

# Remedies in Administrative Law: A Roadmap to a Parallel Legal Universe

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I. Introduction .....	43
II. Remedial Options at the Tribunal Stage .....	46
A. Statutory Authority .....	47
B. What Makes Administrative Tribunals Unique .....	48
C. Systemic Remedies at the Tribunal Level .....	52
III. Enforcing Tribunal Orders Against Parties .....	56
A. The Tribunal Seeks to Enforce Its Order .....	56
B. A Party Seeks to Enforce a Tribunal's Order .....	58
C. Criminal Prosecution .....	58
IV. Challenging Administrative Action Without Going to Court .....	59
A. Internal Tribunal Mechanisms .....	60
B. External Non-Court Mechanisms .....	61
C. Using the Courts .....	62
1. Statutory Rights of Appeal to the Courts .....	63
D. Using the Courts: Judicial Review .....	67
1. Discretionary Bases for Refusing a Remedy .....	67
2. Is Judicial Review Available? Threshold Questions .....	71
E. Remedies on Judicial Review .....	75
1. Introduction to the Prerogative Writs .....	76
2. Statutory Reform .....	78
F. Private Law Remedies .....	80
V. Conclusion .....	84
Suggested Additional Readings .....	85

## I. INTRODUCTION

The Northern Gateway pipeline saga introduced in this book's first chapter is a case study in how administrative law operates in Canada, and the crucially important subjects, on the border between law and policy, that get decided through administrative law means.

The saga also helps shed light on the role of the courts, vis-à-vis the executive, and in particular on the kinds of remedies that courts are able to impose.

*Gitxaala Nation*<sup>1</sup> is generally considered at least a qualified victory for the several First Nations that brought the matter to the Federal Court of Appeal. The Gitxaala Nation had alleged that the federal Crown had failed in its duty to consult and, if necessary, to accommodate their interests during the Northern Gateway pipeline approval process. A majority of the Federal Court of Appeal held that they were right: that at key points, Canada had offered “only a brief, hurried, and inadequate opportunity ... to exchange and discuss information and dialogue,” and that the consultation process fell “well short of the mark.”<sup>2</sup>

In many respects, the majority’s decision looks like any appellate decision (albeit a long one, weighing in at almost 140 pages). It reviews the facts and the decisions reached below, analyzes the case law, and develops a lengthy set of reasons for deciding in the way it did. Yet in other ways, it looks different. For example, Gitxaala Nation are styled as both “appellants”—appealing a National Energy Board (NEB) decision to issue regulatory certificates approving key pieces of the pipeline project—and as “applicants” on “judicial review,” challenging an Order in Council made by the Governor in Council (i.e., federal Cabinet, or the “GIC”), directing the NEB to issue those certificates. Is there a meaningful difference between an “applicant” and an “appellant”? How exactly does a court acquire the authority to oversee the actions of the NEB, or of federal Cabinet? The Federal Court of Appeal also made observations about its role that were very different from what any appellate court would normally have made in reviewing a trial court decision. It said things like, “the Governor in Council is entitled to a very broad margin of appreciation in making its discretionary decision upon the widest considerations of policy and public interest.”<sup>3</sup>

Perhaps more importantly, although the Gitxaala were seen to have enjoyed a victory, the remedy they received was confusing. The court did not make a decision about whether, on its merits, the Northern Gateway pipeline project should proceed. It did not give it the go-ahead, nor order that it had to be stopped. It did not order sanctions or money damages against the GIC for proceeding with the project on the basis of what it had held to be inadequate consultation. Instead, it “quashed” the earlier GIC decision and sent it back, *again to the GIC*, for reconsideration. The majority held that Canada would have to go back and adequately consult with the relevant First Nations, but once it had done so (something the court did not think would take long) it was apparently free to continue with the approval process.

None of this seems very familiar or necessarily, at first glance, very satisfactory. What was going on? Why did this outcome count as a success for the Gitxaala Nation at all, if it failed to stop the pipeline, imposed no damages, and put the ultimate approval decision back with the GIC itself? Was this the most they could have hoped for? Understanding how the remedies operated in this case involves understanding how administrative law remedies have evolved to be something separate from what we normally expect from courts—something that recognizes the particular role of administrative decision-makers, like the GIC and many others, and that draws on a particular tradition, and a particular understanding of court authority.

1 *Gitxaala Nation v Canada*, [2016 FCA 187](#), [\[2016\] FCJ No 705](#) (QL) [*Gitxaala Nation*].

2 *Ibid* at para 325.

3 *Ibid* at para 152.

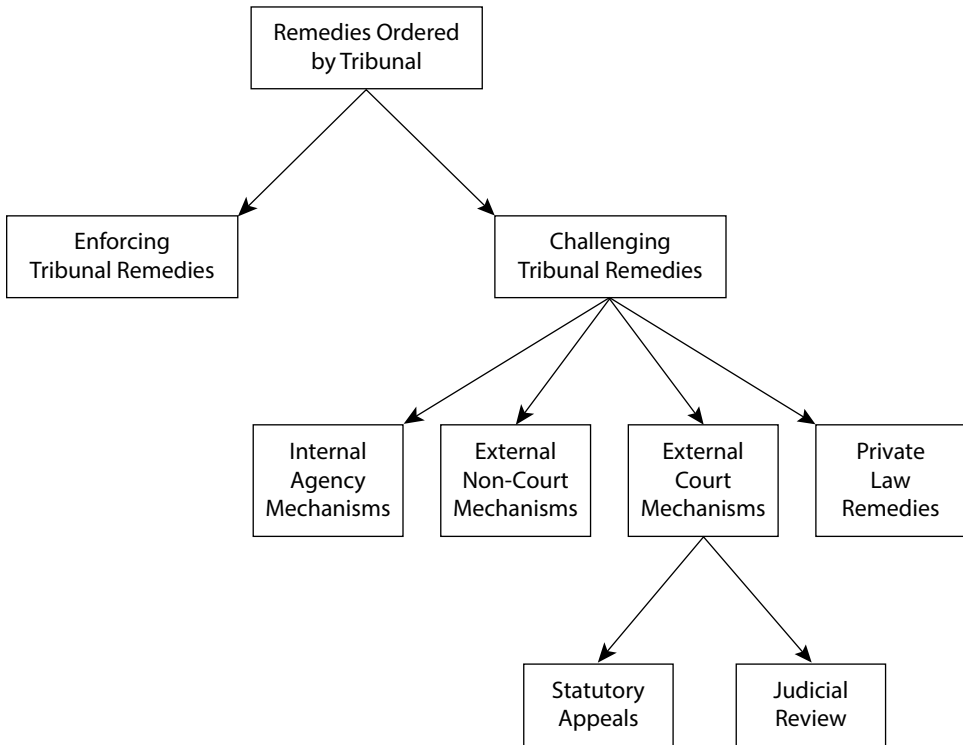
Even starting with a court decision as we have done, however, can obscure what goes on before a party like the Gitxaala get to court. Administrative law does not begin at the point where a party to an administrative action seeks judicial review of that action through the courts. The scope of administrative law begins much earlier, and also encompasses administrative decision-making processes that may take policy into account, or operate under a different mandate, or otherwise look quite different from what a court is likely to produce. Most other tribunals, to be sure, are not as purely political as the GIC, but nor are they courts.<sup>4</sup> Rich forms of action are possible in these forums. A tight focus on court action thus misses the hugely important first step in real-life administrative action: the varied and sometimes creative remedies that a tribunal itself may impose.

Let us, then, start at the beginning. This chapter provides an overview of administrative law remedies as a whole, including not only judicial review 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, and it provides a broad structural framework on which subsequent chapters can build. This chapter is meant to operate almost as a decision tree, to help guide students through the different stages where remedies issues arise. Figure 2.1 sets out the broad outlines of the chapter.

The chapter is divided into three main sections. Section II, “Remedial Options at the Tribunal Stage,” Section III, “Enforcing Tribunal Orders Against Parties,” and even the first part of Section IV, “Challenging Administrative Action Without Going to Court” have not traditionally been located in the “remedies” chapter of administrative law texts (if they appear at all). As we shall see in Section II, remedial options available to administrative agencies at the first stage differ from those available to courts and reflect the different composition of tribunals. The remedies available at the administrative stage are both more limited (in terms of the tribunal’s statute-derived authority to impose them) and, potentially, more expansive (as a consequence of tribunals’ particular expertise and their ability to remain seized of a matter over time). Section III looks at the ability of a party or tribunal to *enforce* a tribunal order against another party, either civilly or criminally. Section IV considers parties’ ability to *challenge* tribunal action. This includes internal appeal options, extralegal options, appeal to the courts, and, finally, the classic administrative law remedy of judicial review (which, as discussed below, is not the same thing as appeal to the courts). In addressing these three aspects in a single chapter, the goal is to provide the reader, in a systematic and chronological fashion, with a conceptual frame of reference that includes the full range of remedial options available to parties before administrative tribunals.

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4 The GIC is not a tribunal at all, but it is the exception in this chapter. For simplicity I use the term “tribunal” throughout to refer to the full range of administrative agencies, commissions, and other bodies, but generally not including Cabinet. This is an oversimplification because many administrative decision-makers do not take a tribunal form. Many administrative decisions are made by bureaucrats without a hearing or the court-style structure of a tribunal; administrative agencies also regularly make policy decisions that affect individual and social interests. However, the tribunal is perhaps the prototypical administrative structure for the purpose of understanding the remedies available to a party to tribunal action.

**Figure 2.1**

## II. REMEDIAL OPTIONS AT THE TRIBUNAL STAGE

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

## A. Statutory Authority

As a creature of statute, a tribunal cannot make orders that affect individuals' rights or obligations without authority from its enabling statute.<sup>5</sup> Therefore, the first step in determining a tribunal's remedial options is to look at the statute itself. If a tribunal makes orders outside the scope of its enabling statute, it is exceeding its jurisdiction, and those orders will be void.<sup>6</sup>

Many enabling statutes set out express lists of the remedies a tribunal may order. For example, tribunals often have the power to make declaratory orders, to order a party to repair a problem or to mitigate damage, or to order a party to comply with the tribunal's enabling statute. Licensing powers may also be given to tribunals in statutory regimes designed to protect the public (for example, through professional licensing qualifications or requirements for corporations issuing securities to public investors), or to manage natural resources (for example, fishing and forestry licences). Some tribunals can appoint conciliators and otherwise assist in settling matters before them.<sup>7</sup> Some enabling statutes empower tribunals to impose significant fines and possible incarceration, or provide for more serious quasi-criminal offences that must be prosecuted by the Crown.<sup>8</sup>

Other statutes accord their tribunals broad, discretionary power to fashion the remedies they see fit. For example, the Ontario *Human Rights Code* gives the Ontario Human Rights Tribunal the discretion to order a party who has been found to discriminate to "do anything that, in the opinion of the tribunal, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices."<sup>9</sup>

Even where a tribunal's remedial power is less certain (that is, its enabling statute does not expressly permit a particular remedy and the tribunal has no broad discretionary power), one may try to argue that, as a matter of practical necessity, a tribunal must have the remedial power to do the things its statute requires it to do.<sup>10</sup> However, orders for the payment of money, such as compensation or damages, fines, fees and levies, and costs, can generally only be ordered by tribunals that have the express statutory authority to do so. Tribunals also lack the equitable jurisdiction to order interim injunctions, although they may be given statutory authority to seek an injunction in court to enforce a statute. Finally, whether a tribunal has the power to grant remedies under the *Canadian Charter of Rights and Freedoms*<sup>11</sup> is a separate question. As Evan Fox-Decent and Alexander Pless explain in Chapter 13, *The Charter and Administrative Law Part II: Substantive Review*, a separate test determines whether particular administrative tribunals can grant remedies under s 24(1) of the Charter.<sup>12</sup>

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

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

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

8 See e.g. *BC Securities Act*, RSCBC 1996, c 418, s 155.

9 *Human Rights Code*, RSO 1990, c H.19, s 41(1)(a).

