s 57(1). The ATA does not apply to all tribunals in BC.

¹²¹ E.g. Ontario *Judicial Review Procedure Act*, *supra* note 164, s 5; BC ATA, *supra* note 9, s 57(2). The *Federal Courts Act*, *supra* note 83, 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).

¹²² *Harelkin v University of Regina*, [1979] 2 SCR 561, 96 DLR (3d) 14 [*Harelkin*].

means of recourse will necessarily be “adequate”. In determining whether other means of recourse are actually adequate, courts will consider “the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost.”¹²³ These categories are not closed. In balancing these factors, a court should engage in a broad inquiry that considers not only whether some other remedy is adequate but whether—taking into account the purposes and policy considerations underpinning the legislative scheme, the balance of convenience to the parties, and other factors the court may consider relevant—granting judicial review in the circumstances would be appropriate.¹²⁴

In determining whether an internal administrative appeal counts as an adequate alternative remedy, applicants must do more than just raise unproven allegations that the appellate tribunal will suffer from the same errors¹²⁵ or biases¹²⁶ as the original tribunal. Nor can challengers circumvent available appeals on the grounds both parties consent to doing so.¹²⁷

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.¹²⁸ Quebec's *Code of Civil Procedure* also prohibits a superior court from applying Quebec's version of *certiorari* to a tribunal decision where an appeal is available. On the other hand, Ontario's *Judicial Review Procedure Act* and Prince Edward Island's *Judicial Review Act* both permit judicial review notwithstanding any other right of appeal to the courts.¹²⁹ 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.¹³⁰

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 provinces, they were modified by statute to deal with the fact that they had become progressively more technical and more unreasonably narrow. In spite of this, it is still necessary to

¹²³ *Strickland*, *supra* note 89 at para 42.

¹²⁴ *Ibid* at paras 43-44.

¹²⁵ *Harelkin*, *supra* note 170.

¹²⁶ *Turnbull v Canadian Institute of Actuaries* (1995), [129 DLR \(4th\) 42](#) (Man CA).

¹²⁷ *Canada (Border Services Agency) v CB Powell Limited*, *supra* note 95 at para 33.

¹²⁸ *Federal Courts Act*, *supra* note 83, s 18.5. For a more extensive discussion of access to judicial review in the Federal Court, see *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, [2013 FCA 250](#).

¹²⁹ See, respectively, *Code of Civil Procedure*, *supra* note 46, s 529; *Judicial Review Procedure Act*, *supra* note 164, s 2(1); and *Judicial Review Act* (PEI JRA), RSPEI 1988, c J-3, s 4(2).

¹³⁰ See, e.g. *Volochay v College of Massage Therapists of Ontario*, 2012 ONCA 541 at para 70; *Anne & Gilbert Inc v Government of PEI*, [2012 PECA 4](#).

understand the ancient writs to understand the scope and range of remedies available on judicial review. For example, neither the old writs nor the reform statutes, which are based on the old writs, allow 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.¹³¹

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.¹³² 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 fundamentally discretionary, we also discuss the bases on which courts have refused to grant a remedy.

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 lower courts and maintained the supremacy of the royal courts. In the United States, the vast majority of applications to the US 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 that generally, the court cannot substitute its decision for the decision of a tribunal that the court finds had erred, because the court does not have the tribunal's statutory decision-making authority.¹³³ Quashing the existing decision effectively means that the matter is remitted to the administrative decision-maker, who still retains the statutory jurisdiction to decide.

¹³¹ For example, the "direct action in nullity" continues to operate in Quebec: *Immeubles Port Louis*, *supra* note 139. In New Brunswick, judicial review exists alongside a range of "alternative" remedies echoing the old prerogative writs. See e.g. *Sullivan v Greater Moncton Planning District Commission* (1993), 132 NBR (2d) 285 (TD). 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 writs.

¹³² See e.g. *Ontario Statutory Powers Procedure Act*, *supra* note 43, s 25; *New Brunswick Energy and Utilities Board Act*, SNB 2006, c E-9.18, s 52(2).

¹³³ Even before *Vavilov*, in exceptional circumstances, courts have sometimes ordered the decision that they find the original tribunal ought to have made. See e.g. *Renaud v Québec (Commission des affaires sociales)*, [1999] 3 SCR 855, 184 DLR (4th) 441, [1999] SCJ No 70 ; *Corp of the Canadian Civil Liberties Assn v Ontario (Civilian Commission on Police Services)* (2002), 61 OR (3d) 649 (CA); *Allman v Amacon Property Management Services Inc*, [2007] BCJ No 1144 (CA).