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

11 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

12 See *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765.

Moreover, some provinces have now enacted statutes that explicitly bar at least some tribunals from considering Charter issues.<sup>13</sup>

## B. 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. The particular structures and qualities of administrative tribunals equally affect the kinds of remedies they are inclined, and empowered, to grant. This part of the chapter seeks to set out in broad strokes the kinds of remedies that tribunal-type administrative bodies in particular are likely to grant. The kinds of functions performed by tribunal-type administrative bodies—namely, party-on-party dispute resolution, party-versus-agency enforcement and disciplinary proceedings, and other similar forms of hearings and decision-making—tend to be the most common ways in which members of the public engage with administrative bodies. These functions also square especially well with the concept of a “remedy,” defined by *Black’s Law Dictionary* as “the means by which the violation of a right is prevented, redressed, or compensated.”<sup>14</sup>

However, the reader should be aware that tribunal-type administrative agencies are only one version of administrative agency operations. Parties may interact, be answerable to, and seek to influence administrative law agencies in other ways. Agencies’ policy-making functions, in particular, are outside the scope of this chapter but should not be outside one’s field of vision.<sup>15</sup> 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 at some remove from their tribunal departments. Administrative policy instruments can range from formal, binding interpretive releases to relatively informal, non-binding administrative guidance. Policy releases and guidelines have a direct impact on regulated entities. They are publicly available, and regulated entities are expected to know about them. Their release can be preceded by formal public consultation, providing those affected with a chance for input in advance.

Moreover, even when acting in their tribunal capacity, administrative tribunals often do, and should, take a broader perspective on a dispute than courts necessarily will. One way to understand the difference is in terms described by an American scholar, Abram Chayes, in the mid-1970s.<sup>16</sup> Chayes talked about courts, not administrative agencies. Nevertheless, his

13 See e.g. the BC *Administrative Tribunals Act*, SBC 2004, c 45 [ATA], which provides that the majority of provincial tribunals do not have discretion to consider either constitutional questions generally, or at least constitutional questions relating to the Charter. The statute establishes a mechanism for referring constitutional questions to the courts. Sections 46.1-46.3 of the Act impose similar restrictions on many tribunals’ jurisdiction to apply the BC *Human Rights Code* to any matter before them on the basis that the Human Rights Tribunal is the more appropriate forum.

14 *Black’s Law Dictionary*, 10th ed, *sub verbo* “remedy.”

15 See Chapter 8, Delegation and Consultation: How the Administrative State Functions and the Importance of Rules.

16 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 (defining a judicial function as one that determines “pre-existing” rights and liabilities by reference to a “fixed objective standard,” as contrasted to an administrative function, in which rights and liabilities are created by “policy and expediency”).

point illuminates the distinction between the two. Chayes described an emerging dichotomy between traditional conceptions of adjudication and an emerging judicial role in what he described as public law litigation. In traditional adjudication, a suit involves only the private parties before the court. It is self-contained and party-initiated. A dispassionate judge identifies the private right at issue on the basis of doctrinal analysis and retrospective fact inquiry. The judge imposes relief, understood as compensation for the past violation of an identifiable existing right. (This portrayal describes party-on-party dispute resolution, but this sort of rights-based approach also underpins tribunal-on-party regulatory action, such as a self-regulatory profession's disciplinary proceeding against one of its members.) By contrast, in public law litigation, Chayes argued that the debate is more focused on the vindication of broader statutory or constitutional policies. The lawsuit is not self-contained. The judge must manage complex trial situations involving not only the parties to the dispute but also the many and shifting parties not before the court who nevertheless may be affected by the suit's outcome. Fact inquiry is predictive, not retrospective. Through a combination of party negotiation and continuing judicial involvement, the judge fashions relief that is ad hoc, ongoing, and prospective. On the Chayes model, judges can become change agents under whose management specific cases can have far-reaching effects.

Like Chayes's public law adjudicatory model, administrative agencies—even when acting as tribunals rather than policy-making bodies—may have a broader mandate, and the ability to leverage a broader range of tools than a traditional assertion of rights-based claims provides. Chayes's point was somewhat aspirational when it came to courts, but it is accurate in describing how at least some tribunals function. Many administrative bodies are explicitly charged with managing complex and often “polycentric” problems in a comprehensive manner. The Supreme Court of Canada has recognized this, pointing out that “while judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems [assigned to tribunals by their enabling statutes] require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties.”<sup>17</sup>

This has a few implications. First, it means that relative to courts, administrative tribunals have stronger theoretical justifications for remaining seized of a case over a longer period of time.<sup>18</sup> Second, it means that administrative tribunals may try to develop remedies that address underlying structural or systemic problems, in a forward-looking rather than retrospective, rights-oriented way. This is not to say that courts may not also sometimes craft systemic, forward-looking remedies. Indeed, Chayes's point is that they may.<sup>19</sup> However, relative to courts, administrative tribunals may be especially well placed to develop and implement novel remedies thanks to their subject-specific expertise, their field sensitivity, and their particular statutory mandates.

17 *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 36, [1998] SCJ No 46 (QL); see also *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at paras 17-25 [Catalyst Paper]; *Canada v Kabul Farms Inc*, 2016 FCA 143, [2016] FCJ No 480 (QL) at paras 24-25.

18 See e.g. *Ontario (Ministry of Correctional Services) v Ontario (Human Rights Comm)* (2001), 39 CHRR 308 (Ont Sup Ct), aff'd [2004] OJ No 5051 (CA) (holding that the Human Rights Tribunal of Ontario had extensive supervisory jurisdiction over its orders and could remain seized of a matter to recast its orders to deal with ongoing systemic racism at correctional facilities).

19 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3, provides justification for structural injunction-style remedies by courts.

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. Some tribunals' enabling statutes stipulate that a certain portion of their tribunal members should be laypersons. For example, the federal *Competition Tribunal Act*<sup>20</sup> stipulates that the tribunal shall consist of not more than six members who are Federal Court judges, and not more than eight other "lay" members. The statute goes on to say that the Governor in Council should establish an advisory council, "to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs,"<sup>21</sup> to advise the Minister of Industry with respect to the appointment of lay members. The result is a tribunal with substantial expertise in economics and in commerce.<sup>22</sup> The tribunal's expertise also makes it more likely that its members will devise remedies that reflect their training and perspective, and that may be more economic than legal.

Sometimes, the composition of tribunal membership reflects an explicit attempt to represent different interest groups, perhaps especially in subject areas where there is a perception that judges historically have been unsympathetic or not alive to some of the issues at stake. A classic example is a tripartite labour board, on which a representative of labour, a representative of management, and a third member must sit. A further example of a tripartite structure is the BC Review Board, charged under the *Criminal Code*<sup>23</sup> with making dispositions with respect to individuals found unfit to stand trial or not criminally responsible on account of mental disorder. The BC *Mental Health Act*<sup>24</sup> 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.<sup>25</sup> The kinds of remedies that such boards devise are likely to reflect the particular priorities and assumptions of its members, and may not be limited to the set of strictly legal remedies that spring most easily to the legally trained mind.

Administrative law has also been affected by what is variously called "new public management" theory, neoliberalism, or administrative structures that "span the public-private divide." Effectively, these are mechanisms by which public structures, such as administrative tribunals, retain ultimate accountability for their programs but "outsource" the implementation of those programs to private or third-party actors. For example, hundreds of standards developed by private bodies are incorporated into law and used for enforcement and compliance purposes.<sup>26</sup> Regulators also delegate enforcement and compliance functions to private bodies. For example, the Technical Standards and Safety

20 RSC 1985, c 19 (2nd Supp), s 3(2) [CTA].

21 *Ibid.*, s 3(3).

22 *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748. Separately, note that expertise is not only based on qualifications. Tribunal members also gain expertise through familiarity and experience with their fields.

23 RSC, 1985, c C-46.

24 RSBC 1996, c 288 [BC MHA].

25 BC MHA, s 24.1(3). Additional guidelines on qualifications for part-time members of the board can be found in "Recruitment, Screening and Appointment Procedures" (Vancouver: British Columbia Review Board, 2004), online: British Columbia Review Board <<http://www.bcrb.bc.ca/BCRB%20Recruitment%20Procedures%202011.pdf>>.

26 For example, since 1927, the Canadian Standards Association's Canadian Electrical Code, Canadian Standards Association Standard C22.1-06, has provided the standards for addressing shock and fire hazards of electrical products in Canada. It has been incorporated by reference into provincial regulations across the country: see e.g. *Electrical Safety Regulation*, BC Reg 100/2004, s 20.



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

These are deeply embedded features of Canadian law, especially in fields where there are highly technical product or process issues to be regulated. They are also controversial, particularly as their use becomes more widespread and it becomes clear that “technical” standards are not so easily divorced from larger social and policy considerations. Proponents of public–private coordination in regulation argue that delegated implementation is the best way forward for administrative agencies that are otherwise at risk of being ineffective and out of touch; that it allocates action to those bodies best equipped and with the greatest information to perform tasks effectively; that public–private partnerships are capable of accomplishing public ends more efficiently than the public sector could acting alone; and that such partnerships do not eliminate the public state, but rather “save” it from its own bureaucratic flaws.<sup>27</sup> Those opposed argue that these mechanisms are privatization by another name; that they reduce accountability and the public sector’s responsibility for what should be publicly provided goods and services; and that they “hollow out” the state in potentially irretrievable ways.<sup>28</sup> We must leave this important debate for another day. At a practical level, though, parties to administrative actions should be aware that a constellation of ostensibly private actors may play more or less formal roles in real-life public administration.

As well, both tribunal-side and policy-side administrative functions have been affected by globalization. The effects of globalization mean that domestic administrative tribunals no longer act entirely free of international and transnational agreements, organizations, standard-setting bodies, and commitments. Some of the most notable international examples come out of the European Union, whose policy and harmonization directives and court decisions have, over the last several decades, had a direct impact on European nation states’ domestic administrative law. In Canada, as well, international obligations have had an impact on, for example, federal labour policies and their subsequent administration through a variety of public bodies.<sup>29</sup> International human rights norms have also influenced the substantive review of administrative decisions.<sup>30</sup> Relevant international or transnational standards are sometimes set by governments acting together (such as the North American Free Trade Agreement [NAFTA] and its associated side agreements) and sometimes by independent, private, or non-governmental bodies filling lacunae in international law (as is the case

27 Jody Freeman, “Private Parties, Public Functions, and the New Administrative Law” (2000) 52 Admin L Rev 813; Richard Stewart, “Administrative Law in the Twenty-First Century” (2003) 78 NYUL Rev 437.

28 See e.g. Harry Arthurs, “Public Law in a Neoliberal Globalized World: The Administrative State Goes to Market (and Cries ‘Wee, Wee, Wee’ All the Way Home)” (2005) 55 UTLJ 797.

29 Canada, Commission on Labour Standards Review, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau: Human Resources and Skills Development Canada, 2006) at 51-52, online: <[http://publications.gc.ca/collections/collection\\_2008/hrsc-rhdsc/HS24-31-2006E.pdf](http://publications.gc.ca/collections/collection_2008/hrsc-rhdsc/HS24-31-2006E.pdf)>.

30 See Chapter 16, International Human Rights Norms and Administrative Law.

with forest practices certification).<sup>31</sup> Looking at these developments, some scholars have even begun to herald the birth of a “global administrative law.”<sup>32</sup>

Thus, the conversation about proper tribunal action spans multiple disciplines—law, public policy, and organizational and political theory—and it is taking place at the levels of practice and theory, both within tribunals and with respect to them. The forces that influence tribunals produce remedies that can be more dynamic and varied than the ones we are accustomed to seeing in the courts. Courts’ review of administrative action—the piece of the puzzle that gets so much attention in mainstream Canadian administrative law courses—is only one facet of administrative law.

### C. Systemic Remedies at the Tribunal Level

Some of the factors described above—ongoing seizure, a broad mandate, different expertise, public–private coordination, and transnational linkages—have led some tribunals to create innovative remedies. For example, one cluster of innovations incorporates an independent third party in trying to develop and implement remedial measures within a subject organization or corporation where systemic problems seem to be significant. These remedies try to effectuate meaningful systemic change within the organization through sustained engagement with the problem by an impartial outsider. They have become fairly common, particularly among securities and other corporate regulators in the United States and Australia, as well as Canada.<sup>33</sup> An important function of the third party in this context is to facilitate a deliberative process within the organization itself—that is, to help the troubled organization confront and work through its problems internally. Some scholars argue that transparent, accountable, and broadly participatory dialogue of this nature, potentially facilitated by such third parties, is the most legitimate and most effective mechanism for making decisions in complex organizational structures.<sup>34</sup>

31 Errol Meidinger, “The Administrative Law of Global Private-Public Regulation: The Case of Forestry” (2006) 17 EJIL 47.

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

33 In the United States, corporate monitorships have been imposed on dozens of corporations under the terms of deferred criminal prosecution agreements or regulatory enforcement settlements. On the effectiveness of corporate monitorships in that context, see Cristie Ford & David Hess, “Corporate Monitorships and New Governance Regulation: In Theory, in Practice, and in Context” (2011) 33:4 Law & Pol’y 509. The Australian Competition and Consumer Commission was a pioneer in developing what are known there as “enforceable undertakings”: Christine Parker, “Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings” (2004) 67 Mod L Rev 209. Canadian examples include Settlement Agreement, Mackie Research Capital Corporation, 2010 BCSECCOM 646 (22 November 2010), online: <[http://www.bccsc.bc.ca/Enforcement/Settlements/PDF/2010\\_BCSECCOM\\_646\\_pdf/](http://www.bccsc.bc.ca/Enforcement/Settlements/PDF/2010_BCSECCOM_646_pdf/)>; Settlement Agreement, *In the Matter of Union Securities Ltd and John P Thompson* (18 April 2006), online: <<http://docs.iroc.ca/DisplayDocument.aspx?DocumentID=71522F-D9816A452F8246B58D8776B613&Language=fr>>; Order, *In the Matter of Agnico-Eagle Mines Limited* (28 April 2005), online: Ontario Securities Commission <<http://www.osc.gov.on.ca/en/10499.htm>>.

34 See e.g. Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton, NJ: Princeton University Press, 2004); but see César A Rodríguez-Garavito, “Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala” (2005) *Politics & Society* 203.

One effort at creating such a deliberative, third-party facilitated process took place within Ontario's Ministry of Correctional Services, as a response to a long-standing human rights complaint by an employee of the ministry. The complainant in that case, Michael McKinnon, was a correctional officer of Indigenous ancestry working within the Ministry of Correctional Services. In 1998, 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 of Mr McKinnon's allegations 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 in a strict sense, but whether they had been carried out in good faith.

After dealing with the question whether it could remain seized of the matter—finding that it could, as affirmed later by the Ontario Court of Appeal<sup>35</sup>—the tribunal ordered an additional range of remedies, including training for ministry and facility management; establishing a roster of external mediators to deal with discrimination complaints; and appointing, at the ministry's expense, an independent third-party consultant nominated by the Ontario Human Rights Commission (OHRC) to develop and oversee the delivery of training programs. The third-party consultant was to be nominated by the OHRC, to be paid for by the ministry, and to report to the tribunal.

What makes these remedies interesting is that they are so different in character from traditional legal remedies, such as damages (in the civil context) or quashing of ministry or Facility decisions (in the administrative law context). This looks like 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 and permanent *systemic* change to institutional culture.

The *McKinnon* case became the longest-running human rights case in Canada, but ultimately after a protracted and difficult run, it had a somewhat happy ending. As of May 2005, the parties were still arguing over the scope of the third-party consultant's responsibilities, with the consultant alleging that the ministry was attempting to gain control over the process. The process of defining the consultant's mandate seemed itself to have become an adversarial contest that did not bode well for the consultant's ability to catalyze the hoped-for meaningful dialogue within the ministry.<sup>36</sup> By 2007, the tribunal found that the ministry had not been implementing the tribunal's previous orders in good faith,<sup>37</sup> and in February

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35 *Ontario v McKinnon*, [2004] OJ No 5051 (QL) (CA) [*McKinnon*].

36 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: <<http://www.canlii.org/en/on/onhrt/doc/2005/2005hrto15/2005hrto15.html>>.

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

2011 the tribunal found that a *prima facie* case had been made out that the deputy minister was in contempt for failing to implement the earlier orders. The tribunal exercised its discretion to state a case for contempt to the Ontario Divisional Court.<sup>38</sup> (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. 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.<sup>39</sup> Despite progress, however, a pervasive "organizational culture" remained a barrier to effecting "long-term, systemic, or broad-based human rights improvements."<sup>40</sup> In the agreement's final year, the parties formulated a "Multi-Year Plan" to "crystalize the extensive work" done to date and to "sustain change" into the future.<sup>41</sup>

The *McKinnon* settlement and the efforts that continue to follow it are cause for some optimism, but a satisfactory result was never, and is still not, a foregone conclusion. The 2011 settlement might not have happened in the absence of a factor external to the tribunal process—the appointment of a new Deputy Minister of Corrections with a mandate to professionalize the service and improve its record.<sup>42</sup> Nor is a 23-year-long litigation matter ever really a victory, no matter what its outcome. Thus, *McKinnon* raised and still leaves us with some challenging questions: Is it possible to effect real, substantive "good faith" compliance in a truly recalcitrant employer? Is it appropriate to use law to simultaneously enforce rights, redress wrongs, and "cure" systemic problems? Is it appropriate for a tribunal to continue crafting new orders in an effort to achieve an optimal outcome? Can external third

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

39 OHRC, "Organizational change in Correctional Services—the MCSCS Human Rights Project Charter," online: <<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>>. The executive committee receives advice from an Aboriginal advisory subcommittee, an external advisory group, and several working groups. Committee members receive *Human Rights Code* training, and the ministry discloses relevant internal operations data to the OHRC. See OHRC, "Correctional Services: Update on the MCSCS Human Rights Project Charter," online: <<http://www.ohrc.on.ca/en/annual-report-2011-2012-human-rights-next-generation/correctional-services-update-mcscs-human-rights-project-charter>>.

40 *Ibid.*

41 OHRC, "Reaching new milestones with the Human Rights Project Charter," online: <<http://www.ohrc.on.ca/en/annual-report-2013-2014-ohrc-today/organizational-change-page>>. A phased implementation strategy focuses on embedding human rights and Aboriginal expertise, service delivery, building competencies, maintaining an inclusive workplace, and complaint management."

42 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 allegation of a hate mail campaign directed at African-Canadian corrections officers going back to 2004. Mr Cox claims that the mail is coming from fellow correctional officers. Like Mr McKinnon, Mr Cox alleges that his employer has not taken adequate affirmative steps to respond to the problem, and that the majority of Don Jail correctional officers do not participate in its ostensibly mandatory human rights training program. He also alleges, *inter alia*, that the Ontario Public Service Employees Union actively undermined an earlier investigation into the incidents. See Jasmin Seputis, "Toronto Jail Guard Seeks Workplace Racism Investigation," *CBC News* (5 March 2012), online: <<http://www.cbc.ca/1.1129238>>.

parties really change culture and create meaningful dialogue? If not, what legal options do we have left—through tribunal remedies or otherwise?

Moreover, we should not overestimate courts' comfort with broader remedial orders by tribunals that aim to address systemic problems. Court review of tribunal remedies by means of judicial review serves a valuable validation function, based on important rule-of-law values. It also introduces some difficult tensions. As we have identified, cases like *McKinnon* straddle what Chayes might describe as the boundary between party-on-party dispute resolution and public law litigation. As we know, when courts engage with systemic issues, they run quickly into public policy choices, public law 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, in *Moore v British Columbia (Education)*,<sup>43</sup> the court reviewed the BC Human Rights Tribunal's decision that the failure to provide educational support to Jeffrey Moore, a child with dyslexia, constituted discrimination on the basis of disability. The tribunal had considered not only Jeffrey's personal damages but also the fact that the BC Ministry of Education had implemented a fixed cap on special education funding, below the actual incidence rate; and the school district's decision, faced with those funding constraints, to close its Diagnostic Centre, which provided support to dyslexic students, without providing an adequate substitute.

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.<sup>44</sup> 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 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.*<sup>45</sup>

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."<sup>46</sup> The sharp contrast in *Moore* between the tribunal's conception of its mandate, consistent with the Chayes public law litigation model, and the

43 [2012 SCC 61](#), [2012] 3 SCR 360 [*Moore*].

44 *Catalyst Paper*, *supra* note 17 at para 56. The relevant standard of review was patent unreasonableness, which exists in British Columbia under the BC ATA.

45 *Moore*, *supra* note 43 at para 64 (emphasis added).

46 *Ibid* at para 66.

Supreme Court’s retrospective, party-focused analysis underscores both the possibilities, and limitations, of novel remedial strategies in effecting systemic change.

### III. ENFORCING TRIBUNAL ORDERS AGAINST PARTIES

After a tribunal makes a decision and imposes an order, assuming no one challenges that decision,<sup>47</sup> another set of administrative law remedies becomes available: the enforcement powers. These may be invoked where a tribunal needs to enforce its order against a party that is not complying with the order. This is not uncommon among self-regulatory organizations such as professional licensing bodies, where the tribunal acts against particular individuals rather than adjudicating disputes between parties. Alternatively, a party to a multiparty dispute before a tribunal may want to enforce the tribunal’s order against another party on which the order was imposed. Criminal prosecution is also a possibility. Of course, regardless of any broader social patterns or systemic factors operating, tribunal orders can only be enforced against the parties on which they are imposed.

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

Rarely, a tribunal may enforce its own orders. One tribunal that has the power to enforce its own orders—for example, an order for civil contempt—is the federal Competition Tribunal.<sup>48</sup> Some other tribunals are also given the authority to enforce monetary obligations, such as requiring unpaid wages or family maintenance to be paid, imposing liens, making garnishment orders, seizing assets, or even suspending driving privileges.<sup>49</sup> However, any enforcement powers a tribunal has must be granted to the tribunal in its enabling statute, and that delegation of enforcement power must pass constitutional scrutiny. For example, a provincially created tribunal cannot have criminal (and therefore federal) enforcement powers.<sup>50</sup>

In British Columbia, certain sections of the *Administrative Tribunals Act* are intended to assist tribunals in obtaining compliance with their orders. For example, s 18 permits certain tribunals to schedule a hearing, make a decision, or dismiss an application if a party fails to comply with an order (presumably, an order to appear). Section 31(1)(e) permits some tribunals to dismiss an application if the applicant fails to comply with a tribunal order. Section 47, which permits some tribunals to make orders for payment of costs, also allows some tribunals, under s 47(1)(c), to require a party to pay the *tribunal’s* actual costs “if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive.” Orders for

47 See Section IV.

48 CTA, s 8(1). See *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 (4th) [*Chrysler Canada*] (holding that clear and unambiguous statutory language can override the common law rule that only superior courts have the power to punish for contempt and that the wording of the CTA, s 8(1) (as it then was), which conferred on the tribunal jurisdiction “to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto,” constituted such clear and unambiguous statutory language); also *Lymer v Jonsson*, 2016 ABCA 76 at paras 11-13 (re registrar in bankruptcy).

49 E.g., BC ESA, ss 87-101; *Maintenance Enforcement Act*, SNS 1994-95, c 6, ss 19, 27-30.

50 *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 [*United Nurses of Alberta*].

costs, on being filed in the court registry, have the same effect as a court order for the recovery of a debt (s 47(2)).

More commonly, the tribunal must make an application in court to enforce any order it makes. Where a party has disobeyed a tribunal order, the statute provides that the tribunal may apply to court for an order requiring the person to comply.<sup>51</sup> The tribunal's order is presumed to be valid and correct if the party disobeying it failed to file an appeal (if one is available) or if the party appealed and lost.<sup>52</sup> Other statutes allow tribunal orders to be registered with the court, sometimes only with leave.<sup>53</sup> In Quebec, a distinct procedure known as homologation gives courts the authority to compel individuals to fulfill tribunal orders. Courts can only access homologation if it is expressly provided for in the tribunal's enabling statute.<sup>54</sup> The omnibus *Statutory Powers Procedure Act* in Ontario allows tribunals to state a case for contempt to the Ontario Divisional Court, as happened in the *McKinnon* case in 2011.