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 preemptively. 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. It can be 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 remit the matter to the tribunal, to reconsider in a procedurally fair manner. A variation on *mandamus* gives the court the discretion to remit 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*,¹³⁴ also grant this power.

The 2019 *Vavilov* decision made some substantial changes to judicial review applications based on *mandamus*. As noted, the ancient prerogative writ of *mandamus* permitted courts to remit a matter back to a decision maker, but did not permit the court to give directions to that decision maker. The variant, *mandamus 2.0*, recognized that a court could exercise its discretion to remit a matter back to a tribunal with directions. However, the court could not tell the tribunal how it must decide. In particular, even *mandamus 2.0* could not be used to force an administrative decision-maker to exercise its discretion in a particular way, although exercises of discretion could not be unlawful and must always conform to the constitution. This notion took on a life of its own over the last decade, as courts began to reflect on the idea that sometimes, there could only be one lawful way in which the decision maker's discretion could be exercised, and that courts should avoid excessive delay on the way to reaching that one right answer.¹³⁵ *Vavilov* has confirmed this trend.¹³⁶ It tells us that it will most often be appropriate for the court to remit the matter, with reasons. However, the court can also decline to remit a matter to the tribunal altogether, "where it becomes evident to the court ... that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose".¹³⁷ In determining whether to remit a matter to a tribunal, a court on judicial review should consider "[e]lements like concern for delay, fairness to the parties, urgency

¹³⁴ *Federal Courts Act*, *supra* note 83.

¹³⁵ In the so-called *Insite* case, which concerned a safe drug injection site, the Supreme Court of Canada held that BC's Minister of Health had not exercised its discretion consistent with the Charter when it refused to exempt Insite from certain criminal law provisions. The court then took the rare step of issuing an order in the nature of *mandamus*, compelling the Minister to exercise its discretion so as to issue an exemption to Insite. *Canada (Attorney General) v PHS Community Services Society*, [2011 SCC 44](#), [2011] 3 SCR 134, para 150. See also *Canada (Public Safety and Emergency Preparedness) v LeBon*, [2013 FCA 55](#); *D'Errico v Canada (Attorney General)*, [2014 FCA 95](#) at paras 16-18.

¹³⁶ See Paul Daly, chapter XX at ?

¹³⁷ *Vavilov*, *supra* note 27 at para 142.

of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources”.¹³⁸

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 kind, used to declare some government action *ultra vires*, and the private law kind, used to clarify the law or declare a private party's rights under a statute. The public law kind 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, because the Crown was the source of its own authority. 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.¹³⁹ Where a declaration does not produce a government response, however, the declaration may look like a distinctly second-rate remedy.¹⁴⁰ At least where the Crown prerogative over foreign affairs is concerned, an aggrieved party may find themselves 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.

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-level death penalty sentences in the federal courts. In Canada, most *habeas corpus* applications are brought by people detained in correctional, immigration, and mental health institutions or detained by police, child welfare authorities, or other state actors. Unlike the other prerogative writs, *habeas corpus* is not inherently discretionary. It issues “as of right if the applicant proves a deprivation of liberty and raises a legitimate ground upon which to question the legality of the deprivation.”¹⁴¹ Moreover, *habeas* is available regardless of what other remedies a statutory scheme provides for, unless the administrative regime in question is “a complete, comprehensive and expert scheme which provides review that is at least as broad and advantageous as *habeas corpus* with respect to the grounds raised by

¹³⁸ *Ibid.*

¹³⁹ See, e.g., *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (issuing a declaration that the RCMP pension plan violated job-sharers' Charter s. 15 rights, apparently confident that Canada would take the necessary steps to address the discriminatory effect).

¹⁴⁰ *Khadr*, *supra* note 66. In 2008 the Supreme Court of Canada determined that Omar Khadr had been deprived of his s 7 Charter rights and issued a declaration to that effect, leaving it to the government to decide how best to respond. The government did not seek Mr. Khadr's repatriation as he had sought.

¹⁴¹ *Khela*, *supra* note 97 at para 41.

the applicant".¹⁴² In the Supreme Court's words, *habeas* "remains as fundamental to our modern conception of liberty as it was in the days of King John".¹⁴³