Once a tribunal has successfully converted its order into a court order through one of the mechanisms above, the order can be enforced in the same manner as a court judgment. Among other things, this means that the court can initiate contempt proceedings if the party continues to disregard the order.<sup>55</sup> Contempt proceedings may be available if a party fails to abide by a tribunal's procedural order (for example, by failing to appear as a witness or to produce documents) or a tribunal's final substantive order.<sup>56</sup> Contempt can be civil or, where the conduct constitutes an intentional public act of defiance of the court, criminal.<sup>57</sup> In a contempt proceeding, the judge does not inquire into the validity of the tribunal's underlying order. However, only violations of "clear and unambiguous" tribunal orders will form the basis of a contempt order.<sup>58</sup> A court can also refuse to hold a party in contempt until an appeal or judicial review application (discussed in Section IV below) is completed, although parties can be required to pay moneys into court in the meantime.<sup>59</sup>

Note that legislators seem content to house tribunal order enforcement powers in the courts, even while using clauses to try to limit the availability of judicial review from administrative tribunals (known as "privative clauses").<sup>60</sup> For the legislative drafter, then, access to courts to *enforce* tribunal orders seems to be acceptable, while access to courts to *challenge* tribunal orders is less so. There is history at work here, along with separation-of-powers concerns and the legislator's appreciation for courts' existing enforcement powers. Arguably, this drafting choice also signals that legislators may be most concerned about conserving

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

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

53 See e.g. ATA, ss 47, 54.

54 See e.g. *Regulation respecting the conciliation and arbitration procedure for the accounts of members of the Corporation professionnelle des physiothérapeutes du Québec*, RRQ, c C-26, r 141.1.

55 Tribunals themselves may have the power to make orders for *in facie* contempt (contempt "in the face of" the court during the proceedings) because this power is implicit in the designation of a tribunal as a court of record. If a tribunal is not designated as such, then the power to punish for *in facie* contempt, like the power to punish for *ex facie* contempt (contempt outside the proceedings), must be explicitly conferred by the enabling statute. See *Chrysler Canada*, *supra* note 48.

56 See e.g. SPPA, s 13.

57 *United Nurses of Alberta*, *supra* note 50; also *Re Cowan*, 2010 ONSC 3138.

58 *Chrysler Canada*, *supra* note 48; *Bell ExpressVu Limited Partnership v Corkery*, 2009 ONCA 85 at paras 24-28.

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

60 On privative clauses and substantive fairness, see Chapter 11, Standard of Review: Back to the Future?

scarce judicial resources when those judicial resources might be deployed to undermine, rather than buttress and reinforce, the authority of the tribunals the legislation creates.

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

A party to an administrative action may also, exceptionally, bring an action against another party in court to enforce the tribunal's order. For example, a group of teachers successfully sought to enforce an arbitrator's order that a school board annually set aside certain funds for teachers' professional development.<sup>61</sup> Sara Blake has suggested that the party's success "may depend on whether the tribunal order is of a type that a court would enforce, and whether the court believes it should enforce the tribunal order in the absence of any statutory procedure for obtaining court assistance."<sup>62</sup> 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.

## C. Criminal Prosecution

Many statutes provide for quasi-criminal prosecution of persons who disobey tribunal orders. Quasi-criminal offences are prosecuted by the federal or provincial Crown, as appropriate, and they carry penalties that include fines and imprisonment. For example, a person who commits an offence under s 155 of the *BC Securities Act*<sup>63</sup> is liable to a fine of not more than \$3 million, to imprisonment for not more than three years, or both. Indictable offences under the federal *Fisheries Act*<sup>64</sup> may attract, at their upper end, fines of up to \$500,000 or imprisonment for up to two years, or both.<sup>65</sup>

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

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

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

or

(b) an offence punishable on summary conviction.<sup>66</sup>

The *Criminal Code* provision is only available where no other penalty is expressly provided by law. What does this mean? Superior courts' own contempt powers do not generally count

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

62 Sara Blake, *Administrative Law in Canada*, 4th ed (Markham, Ont: LexisNexis Butterworths, 2006) at 226.

63 *BC Securities Act*

64 *Fisheries Act*, RSC 1985, c F-14.

65 *Fisheries Act*, s 78(b).

66 *Criminal Code*, s 127(1) (emphasis added).



as an “other mode of proceeding” for purposes of this section.<sup>67</sup> Most administrative tribunals do not have the ability to make contempt orders on their own. Therefore, the *Criminal Code* provisions should apply where no “punishment or other mode of proceeding” is explicitly set out in the *tribunal’s enabling statute*. This has been held not to violate the constitutional separation of powers, even when dealing with provincial tribunals, on the basis that the provincial tribunal is still making orders that are non-criminal. Parliament, acting within its sphere, is the one that has decided that breach of those provincial provisions is a criminal offence.<sup>68</sup>

#### IV. CHALLENGING ADMINISTRATIVE ACTION WITHOUT GOING TO COURT

A party to an administrative action may also decide to challenge that administrative action itself. The possible bases for a party’s challenge are described in other chapters in this text. For example, a party may challenge the tribunal’s jurisdiction, its procedure, its impartiality, 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 affairs. Moreover, it is important to be realistic about what can be achieved through judicial review. In order to bring a successful judicial review application, a challenger must be aware of the specific remedial mechanisms available and how those mechanisms will help them achieve the result that they want. For example, as the *Gitxaala Nation* example shows, a motion to quash a tribunal decision, if successful, will usually only lead to the court sending the matter back to the original tribunal for rehearing.<sup>69</sup> This result may not satisfy the challenger. Even assuming that proper procedure is observed the second time, there is no guarantee that the party will receive the substantive outcome they seek.

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

67 *R v Gibbons*, [2012 SCC 28](#), [[2012](#)] 2 SCR 92 (holding that s 127 applies “where there is an express alternative statutory response to failures to obey court orders,” and that the Ontario Rules of Civil Procedure are not such an alternative); but see *R v Nielsen*, [2014 ABCA 173](#), [575 AR 197](#) (determining, for purposes of granting leave to appeal, that there is a “real issue” as to whether the Alberta Rules of Court would constitute such an exception).

68 *United Nurses of Alberta*, *supra* note 50.

69 See Kate Glover, Chapter 5, *The Principles and Practices of Procedural Fairness*.

## A. Internal Tribunal Mechanisms

A party considering a challenge to tribunal action will need to understand the particular tribunal's structure and capacity, as established by its enabling statute. All tribunals can fix certain things, such as clerical errors or factual errors due to mistake or dishonesty, without express statutory authority. This is sometimes called the "slip rule."<sup>70</sup> Tribunals can also "change their minds" until the time a final decision is made. Therefore, what constitutes a "final decision" is important. For example, if a statute provides that final decisions must be in writing, then only written decisions will constitute final decisions. Preliminary rulings can also be changed until the final decision on a matter has been made.<sup>71</sup>

Some enabling statutes specifically provide tribunals with the ability to reconsider and rehear decisions they have made. This is most common where a particular tribunal has ongoing regulatory responsibility over a particular domain, such as public utilities regulation or employer–employee relations. For example, the *Public Service Labour Relations Act* provides, "[s]ubject to subsection (2) [prohibiting retroactive effect of any rights acquired], the Board may review, rescind or amend any of its orders or decisions, or may rehear any application before making an order in respect of the application."<sup>72</sup> Absent such express statutory authority, however, for policy reasons that favour finality of proceedings, a tribunal cannot reconsider or alter a final decision made within its jurisdiction. Once it has made a final decision, the tribunal is *functus officio*.<sup>73</sup>

As a next-best alternative for challenging a tribunal decision, consider that some administrative tribunals are part of multi-tiered administrative agencies. Those tribunals' enabling statutes may provide for appeals internal to the administrative agency itself. For example, parties appearing before Canada's Immigration and Refugee Board Immigration Division may appeal to its Immigration Appeal Division.<sup>74</sup> Similarly, provincial securities acts across the country provide that persons directly affected by decisions made by Securities Commission staff may appeal to (or, in some statutes, seek "review" from) the commission itself, to which staff report.<sup>75</sup> Again, parties should be aware that internal appellate structures may not look much like courts.

These internal review proceedings do not preclude subsequent appeals to the courts. Indeed, the various provincial securities acts mentioned above provide for appeals under limited conditions from their internal appellate bodies to the courts. These are called "statutory appeals." Where the statute does not provide for an appeal to the courts, the parties' only access to the courts is by means of judicial review. However, as discussed in more detail below, where a statute provides for reconsideration or internal administrative appeals within

70 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 (QL) (CA).

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

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

73 *Chandler*, *supra* note 70. Because rights of appeal from tribunals tend to be more limited than from courts, the *functus officio* doctrine should be more flexible and less formalistic for such tribunals.

74 *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], ss 62-71, 174-75. Recourse to the courts is only available with leave of the Federal Court: *ibid*, s 72.

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

a multi-tiered agency, a challenger will generally be expected to exhaust those avenues before making an application for judicial review.

One of the more interesting innovations in internal administrative appeals was created in 1996, with the passage of Quebec's *Administrative Justice Act*.<sup>76</sup> The statute creates the Tribunal administratif du Québec (TAQ), a supertribunal that hears "proceedings" brought against almost all administrative tribunals and public bodies in the province, including government departments, boards, commissions, municipalities, and health care bodies.<sup>77</sup> As a practical matter, this means that there is now one main appellate/review body for administrative matters in the province. According to the Act, the tribunal's purpose is "to affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility and to safeguard the fundamental rights of citizens."<sup>78</sup> It is an administrative (that is, executive branch) institution, not a judicial one, but its remedial powers include judicial review-style options and (surprisingly for common law administrative lawyers) the ability to substitute its decision for an original tribunal's: "[i]n the case of the contestation of a decision, the Tribunal may confirm, vary or quash the contested decision and, if appropriate, make the decision which, in its opinion, should have been made initially."<sup>79</sup> Where the TAQ has jurisdiction to consider a proceeding, claimants should exhaust the remedies available from it rather than trying to circumvent the administrative process.<sup>80</sup> Avenues of appeal from the TAQ to the Superior Court of Quebec are limited.<sup>81</sup>

## B. External Non-Court Mechanisms

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.

An ongoing issue has been the degree to which an ombudsperson can assert jurisdiction with respect to administrative tribunal decisions and processes (as opposed to the general

76 *An Act Respecting Administrative Justice*, RSQ, c J-3.

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

78 *Ibid*, s 1.

79 *Ibid*, s 15.

80 *Okwuobi v Lester B Pearson School Board; Casimir v Quebec (Attorney General); Zorrilla v Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 SCR 257.

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

run of government departments and ministries—that is, public servants not possessing the statutorily created decision-making structure that tribunals have). Most legislation defines the ombudsperson’s jurisdiction as being over “matters of administration,” and courts have tended to define “administration” expansively as involving generic administrative processes, not simply as the antonym of “judicial” processes.<sup>82</sup> Among the tribunals themselves, the range of bodies subject to an ombudsperson’s investigatory powers can be quite broad. In Ontario, for example, the courts have held that even largely independent bodies can be subject to ombuds review if the government pays its members’ wages.<sup>83</sup> However, most ombuds statutes provide that an ombudsperson is not authorized to investigate a tribunal’s decision until after any right of appeal or review on the merits has been exercised or until after the time limit for doing so has expired.<sup>84</sup>

Several other public officials similar to ombudspersons also exist, including freedom of information and privacy commissioners, the auditor general, provincial auditors, and human rights commissioners. While harder for individuals to instigate, public inquiries are another mechanism for challenging government conduct.<sup>85</sup>

### C. Using the Courts

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 that the internal appeal mechanisms described above, 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—among others, during national emergencies—when executive action unquestionably needs to be subject to the rule of law, as applied by independent courts.<sup>86</sup> As with so many things in administrative law, context matters in thinking about the legitimacy of each alternative. There may be times when it makes sense to maintain the integrity of the administrative regime through all internal appeal stages. There may also be

82 For example, in *British Columbia Development Corporation v Friedmann (Ombudsman)*, [1984] 2 SCR 447, the Supreme Court ruled that policy-making activities of provincial Crown corporations were “matters of administration” for the purposes of the *Ombudsman Act*. The Ontario Court of Appeal has interpreted the ombudsperson’s jurisdiction over “administration of a government agency” to include investigations into matters determined by administrative tribunals: *Ombudsman of Ontario v Ontario (Labour Relations Board)* (1986), 44 DLR (4th) 312 (Ont CA).

83 *Ontario (Ombudsman) v Ontario (Health Disciplines Board)* (1979), 104 DLR (3d) 597 (Ont CA).

84 See e.g. the *Yukon Ombudsman Act*, RSY 2002, c 163, s 12. The *Manitoba Ombudsman Act*, CCSM c O45, s 18(d) and the *Saskatchewan Ombudsman and Children’s Advocate Act*, RSS 1978, c O-4, s 15(1)(d) provide that rights of appeal or review preclude an ombudsperson’s intervention “unless the Ombudsman is satisfied that in the particular case it would have been unreasonable to expect the complainant to resort to the tribunal or court,” although the time limitation for appeal or review must still have run.

85 See Peter Carver, Getting the Story Out: Accountability and the Law of Public Inquiries, <[www.emond.ca/adminlaw3e](http://www.emond.ca/adminlaw3e)>.

86 See Chapter 4, Administering 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].

times when what is required is faster and unapologetic recourse to the courts—for example, allowing a party to “leapfrog” the internal appeals and proceed directly to judicial review.

There are two main ways by which a party to a tribunal action can access the courts to challenge that action: appeal and judicial review. Appeal mechanisms—either to internal administrative appellate bodies or to courts—are provided for in the statutory scheme itself. The scope of a possible appeal is confined to what the statute expressly provides. Courts still struggle sometimes with knotty issues in taking appeals from administrative tribunals, but relative to judicial review it is easier to determine whether internal appeals or statutory appeals to the courts are available: one just has to read the statute. By contrast, judicial review is an exceptional remedy that goes beyond what the statute provides for.<sup>87</sup> 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.<sup>88</sup>

### 1. Statutory Rights of Appeal to the Courts

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

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

Courts have no inherent appellate jurisdiction over administrative tribunals.<sup>89</sup> A tribunal’s enabling statute may provide for a right to appeal to the courts. If it does not, then quite simply there is no such appeal. A dissatisfied party could only access the courts by way of the exceptional remedy of judicial review, described below. Moreover, parties generally may not appeal interlocutory rulings (for example, on jurisdiction, procedural or evidentiary issues, or bias).<sup>90</sup> To be appealable, the tribunal’s decision must decide the merits of the matter or otherwise be a final disposition of it.<sup>91</sup>

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

88 When reviewing a statutory appeal from an administrative actor or a judicial review, an appellate court should “step into the shoes” of the court that initially conducted the judicial review, determining whether the judge selected the appropriate standard of review and applied it correctly: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 at paras 46–47.

89 *Medora v Dental Society* (1984), 56 NBR (2d) 145 at 147, [1984] NBJ No 236 (QL) (CA).

90 *Mary & David Goodine Dairy Farm v New Brunswick (Milk Marketing Board)*, 2002 NBCA 38, 217 DLR (4th) 708, [2002] NBJ No 177 (QL); *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.

91 *Ontario (Human Rights Commission) v Ontario Teachers’ Federation*, 19 OR (3d) 371, [1994] OJ No 1585 (QL) (Div Ct); *Prince Albert (City) v Rioacan Holding Inc*, 2004 SKCA 73, 241 DLR (4th) 308 (CA).

Usually, a tribunal's enabling statute will also set out the court to which tribunal orders may be appealed. For federal tribunals, appeals are usually taken to the Federal Court or the Federal Court of Appeal.<sup>92</sup> Appeals from provincially constituted tribunals may be taken, depending on what the enabling statute says, to the province's trial court of general jurisdiction,<sup>93</sup> to a divisional court,<sup>94</sup> or to a court of appeal.<sup>95</sup> Rarely, a statute will provide a right (seldom exercised) to appeal a tribunal decision to Cabinet itself.<sup>96</sup>

### *b. 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 entirely determines its scope. That scope varies from tribunal to tribunal. Some statutes permit complete *de novo* review of a tribunal's decision, while others will be limited to issues of law based entirely on the record. In other words, an appellate court's jurisdiction in reviewing *tribunal* decisions may be different in scope from an appellate court's jurisdiction in reviewing lower *court* decisions. A court that has been designated to take appeals from a tribunal's decision must look to the tribunal's enabling statute to determine the breadth and scope of its appellate powers. Often, for example, enabling statutes will provide for a statutory right of appeal from an administrative decision-maker only on questions of law or jurisdiction.<sup>97</sup>

Arguably, the scope of an available appeal is determined by how closely the tribunal's subject matter, and its expertise, mirror the mandate and expertise of general courts. Statutes are more likely to provide a right of appeal to the courts where the tribunal has the power to affect individual rights (for example, human rights tribunals, land-use planning tribunals, and professional licensing). Labour relations and employment-related matters, which have long been adjudicated by tripartite boards with specialized expertise and which involve claims by organized labour to which courts were historically perceived to be hostile, cannot generally be appealed to the courts.<sup>98</sup> The same considerations affect the scope of available appeal. A statute is more likely to provide for a right of appeal to the courts where

92 Respectively, see e.g. *Trade-marks Act*, RSC 1985, c T-13, s 56; and CTA, s 13.

93 See e.g. Nunavut's *Travel and Tourism Act*, RSNWT 1988, c T-7, s 8.

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

95 See e.g. Newfoundland and Labrador's *Law Society Act, 1999*, SNL 1999, c L-9.1, s 55.

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

97 In *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, [2016 SCC 47](#), [[2016](#)] 2 SCR 293 at para 29 [*Edmonton East*], the majority pointed to six recent Supreme Court of Canada decisions involving statutory rights of appeal. In five of those cases, as well as in the *Edmonton East* context itself, the statutes in question provided for leave to appeal to the relevant court only on questions of law or of jurisdiction. In one case, *Sattva Capital Corp v Creston Moly Corp*, [2014 SCC 53](#), [[2014](#)] 2 SCR 633, a statutory appeal was available on a question of law, with leave and subject to potential conditions, effectively where the court had determined that the point of law was of particular importance to the parties, to a group of individuals, or to the public generally: *Arbitration Act*, RSBC 1996, c 55, s 31(2). It is not surprising that arbitrators would be treated differently than tribunals in this regard.

98 Gus Van Harten et al, *Administrative Law: Cases, Text, and Materials*, 7th ed (Toronto: Emond Montgomery, 2015) at 17. While Canadian courts were historically not friendly to organized labour, they were not as hostile to it as US courts were: John Godard, "Labour Law and Union Recognition in Canada: A Historical-Institutionalist Perspective," (2013) 38:2 Queen's LJ 391-418 at 400.

individual rights are at stake. For example, statutes generally provide for a broad power to appeal from certain professional disciplinary tribunals on questions of fact and law, where professionals risk losing their ability to practise their profession,<sup>99</sup> and from human rights tribunals adjudicating on violations of human rights codes.<sup>100</sup>

Yet even where the appeal rights are broad, courts will show deference to a tribunal's decisions, in order to respect the legislative intention to give a specialized tribunal responsibility for a particular statutory regime, and because of the tribunal's expertise and its familiarity with its own legislative scheme. Note that the standard of review on a statutory appeal from an administrative decision is generally "reasonableness." That is, unlike an appeal from a trial court to an appellate court, the question is not whether the original decision-maker made an error of law, or committed a palpable and overriding error of fact.<sup>101</sup> Most of the time, the question on a statutory appeal from an administrative decision-maker, as it is on judicial review, is not whether the decision-maker's decision was correct, but whether it was *reasonable*.<sup>102</sup> Standard of review is discussed in detail in Chapters 13 and 14 of this text.

Below are a few more considerations relevant to statutory appeals from administrative tribunals.

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

Appeals can be as of right or require leave. Where leave must be obtained, it can be the leave either of the original decision-maker or, more frequently, of the appellate body (that is, the court). For example, British Columbia's *Forest Practices Code of British Columbia Act*<sup>103</sup> 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

99 See e.g. *Ontario College of Teachers Act, 1996*, SO 1996, c 12, s 35(4). See also *Reddall v College of Nurses of Ontario* (1983), 149 DLR (3d) 60, 42 OR (2d) (CA). Ontario statutes in particular tend to provide explicitly for appeal from various tribunals "on questions of law or fact or both."

100 See e.g. Ont HRC, s 42(3); also *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 at 336-38.

101 In *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, [2016] 1 SCR 770 [Wilson] at paras 14-16, the Court stated that the standard of review on an appeal from a judicial review was still reasonableness (overruling the Federal Court of Appeal in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17, which had held at paras 25-26 and 34 that the normal appellate standard applied).

102 *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 at paras 38, 46 ("Where a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles ... regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal," and "on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness"); also *Edmonton East*, *supra* note 97 at paras 22-31. In *Edmonton East*, the Court split 5:4, with a forceful dissent, on the question of whether the standard of review was necessarily reasonableness, when the statutory regime provided for a right of appeal from the administrative decision-maker to the courts. However, all judges apparently agreed that statutory appeals from administrative decision-makers should be conducted on the basis of administrative law principles.

103 RSBC 1996 [Forest Practices Code].

Securities Commission may appeal to the BC Court of Appeal only with leave of a justice of that court.<sup>104</sup> Sometimes, additional statutory criteria must also be met before such leave will be granted.<sup>105</sup>

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

The rules governing stays of proceedings vary between jurisdictions and even tribunals. Specific enabling statutes may expressly empower their tribunals or the appellate bodies (internal or court) to which they appeal to stay enforcement of the tribunal order pending appeal.<sup>106</sup> The Ontario *Statutory Powers Procedure Act* establishes a default rule that an appeal operates as a stay of a tribunal's proceedings.<sup>107</sup> The BC ATA, by contrast, provides that "the commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise."<sup>108</sup> In the Federal Court, as well, stays of proceedings are usually discretionary.<sup>109</sup> Unless a statute specifically excludes it, as BC's ATA does, the superior court that is the tribunal's designated appellate court has the inherent authority to grant a stay.<sup>110</sup>

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

104 Compare *Forest Practices Code*, s 141 with BC *Securities Act*, s 167.

105 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. See IRPA, s 74.

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

107 SPPA, s 25.

108 ATA, s 25.

109 *Federal Courts Act*, RSC 1985, c F-7, s 50(1) [FCA]; but see s 50.1 concerning mandatory stays of claims against the Crown under certain conditions. In *Cardoza Quinteros v Canada (Citizenship and Immigration)*, 2008 FC 643 at paras 10, 13, the Federal Court noted that the granting of a stay requires (1) a serious issue to be tried; (2) that irreparable harm would be suffered if no stay were granted; and (3) that the balance of convenience favour granting the order. The Court also noted that the serious issue threshold "cannot automatically be met simply by formulating a ground of judicial review which, on its face, appears to be arguable."

110 *Kooner v College of Physicians and Surgeons of Ontario* (2002), 213 DLR (4th) 707 (Ont Div Ct).



## D. Using the Courts: Judicial Review

Now, finally, we discuss judicial review, the parallel universe under whose rules the outcome in *Gitxaala Nation* could be considered some sort of victory for the Gitxaala.

Judicial review has long been the fixation of administrative law, at the expense of tribunal-based and extralegal mechanisms and statutory appeals—not to mention the hugely important arena of administrative rulemaking—in part because administrative law is created primarily by judges, lawyers, and legal scholars. The legal training these individuals receive is, understandably, preoccupied with legal mechanisms and, in particular, with courts and the common law. This makes for an overly narrow lens. And yet, having placed judicial review in its broader context, it nonetheless deserves careful attention. Judicial review can be conceptually and logistically complex, and it differs from a straightforward appeal. The outcome in *Gitxaala Nation* was a function of the available judicial review remedies.

As we shall see throughout this volume, the basic nature of judicial review is different from statutory or internal tribunal appeals because, at its root, judicial review is about the inherent jurisdiction of courts to oversee and check administrative (that is, executive) action in the interest of the rule of law. This makes it a potentially sweeping remedy. Unlike appeals from tribunals, which are statutorily created, judicial review is the review of executive action *beyond* what the legislature provided for.

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 fundamentally discretionary nature of judicial review, an applicant will need to cross some 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 in more detail below.