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.¹⁴⁴

Statutory Reform

Over time, each of the prerogative writs above came to be bound up in technical complexity and arcane rules. Potentially meritorious applications were dismissed because the applicant had petitioned for the wrong writ, or because the claim was barred by some technical limitation. As the case law became more complex 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,¹⁴⁵ was statutory reform. Some provinces enacted omnibus statutes governing judicial review or statutory/civil procedure,¹⁴⁶ while others used their rules of court to enact changes.¹⁴⁷ 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 BC *Judicial Review Procedure Acts* (JRPA), the Ontario *Statutory Powers Procedure Act*, the BC *Administrative Tribunals Act*, the PEI *Judicial Review Act*, Quebec's *Code of Civil Procedure*, and the rules of court in other provinces and territories. These important statutes have sought to clarify judicial review procedure. Some have also tried to change the substantive shape of judicial review itself. Therefore, parties considering challenging a tribunal order must be aware of the relevant statutes' provisions, as well as those of the tribunal's own enabling statutes. Statutory reforms commonly provide for the following:

¹⁴² *Chhina*, *supra* note 98 at para 71; see also *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 in relation to the *Federal Courts Act*.

¹⁴³ *Chhina*, *ibid.*

¹⁴⁴ E.g. PEI JRA, *supra* note 129, s 11; BC *Judicial Review Procedure Act* (BCJRPA), RSBC 1996, c 241, s 18 (certain remedies in the nature of *quo warranto* still available).

¹⁴⁵ *Federal Courts Act*, *supra* note 83, s 18(1) provides the Federal Court 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." Note that *habeas corpus* is not included in the list. Jurisdiction to grant *habeas corpus* in, e.g. federal penitentiaries, which are otherwise subject to Federal Court review, remains with the provincial superior courts: *Khela*, *supra* note 97 at paras 31-35.

¹⁴⁶ Ontario JRPA, *supra* note 164, BCJRPA, *supra* note 144, PEI JRA, *supra* note 129, Quebec *Code of Civil Procedure*, *supra* note 46. Ontario and BC have enacted the most comprehensive reforms. Be aware that, apart from *habeas corpus*, terminology in Quebec 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 their rights "declared."

¹⁴⁷ Alberta, Manitoba, New Brunswick, Newfoundland, Northwest Territories, Nova Scotia, Nunavut, and Saskatchewan.

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 most of the old writs. In bringing a petition for judicial review, the party only has 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 they 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 the superior courts of the provinces, and the statutes provide for a subsequent right of appeal to the provincial Court of Appeal. Federal Court decisions would be appealed to the Federal 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 BC and Ontario JRPA's use the words "exercise of statutory power," rather than the word "decision," which expands the range of judicial review to include any exercise of statutory power.¹⁴⁸ Other statutes permit a tribunal to refer a "stated case" to the courts to determine a question of law, after which the case can go back to the original tribunal for determination of the ultimate issues.¹⁴⁹ For example, BC tribunals that do not have jurisdiction over constitutional questions under the ATA can issue a stay and refer a constitutional question to a court of competent jurisdiction.¹⁵⁰

Private Law Remedies

As noted above, a tribunal's enabling statute may give it the power to order a range of remedies, including money damages. Courts on judicial review do not have the same ability. The difficulty is that neither the old prerogative writs, nor the new statutory remedy of judicial review, allow a party to obtain monetary relief through judicial

¹⁴⁸ BCJRPA, *supra* note 144, s 3; Ontario JRPA, *supra* note 164, s 2.

¹⁴⁹ E.g. *Federal Courts Act*, *supra* note 83, s 18.3; BC ATA, *supra* note 9, s 43.

¹⁵⁰ BC ATA, *ibid*, ss 44, 45.

review. In some circumstances, what the unhappy parties probably really want are monetary damages. They are not easy to obtain.

Public bodies, like administrative agencies, can be subject to purely private law remedies outside the scope of administrative action and judicial review. The Crown and its servants can be liable to private parties for monetary relief, although some statutes limit individual administrative tribunal members' liability.¹⁵¹ However, to seek monetary relief, an aggrieved party must initiate a separate civil action for restitution or damages alongside, or instead of, a judicial review application.

Government agencies may be sued, for example, for breach of contract or for the tort of negligence. However, a public officer must be able to make decisions that are adverse to some peoples' interests, in the service of broader public policy goals. One cannot sue when it comes to the effects of government decisions around "core policy matters".¹⁵² The government can also raise the legality of a tribunal's decision as a defence to a damages claim.¹⁵³ The tort of negligence, which is grounded in proximity and the question of what one owes to one's neighbour, is a poor fit when considering the relationship between citizens and the state.¹⁵⁴ Alexander Pless discusses these private law suits, as well as the relationship and potential overlap between private rights of action and judicial review applications, further in Chapter 21.

As another alternative, government agencies may be sued for the special tort of misfeasance in (or abuse of) public office. This would be a potential source of money damages against public actors acting in their public capacity. The threshold is high, however. 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.¹⁵⁵ The public officer must "deliberately engage in conduct that [they know] to be inconsistent with the obligations of the office."¹⁵⁶

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 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 cooperation. The case made its way to the Supreme Court of

¹⁵¹ E.g. BC ATA, *supra* note 9, s 56.