### 1. Discretionary Bases for Refusing a Remedy

A court's decision whether to grant judicial review is intimately bound up with the core tension that underlies all of administrative law—what the Supreme Court 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.”<sup>111</sup> Courts are the indispensable guardians of the rule of law, but they still need to operate within their sphere of authority. This means respecting the fact that, through enabling statutes, legislatures grant authority over certain things to administrative tribunals, *and not to the courts*. A lot of administrative

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111 *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 27 [*Dunsmuir*].

law jurisprudence is devoted to trying to negotiate a path through the difficult territory on the borders of the branches' spheres of authority. What concerns us here is the threshold question of whether to grant judicial review at all—before considering the merits of the case, before figuring out the standard of review, and before determining the degree of procedural fairness a party is entitled to. Judicial review is fundamentally discretionary in a way that appeals are not. A court has the discretion to refuse to grant a remedy even where one seems clearly warranted on the facts.<sup>112</sup>

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 reminiscent of similar 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*.<sup>113</sup> 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 tribunal proceedings have been concluded are usually dismissed as being *premature*. This includes challenges to the tribunal's interim procedural and evidentiary rulings. The policy rationales that underlie dismissals for prematurity include: (a) that administrative action is meant to be more cost-effective than court proceedings, and interim judicial review fragments and protracts 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 exists.<sup>114</sup> A judge on judicial review retains the discretion to hear an early application; there is no “hard and fast rule” that prevents reviewing interim decisions.<sup>115</sup> However, to obtain judicial review of a tribunal's preliminary or interim ruling, an applicant must generally show exceptional circumstances, the presence of which mean the applicant should not be forced to wait until the administrative proceeding concludes. This is particularly true where the evidentiary record is not complete, factual issues have not been resolved, or the tribunal's expertise has not yet been brought to bear on relevant issues.<sup>116</sup> Evidence of irreparable harm, prejudice, costs, or delay, or the absence of an appropriate remedy at the end of the proceedings may constitute special or exceptional circumstances.<sup>117</sup> Concerns that do not qualify include those about procedural fairness or bias, jurisdictional issues, the presence of an important legal or

112 *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713 at paras 37–45 [Strickland]; *Immeubles Port Louis Ltée v Lafontaine (Village)*, [1991] 1 SCR 326 [Immeubles Port Louis].

113 See *infra* notes 147 to 149 and accompanying text.

114 *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364.

115 *British Columbia (Ministry of Public Safety and Solicitor General) v Mzite*, 2014 BCCA 220.

116 *Ibid.*

117 *Ibid.*; *Manitoba Hydro-Electric Board v Consumers' Association of Canada (Man) Inc*, 2012 MBCA 1, 275 Man R (2d) 60; *Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65, 39 Alta LR (5th) 104; *Volochay v College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 OR (3d) 561 [Volochay].

constitutional issue, or the fact that all parties have consented to seeking judicial review early.<sup>118</sup>

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.<sup>119</sup> Parties should object promptly to any perceived impropriety on the part of the tribunal. Similarly, choosing not to attend a hearing could waive any right to judicial review.
4. 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.<sup>120</sup>
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.<sup>121</sup>

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 about the contingent nature of judicial review remedies from this era comes from *Domtar Inc v Quebec*.<sup>122</sup> In deciding not to intervene to resolve a conflict in legal interpretation between two tribunals construing the same statutory language, the Supreme Court of Canada stated, "[t]he advisability of judicial intervention in the event of conflicting decisions among administrative tribunals, even when serious and unquestionable, cannot, in these circumstances, be determined solely by the 'triumph' of the rule of law."<sup>123</sup> The court went on to articulate what was then a novel, and striking, notion: that even the most deeply cher-

118 *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 [CB Powell].

119 *Immeubles Port Louis*, *supra* note 112; 2122157 Ontario Inc v Tarion Warranty Corporation, 2016 ONSC 851 (Div Ct).

120 *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353; but see *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at paras 13-14 [Khela] (agreeing to hear a *habeas corpus* appeal in spite of its factual mootness, given the time it takes to pursue such an application); *Attawapiskat First Nation v Canada*, 2012 FC 948 at paras 41-48 [Attawapiskat First Nation] (exercising discretion to hear judicial review in spite of technical mootness, where parties are in an ongoing relationship, and same issue will arise in other similar relationships).

121 See e.g. *Gazlat v Canada (Citizenship and Immigration)*, 2008 FC 532, [2008] FCJ No 677 (QL). 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.

122 *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 SCC 106, [1993] 2 SCR 756 [Domtar].

123 *Ibid* at 795.

ished 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:

[C]ertainty of the law and decision-making consistency are chiefly notable for their relativity. Like the rules of natural justice, these objectives cannot be absolute in nature regardless of the context. The value represented by the decision-making independence and autonomy of the members of administrative tribunals goes hand in hand here with the principle that their decisions should be effective. In light of these considerations we must conclude that, *for purposes of judicial review, the principle of the rule of law must be qualified*. This is consistent with the continuing evolution of administrative law itself.<sup>124</sup>

Consistent with this, in 1999, then Chief Justice McLachlin set forth a vision of a “new rule of law,” which would

[make] it possible for institutions other than courts to play key roles in maintaining it. It opens the door to the idea that courts do not necessarily have a monopoly on the values of reasons and fairness ... [C]ontrary to Dicey’s view that the courts’ primary role is to constrain, limit and, if possible eliminate administrative power, the new Rule of Law allows courts to respect and advance the roles of administrative tribunals. The courts’ role shifts from being a brute guardian of an artificial and restrictive Rule of Law to that of a partner.<sup>125</sup>

In this way, courts moved past the restrictive traditional grounds for refusing to exercise discretion to grant judicial review. They did so in the service of a more respectful relationship with the other branches of government, and particularly with administrative tribunals. But to the extent that this shift could be read as introducing some poorly defined, deferential “X factor” into the decision-making process, it risked exempting courts from the very ethos of justification that tribunals were expected to observe in their decision-making. Surely this would be a misreading. The fact that judicial review is discretionary does not mean that courts should refuse to grant judicial review solely on the basis of some abstract ideal of partnership with administrative tribunals, or a relative and qualified rule-of-law value. Respecting, protecting, and adhering to the rule of law means that judges should base even their discretionary decisions on identifiable reasons.

Today, in deciding whether to exercise its discretion to grant judicial review, a court adopts a multi-factorial, contextual approach that nevertheless draws some insight from the traditional grounds described above. Deference to tribunals at the point of deciding whether to grant judicial review is understood to be consistent with normal judicial review analysis, which generally aims to strike the balance between the courts’ essential role in upholding the rule of law, while avoiding “undue interference” with administrative powers.<sup>126</sup> While the factors to be considered in exercising the discretion “cannot be reduced to a checklist or a statement of general rules,”<sup>127</sup> there is guidance to be had. In *Khosa*, the court

124 *Ibid* at 799-800 (emphasis added).

125 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 of the Chief Justice’s concept of the “ethos of justification” that underlies the rule of law, and this concept continues to be a vital part of contemporary jurisprudence.

126 See especially *Dunsmuir*, *supra* note 111 at paras 20-24.

127 *Strickland*, *supra* note 112 at para 45 (in considering whether adequate alternative remedies had been exhausted).

stated that the discretion to grant or withhold judicial review “must be exercised judicially and in accordance with proper principles.”<sup>128</sup> 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.”<sup>129</sup> In *MiningWatch* (*per coram* with Rothstein J writing), the court added another consideration. It is one that has been rising in salience since *Khosa*: the balance of convenience to the various parties.<sup>130</sup> In an interesting juxtaposition to the *Domtar* language, which 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.”<sup>131</sup>

## 2. Is Judicial Review Available? Threshold Questions

Leaving to one side what the cases above have said about the discretionary nature of judicial review writ large, the unique history, purpose, and mechanics of judicial review also mean that whether it will be available in any particular situation depends on a set of considerations particular to administrative law.<sup>132</sup>

One of the key threshold questions is whether the tribunal whose actions are being challenged is, in fact, a public body. Judicial review is available to check executive action. Therefore, only public bodies can be subject to judicial review.<sup>133</sup> While this may sound straightforward, some organizations in Canadian society exercise some degree of “public” function, yet operate at considerable distance from government. Others seem private, but

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

129 *Ibid* at para 51.

130 *MiningWatch Canada v Canada (Fisheries and Oceans)*, [2010 SCC 2](#), [\[2010\] 1 SCR 6](#) at para 52 [*MiningWatch*]; see also *Khosa*, *supra* note 128 at paras 36, 133-35. In that case, the balance of convenience justified reducing the impact of the remedy granted, from relief in the nature of *certiorari* and *mandamus* to a declaration. (These specific forms of relief are discussed below.)

131 *MiningWatch* at para 52.

132 For this chapter’s purposes, we will assume that the court in question has the jurisdiction to grant judicial review. Note, however, that preliminary objections about a subject’s justiciability have been raised in the Crown prerogative context: in *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, [2015 FCA 4](#), [379 DLR \(4th\) 737](#) [*Hupacasath First Nation*], a First Nation alleged that a foreign investment agreement between Canada and the People’s Republic of China might affect Aboriginal rights and interests that it had asserted over territory in British Columbia, and that Canada had a duty to consult with it and if necessary to accommodate its concerns before the agreement came into force. Canada argued that decisions to enter into international agreements and treaties are exercises of federal Crown prerogative power, over which the Federal Court has no jurisdiction. In its decision, the Federal Court of Appeal declined to follow Ontario Court of Appeal jurisprudence holding that the Federal Courts had no jurisdiction over exercises of the Crown prerogative, and further held that exercises of pure federal Crown prerogative are justiciable. For more on the interplay between aboriginal law and administrative law, see Chapter 3, Realizing Aboriginal Administrative Law. The fact that government is exercising the Crown prerogative can also affect the scope of remedies a court is prepared to grant: see *Khadr*, *supra* note 86, in which it limited the appropriate remedy to a declaration.

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

have some connection to public authority. For example, stock exchanges regulate the conduct of their members and issue and revoke licences, and their operations clearly go to the protection of the public. However, their authority to act as they do derives from a compact with their members rather than from any statutory grant of authority. Similarly, one should distinguish between government-acting-as-the-state, and government-acting-as-private-contracting-party. As a general matter, a private party will have difficulty seeking judicial review of a government board's decision not to award it a particular contract.<sup>134</sup> As well, public employees with employment contracts will have their employment relationships governed by private (contract) law, not public (administrative) law.<sup>135</sup>

Various factors go into determining whether a particular tribunal is a private body or a public one. 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."<sup>136</sup>

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.<sup>137</sup> There is also discretionary "public interest standing," under which an individual or group may be able to challenge administrative action on behalf of others.<sup>138</sup> Given that tribunals are expected to maintain a degree of impartiality, courts will also exercise their discretion in deciding whether, and to what degree, a tribunal should be able to participate when a party challenges its administrative action.<sup>139</sup> Angus Grant and Lorne Sossin discuss standing in greater detail in Chapter 9, Fairness in Context: Achieving Fairness through Access to Administrative Justice.

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

135 *Dunsmuir*, *supra* note 111 especially at paras 79-83, 112-17.

136 *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) (decisions by the chief of a police service created through a combination of contract and statute could be judicially reviewed); *Attawapiskat First Nation*, *supra* note 120 at paras 50-62; *Setia v Appleby College*, 2013 ONCA 753 (a private high school's decision to expel a student could not be judicially reviewed); *West Toronto United Football Club v Ontario Soccer Association*, 2014 ONSC 5881 (a provincial soccer association's decision to intervene in a disputed match decision was judicially reviewable).

137 See e.g. *Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 194.

138 The leading case is *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37, under which the test is: "(1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts."

139 Considerations include whether there is any other party with the necessary knowledge and expertise to stand in opposition to the party challenging the administrative action; whether the tribunal has a more policy-oriented or adjudicatory, dispute resolution oriented role; and what limits need to be imposed to ensure that the tribunal is not "bootstrapping" a weak decision by, e.g., introducing new arguments after the fact: *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 414, [2015] 3 SCR 147 at paras 52-59, 63-69.

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 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, the choice of courts is determined by whether the source of the impugned authority's power is provincial or federal.<sup>140</sup> Some overarching provincial statutes, such as Ontario's *Judicial Review Procedure Act*, stipulate the particular provincial court to which judicial review applications should be brought.<sup>141</sup>

Fourth, a party should ensure that they have not missed any deadlines. Some statutes impose time limits within which a party must file an application for judicial review. For example, the *Federal Courts Act* states that a judicial review application from a federal tribunal to the Federal Court must be made within 30 days of the time the underlying decision or order is first communicated.<sup>142</sup> In Alberta, the rules impose a six-month time limit on all applications for judicial review, except *habeas corpus* applications.<sup>143</sup> Nova Scotia precludes all applications for judicial review after the earlier of six months following the decision, or 25 days after the decision is communicated to the person.<sup>144</sup> In British Columbia, the general time limit is 60 days.<sup>145</sup> 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 are often statutorily empowered to extend the time limit for making a judicial review application—for example, where there is a reasonable explanation for the delay, where no substantial prejudice or hardship would result from such an extension, or where the party can demonstrate *prima facie* grounds for relief.<sup>146</sup>

140 There are some exceptions. Provincial superior courts have concurrent or exclusive jurisdiction over some specific aspects of federal statutory regimes, as a result of both the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, and the *Federal Courts Act*. In particular, 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*, *supra* note 132, and on concurrent jurisdiction more generally, see also *Strickland*, *supra* note 112 at paras 16-33 (affirming the Federal Court's refusal to hear a judicial review of family law child support guidelines on the basis that the provincial superior courts were the more appropriate forum).

141 Ontario *Judicial Review Procedure Act* RSO 1990, c J 1 [Ont JRPCA], s 6 says that judicial review applications shall be made to the Divisional Court, unless "the case is one of urgency and ... the delay required for an application to the Divisional Court is likely to involve a failure of justice," in which case an application may be made to the Superior Court of Justice.

142 FCA, s 18.1(2). The deadline can be extended: see e.g. *Canada (Attorney General) v Larkman*, 2012 FCA 204.

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

144 Rule 7.05(1), *Nova Scotia Civil Procedure Rules*, 2008, imposes the time limit on applications for relief in the nature of *certiorari*, online: <[http://www.courts.ns.ca/Civil\\_Procedure\\_Rules/CPRs\\_in\\_html/Rule\\_07.htm#Rule7.05](http://www.courts.ns.ca/Civil_Procedure_Rules/CPRs_in_html/Rule_07.htm#Rule7.05)>.

145 BC ATA, s 57(1). Note, however, that the ATA does not apply to all tribunals in BC.

146 E.g. Ont JRPCA, s 5; BC ATA, s 57(2). The *Federal Courts Act* does not set out the conditions that must be met in order for the court to grant an extension of time: FCA, s 18.1(2).

The final threshold 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.<sup>147</sup> 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 means of recourse will necessarily be adequate. Considerations include "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."<sup>148</sup> 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.<sup>149</sup>

Courts will not find existing non-court appeal mechanisms to be inadequate based only on unproven allegations that an appellate tribunal will suffer from the same errors<sup>150</sup> or biases<sup>151</sup> as the original tribunal. Nor can challengers circumvent available appeals in favour of judicial review by consent, or simply by raising apparent issues with the original tribunal's procedure or jurisdiction.<sup>152</sup> Also, at least in the context of Aboriginal self-government in the taxation field, the fact that appellate tribunal members lack indicia of institutional independence—that is, they may not be paid, they lack security of tenure, and they are appointed by the people whose claims they have to adjudicate—will not make that appellate body "inadequate" without concrete evidence that independence is lacking in practice.<sup>153</sup>

Parliament and several provinces have also legislated in this area. For example, the *Federal Courts Act* prohibits *judicial review* by the Federal Court where an available appeal of a tribunal's decision to the Federal Court exists.<sup>154</sup> 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, unless the tribunal lacked or exceeded its statutory au-

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

148 *Strickland*, *supra* note 112 at para 42.

149 *Ibid* at paras 43-44.

150 *Harelkin*, *supra* note 147.

151 *Turnbull v Canadian Institute of Actuaries* (1995), 129 DLR (4th) 42 (Man CA); but see, *contra*, *Re Batorski v Moody* (1983), 42 OR (2d) 647 (Div Ct).

152 *CB Powell*, *supra* note 118, at para 33. ("Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted ... [T]he presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.")

153 *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3.

154 FCA, 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, [2014] 367 DLR (4th) 525.



thority. 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.<sup>155</sup> Of course, the fact that a court *may* grant judicial review, even where a right of appeal exists, does not mean that it *will* do so. As we might expect, courts are reluctant to do so.<sup>156</sup>

## E. Remedies on Judicial Review

The remedies available on judicial review have their roots in the ancient prerogative writs, discussed further below. Over time, those became unwieldy. In many provinces they were modified by statute to redress problems arising from the writs' extreme technicality and unjustified narrowness. However, it is still necessary to understand the ancient writs to understand the scope and range of remedies available on judicial review. For example, neither the old writs nor the reform statutes, which are based on the old writs, permit a court on judicial review to substitute its views on the substance of a matter for the tribunal's views. The old writs also continue to operate in some provinces, albeit in a more limited way.<sup>157</sup>

A party contemplating judicial review should also be aware that, unlike an appeal, an application for judicial review usually does *not* automatically stay the enforcement of the underlying tribunal order, although the tribunal or the court or both may have the power to stay the tribunal's order on application.<sup>158</sup> The legislative decision to make stays automatic for many appeals but not for judicial review applications is consistent with the "last resort" nature of judicial review. The rules regarding stays vary from jurisdiction to jurisdiction and from tribunal to tribunal, so parties seeking a stay should be sure to review the relevant enabling statute, as well as the rules of court and any omnibus statutes governing procedure or judicial review.

155 See, respectively, *Code of Civil Procedure*, RSQ, c C-25, art 846; Ont JRP, s 2(1); and *Judicial Review Act*, RSPEI 1988, c J-3, s 4(2) [PEI JRA].

156 See e.g. *Volochay*, *supra* note 117 at para 70, *Anne & Gilbert Inc v Government of PEI*, [2012 PECA 4, 320 Nfld & PEIR 99](#).

157 For example, the "direct action in nullity" is a judicial review remedy that predates the Quebec *Code of Civil Procedure*, RSQ 1977, c C-25, and is not referred to in it, yet it continues to operate: *Immeubles Port Louis*, *supra* note 112. In New Brunswick, one cannot apply specifically for the traditional prerogative writs of *certiorari*, *mandamus*, or prohibition, which are now available simply as judicial review. However, a range of "alternative" remedies echoing the old prerogative writs continues to exist. See e.g. *Sullivan v Greater Moncton Planning District Commission* (1993), 132 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 common law writs.

158 See e.g. Ontario SPPA, s 25 (an appeal acts as a stay, but judicial review is not an appeal for that purpose); New Brunswick *Energy and Utilities Board Act*, SNB 2006, c E-9.18, s 52(2) (judicial review does not automatically stay an order, but the board itself or the Court of Appeal may stay it). Indeed, one federal statute that establishes securities clearing houses and banking and payment systems stipulates that *no* stay shall be granted for a judicial review application related to the government's administration of those systems: *Canadian Payments Act*, RSC 1985, c C-21, s 46.

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

### 1. Introduction to the Prerogative Writs

*Certiorari* is the most commonly used prerogative remedy, both historically and today. *Certiorari* (“cause to be certified”) is a special proceeding by which a superior court requires some inferior tribunal, board, or judicial officer to provide it with the record of its proceedings for review for excess of jurisdiction. It was the established method by which the Court of King’s Bench in England, from earliest times, checked the jurisdiction of inferior courts and maintained the supremacy of the royal courts. In the United States, the vast majority of applications to the 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, however, that generally the court cannot substitute its decision for the decision of a tribunal that the court finds had erred, because the court has not been granted the statutory decision-making authority.<sup>159</sup> Quashing the existing decision effectively means that the matter is remitted to the administrative decision-maker, who still retains the statutory jurisdiction to decide. This is what happened in *Gitxaala Nation*.

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

*Mandamus* (literally, “we command”) is a writ issued by a superior court to compel a lower court or a government agency to perform a duty it is mandated to perform. 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 force the tribunal to reconsider the matter in a procedurally fair manner. A variation on *mandamus* gives the court the ability to send a matter back to a tribunal for reconsideration with directions. Superior courts have the inherent power to order reconsideration with directions, and several provincial statutes and rules of court, as well as the *Federal Courts Act*, also grant this power. If the court issues directions, it must clearly state what the original panel is to do or what it must refrain from doing. These directions may only protect against unfair procedures or excess of power and cannot tell the tribunal how it must decide. In particular, the general rule is that *mandamus* cannot be used to force an administrative decision-maker to exercise

159 In exceptional circumstances, a court will nevertheless make the decision that it finds the original tribunal ought to have made. See e.g. *Renaud v Québec (Commission des affaires sociales)*, [1999] 3 SCR 855, 184 DLR (4th) 441, [1999] SCJ No 70 (QL); *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 (QL) (CA).

its discretion in a particular way, although exercises of discretion cannot be unlawful and must always conform to the constitution.<sup>160</sup>

A *declaration* is a judgment of a court that determines and states the legal position of the parties, or the law that applies to them. There are two kinds of declarations: the public law 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. (These prohibitions on remedies against the Crown itself were substantially, though not completely, relaxed over the course of the 20th century.) The non-coercive nature of the remedy has not often proven to be a problem, because court declarations against government bodies in particular tend to be respected.<sup>161</sup> Where a declaration does not produce a government response, however, as happened in the *Khadr* case,<sup>162</sup> the declaration may look like a distinctly second-rate remedy relative to *mandamus*. At least where the Crown prerogative over foreign affairs is concerned, an aggrieved party may find himself or herself having a right without a remedy—or, more accurately, having a right for which a meaningful remedy exists only in the political, and not the legal, arena.

160 In the special circumstances of the so-called *Insite* case, which concerned a safe drug injection site in Vancouver's Downtown Eastside neighbourhood, the Supreme Court of Canada held that the province's Minister of Health had not exercised its discretion in a manner consistent with the Charter when he refused to exempt *Insite* from certain criminal law provisions. The Court found that sending the matter back to the Minister for reconsideration would be inadequate in view of the attendant risks and delays, and that "the only constitutional response to [*Insite's* exemption application] was to grant it." It therefore 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 at para 150. The Federal Court of Appeal has done the same in some recent cases in which it held that there was "only one lawful way" in which the decision maker's discretion could be exercised: *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55; or, pushing the concept further, in "exceptional" cases in which, for example, "there has been substantial delay and the additional delay caused by remitting the matter to the administrative decision-maker for re-decision threatens to bring the administration of justice into disrepute": *D'Errico v Canada (Attorney General)*, 2014 FCA 95 at paras 16-18.

161 *Lount Corp v Canada (Attorney General)*, [1984] 1 FC 332 at 365 (TD) (noting that "by long tradition, the executive abides by declarations of the Court even though not formally or specifically directed to do so"); *aff'd sub nom Canada (Attorney General) v Lount Corp*, [1985] 2 FCR 185.

162 *Khadr*, *supra* note 86. In 2008 the Supreme Court of Canada determined that Omar Khadr had been deprived of his s 7 Charter rights by Canadian officials operating at the Guantanamo Bay detention facility, who shared transcripts of their interviews of Mr Khadr with US authorities. The Court ordered that the Canadian authorities produce those transcripts to Mr Khadr, which they did, but the Prime Minister refused requests to seek his repatriation from the United States to Canada. In its 2010 decision, the Supreme Court of Canada held that, notwithstanding the violation of Mr Khadr's s 7 Charter rights, it would not order the Canadian government to request his repatriation. In light of the Crown prerogative over foreign affairs, the court concluded that the appropriate remedy was a declaration that Canada had infringed Mr Khadr's s 7 rights, leaving it to the government to decide how best to respond. The government did not seek Mr Khadr's repatriation.