¹⁵² *R v Imperial Tobacco Canada Ltd*, [2011 SCC 42](#), [\[2011\] 3 SCR 45](#) [*Imperial Tobacco*] at para 90.

¹⁵³ *TeleZone*, *supra* note 115 at para 46. The precise role of legality or illegality in an action for damages is a little more complicated in practice than this, and is explored in more detail in Chapter xx.

¹⁵⁴ *Paradis Honey Ltd v Canada*, [2015 FCA 89](#), leave to appeal refused, [2015] SCCA No 227 at paras 119-130.

¹⁵⁵ *Powder Mountain Resorts Ltd v British Columbia*, [2001 BCCA 619 at para 8](#).

¹⁵⁶ *Odhavji Estate v Woodhouse*, [2003 SCC 69](#), [\[2003\] 3 SCR 263](#) at para 28. See also *Clark v Ontario (Attorney General)*, 2019 ONCA 311 at paras 97-114; *Rain Coast Water Corp. v British Columbia*, 2019 BCCA 201 at paras 150-156.

Canada on the defendant's motion to dismiss the plaintiff's claim. It was determined that the plaintiff had made out a cause of action and that the matter should be allowed to proceed; thus confirming that the tort of misfeasance in public office exists. Subsequent cases have considered the tort of misfeasance in public office against a range of public actors including provincial and federal departments or ministries, federal penitentiary staff, hospital boards, and racing commissions.

As these cases make clear, some of these kinds of torts will overlap with a potential judicial review application while others will not. Judicial review is not an option in a case like *Odhavji*, because there was no administrative decision to challenge. It was about police action. In other cases, like one involving Health Canada's handling of a drug approval application, or a hospital board's revocation of a doctor's privileges, an administrative actor's conduct may be precisely what is being challenged. As always in this field, an unhappy party needs to understand what it wants, and what routes might be available for getting what it wants – and that party should be realistic about what is and is not possible.

Conclusion

Administrative law remedies are the product of history, and of democratic and rule-of-law priorities, often acting in tension with each other. These tensions are emblematic of a fundamental contest between deeply held values around the rule of law on the one hand, and administrative expertise, legal pluralism, and democratic accountability on the other.

Tribunals develop remedies that are novel, by court standards, because administrative agencies are differently constituted than courts are. Regardless of how we may feel about any particular decision, we should not lose sight of the exciting fact that administrative tribunals are unique, specialized, purpose-built and sometimes innovative structures with focused mandates. They will be at the front line of justice, when it comes to trying to address the public health, social, equity, and economic challenges that face us in this third decade of the third millennium.

Administrative law remedies at the court level, especially on judicial review, have also been shaped by their historical origins and by subsequent, sometimes piecemeal, reform efforts. Judicial review and court-centred processes, which fill up the majority of most textbooks, are still just one, final stage of administrative law and practice. We need court oversight, to safeguard the rule of law and to ensure that our governments remain democratic and accountable. All the same, lawyers' usual focus on courts and legal reasoning should not limit our appreciation of, and approach to, the complex and varied forms that front-line administrative action can represent.

At both levels, parties may not obtain, or to hold onto, the remedies that they want the most. If we were to design a set of remedies from scratch today, we would probably not decide to set up two separate mechanisms for accessing the courts (that is, statutory appeals and judicial review). We might create an overarching administrative

supertribunal to hear both appeals and judicial review applications.¹⁵⁷ Perhaps there was also some decision point at which we could have developed a public law remedy for monetary damages, where those seem to be the most appropriate remedies. Yet without genuinely sweeping reform, administrative law remedies will continue to be influenced by their historical roots as well as by the bold remedial moves that tribunals make, and all of these remedies in turn will continue to drive administrative law forward. Even as they evolve, these remedies will continue to be informed by the particular history, and the promise, that define this unique legal universe.

¹⁵⁷ Quebec has one: see the *Act respecting administrative justice*, CQLR c J-3, Which created the Administrative Tribunal of Quebec.

Suggested Additional Readings

Statutes

Federal Courts Act, RSC 1985, c F-7.

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

Cases

Harekin v University of Regina, [\[1979\] 2 SCR 561, 96 DLR \(3d\) 14](#).

McDonald v Anishinabek Police Service (2006), [83 OR \(3d\) 132](#) (Div Ct).

Secondary Sources

Gwen Brodsky, Shelagh Day & Frances Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies” (2017) 6:1 Can J Hum Rts 1.