Less common these days are the writs of *habeas corpus* and *quo warranto*. *Habeas corpus* (literally, “produce the body”) is a writ employed to bring a person before a court, most frequently to ensure that the person’s imprisonment or detention is not illegal. Like *certiorari*, *habeas corpus* continues to live an active life in the United States, where it is the primary mechanism for challenging state-level death penalty sentences in the federal courts. In Canada, *habeas corpus* applications are fairly rare. Most are brought by prisoners detained in correctional institutions and by police, immigration, child welfare, and mental health detainees. 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.”<sup>163</sup> *Quo warranto* (“by what warrant?” or “by what authority?”) is a writ used to inquire into what authority existed to justify acts by or powers claimed by a public office. It is rarely used today, and some provinces have abolished it by statute.<sup>164</sup>

## 2. Statutory Reform

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

The result, in many provinces and at the Federal Court,<sup>165</sup> was statutory reform. Some provinces enacted omnibus statutes governing judicial review or statutory/civil procedure,<sup>166</sup> while others used their rules of court to enact changes.<sup>167</sup> Only Yukon Territory seems to have

163 *Khela*, *supra* note 120 at paras 38-50. In other ways, as well, *habeas corpus* has developed to be a speedier and more accessible remedy for those who claim to have been unlawfully deprived of their liberty. On the Federal Court’s jurisdiction, see also *infra* note 173.

164 E.g. PEI JRA, s 11; BC *Judicial Review Procedure Act*, RSBC 1996, c 241, s 18 [BC JRPA]. These statutes provide that certain remedies for what would have been an information in the nature of *quo warranto* are still available. However, *quo warranto* is still used in Quebec and New Brunswick to challenge the authority of municipal councillors on the basis of a prohibited conflict of interest. See e.g. *R v Wheeler*, [1979] 2 SCR 650.

165 FCA, s 18(1) provides that the Federal Court has exclusive original jurisdiction “to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus*, or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal.” 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 120 at paras 31-35.

166 Ontario JRPA, BCJRPA, PEI JRA, Quebec *Code of Civil Procedure*, RSQ, c C-25. Ontario and British Columbia 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.”

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

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*, 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 procedure surrounding judicial review. Some have also sought to change the substantive shape of judicial review itself. Therefore, parties considering challenging a tribunal order must be aware of the relevant statutes' provisions, in addition to the provisions of the tribunal's own enabling statutes. Statutory reforms commonly provide for the following:

1. Simplified application procedures. For example, a statute may state that applications for orders "in the nature of" *mandamus*, prohibition, or *certiorari* shall be deemed to be applications for judicial review, to be brought by way of an originating notice or petition. The new judicial review application combines, and in the process supersedes, the old writs of *certiorari*, prohibition, *mandamus*, public law declaration, and injunction. (Some statutes include *quo warranto* and *habeas corpus* within the ambit of the statute; some abolish *quo warranto*; some provinces have a dedicated *Habeas Corpus Act*.) It is sufficient for a party to set out the grounds on which relief is sought and the nature of the relief sought, without having to specify under which particular writ 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 provincial superior courts, and the statutes provide for a subsequent right of appeal to the provincial Court of Appeal.
5. Judicial review mechanisms to challenge interlocutory orders and to resolve interim issues. At common law, *certiorari* was only available with respect to "decisions"—that is, final orders. However, the BC and Ontario JRPA's use the words "exercise of statutory power," rather than the word "decision," thereby expanding the range of judicial review to include any exercise of statutory power.<sup>168</sup> Other statutes permit a tribunal itself to refer a "stated case" to the courts for determination of a question of law, after which the case can go back to the original tribunal for determination of the ultimate issues.<sup>169</sup> 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.<sup>170</sup> Enabling statutes must authorize stated cases.

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168 BC JRPA, s 3; Ontario JRPA, s 2.

169 E.g. FCA, s 18.3; BC ATA, s 43.

170 BC ATA, ss 44, 45.

## F. 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 review. In some circumstances, unhappy parties would probably prefer monetary relief to any other remedy. Attempts to obtain private law remedies from public bodies has put considerable momentum behind the development of the law in this area, and courts have responded in two main ways.

The first has been to clarify and elaborate upon those instances where 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,<sup>171</sup> although some statutes limit individual administrative tribunal members' liability.<sup>172</sup> However, to seek monetary relief, an aggrieved party must initiate a separate civil action for restitution or damages alongside, or in lieu of, a judicial review application.

Government agencies can be sued, for example, for breach of contract, for the tort of negligence, or the special tort of misfeasance in (or abuse of) public office. The first two are straightforward private law actions. The third, as a potential source of money damages against public actors acting in their public capacity, has attracted some interest lately. 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.<sup>173</sup> Because a public officer must be able to make decisions that are adverse to some peoples' interests, in the service of broader public policy goals, mere knowledge of that harm is insufficient. The public officer must "deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office."<sup>174</sup>

The leading case on the tort of misfeasance in public office, *Odhavji*, involved an action for damages against police officers and the chief of the Toronto Police Service 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 them to

171 The Federal Court has concurrent original jurisdiction over all actions for damages against the federal Crown. See *supra* note 109. Individual servants of the Crown, including ministers, are also liable for breaches of private law duties on the same basis as other individuals. However, "core policy matters" are protected from suit: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at para 90 [*Imperial Tobacco*]. A more in-depth discussion is contained in Chapter 15, Making a Federal Case Out of It: The Federal Court and Administrative Law.

172 E.g. BC ATA, s 56.

173 *Powder Mountain Resorts Ltd v British Columbia*, 2001 BCCA 619 at para 8.

174 *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 at para 28 [*Odhavji*]. For his perspective on the tort's value as a practical tool for enhancing state accountability in the UK context, notwithstanding its rather poor fit with the conceptual underpinnings of modern tort law, see John Murphy, "Misfeasance in a Public Office: A Tort Law Misfit?" (2012) 32 Oxford J Leg Stud 51.

cooperate. The case made its way to the Supreme Court of Canada on the defendant's motion to dismiss the plaintiff's claim, where the court determined that the plaintiff had made out a cause of action and that the matter should be allowed to proceed. In other words, the court held that there was such a thing as the tort of misfeasance in public office. Subsequent cases have considered allegations of 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.<sup>175</sup>

As these cases make clear, some torts overlap with a potential judicial review application while others do not. Judicial review was not a possibility in 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.

The relationship and potential overlap between private rights of action and judicial review applications was a cause for concern for a number of years. Then, in 2010, in a case concerning private law claims for breach of contract, negligence, and unjust enrichment, the Supreme Court of Canada made it clear that parties do not need to seek judicial review *before* they can bring a private law action for damages, and the private law action does not constitute a collateral attack on government conduct.<sup>176</sup> Alexander Pless discusses this and other cases in greater detail in Chapter 10, Crown Liability for Negligent Administrative Action. Following *TeleZone*, if a party has a fundamentally private law claim arising from an administrative decision, and primarily wants monetary damages, that party may proceed directly by way of private action. As Binnie J points out, though, "no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. ... The claimant must ... be content to take its money (if successful) and walk away leaving the order standing."<sup>177</sup> Note that, while *TeleZone* makes

175 Some have succeeded, including *Apotex Inc v Canada*, [2017 FCA 73](#) (Health Canada deliberately evaluated drug approval application against inappropriate standard, and attempted to conceal or dissemble that fact); *Rosenhek v Windsor Regional Hospital*, [2010 ONCA 13](#), [\[2010\] OJ No 129](#) (QL), leave to appeal refused, [2010] SCCA No 89 (hospital revoked a doctor's privileges for ulterior purpose, not for the public good, and in bad faith); *Ontario Racing Commission v O'Dwyer*, [2008 ONCA 446](#), [293 DLR \(4th\) 559](#) (Racing Commission frustrated raceway employee's efforts to pursue a complaint about Commission employee's prior conduct, which had led to employee's firing); *JP v British Columbia (Children and Family Development)*, [2015 BCSC 1216](#) (ministry employee approached child protection file with a closed mind, wilfully and deliberately behaving unlawfully and not in best interests of the children); *McMaster v The Queen*, [2009 FC 937](#), [\[2009\] FCJ No 1071](#) (QL) (long and apparently intentional delay by Corrections and prison staff in getting a prisoner new shoes, resulting in prisoner's injury while exercising). See also *Carhoun & Sons Enterprises Ltd v Canada (Attorney General)*, [2015 BCCA 163](#) [*Carhoun*] (motion to strike dismissed, where respondent alleged unreasonable delay by government in carrying out an environmental assessment). Others have failed: see e.g. *Harrison v British Columbia (Children and Family Development)*, [2010 BCCA 220](#), [319 DLR \(4th\) 251](#), leave to appeal refused, [2010] SCCA No 293 (no evidence of targeted malice by social worker who disclosed unsubstantiated complaint of child abuse to employer of alleged abuser, who worked in youth support services).

176 *TeleZone*, *supra* note 140. The courts retain the residual discretion to stay a damages action if the claim being made is actually "in its essential character" an application for judicial review. *TeleZone*, *ibid* at para 78; on this point see also *Manuge v Canada*, [2010 SCC 67](#), another of the five companion cases released alongside *TeleZone*.

177 *TeleZone*, *supra* note 140 at para 75.

clear that parties do not need to seek judicial review before they can bring an action for damages, that case still allows the Crown to raise the legality of the decision as a defence to the damages action.<sup>178</sup>

A second and genuinely novel response to the question of when damages could be available against administrative authorities would be to develop a claim for monetary relief grounded entirely in public, as opposed to private, law. This is what a majority of the Federal Court of Appeal recently did, in *obiter*, in *Paradis Honey*.<sup>179</sup>

The case involved a claim by a group of Canadian beekeepers that the respondents, the Minister of Agriculture and Agri-food and the Canadian Food Inspection Agency, were negligent in imposing a blanket prohibition on importing honey bee “packages” from the United States. (Bees can be imported in “packages,” which hold a queen and a small colony, or simply as a “queen,” a much smaller container holding a queen bee and a few attendant bees. Replacing a failed bee colony with a package, as opposed to a queen, is more efficient and less risky.) The appellant beekeepers argued that the minister had adopted a blanket policy of issuing no permits for importing bee packages, even though the relevant statute and regulations gave the minister the authority to issue permits to import animals (in this case, bees) in any kind of packaging *so long as* doing so would not introduce disease or toxic substances into Canada. The appellants argued that the prohibition exceeded the minister’s lawful authority. They further argued that in prohibiting packages while still permitting queens to be imported, the respondents were using their permit-granting authority in bad faith or for an improper purpose, and impermissibly favouring some parts of the Canadian beekeeping community over others. The decision occurred at the motion to dismiss stage, meaning that the majority of the Federal Court of Appeal held only that, assuming the facts as pleaded were all true, it was not plain and obvious that the appellant beekeepers’ claims would fail.

The appellants sought money damages to compensate them for the costs they incurred as a result of the blanket prohibition on importing bee packages. Because they were seeking damages, they had to establish a claim in private law—in this case, primarily in negligence.<sup>180</sup> As the majority pointed out in *obiter*, the tort of negligence is indeed a poor fit for a situation in which parties have been harmed by impermissible government action. It is grounded in proximity and the concept of what one owes to one’s neighbour—admittedly,

178 *TeleZone*, *supra* note 140 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 10.

179 *Paradis Honey Ltd v Canada*, 2015 FCA 89, 382 DLR (4th) 720 [*Paradis Honey*]. The majority’s reasons (by Stratas JA for himself and Nadon JA) were based on the beekeepers’ claims in negligence and bad faith against the respondents: see paras 88-111 (among other things, forcefully criticizing the ban on private suits against government “policy” decisions, following *Imperial Tobacco*, *supra* note 171 at paras 102-110). The majority then went on to observe that “were it necessary,” they would also have concluded that the facts pleaded supported a claim for monetary relief in public law. Pelletier JA, dissenting, would have confirmed the Federal Court’s dismissal of the beekeepers’ statement of claim. The matter was subsequently certified as a class action: *Paradis Honey Ltd v Canada*, 2017 FC 199.

180 Both majority and minority agreed that the appellants’ allegations, if proved, would have given them an administrative law remedy such as *certiorari* and *mandamus*: *ibid* at paras 1, 76, 112. The appellants also argued that the respondents had acted in bad faith or pursuant to an improper purpose, and the majority of the Federal Court of Appeal declined to strike those claims: *ibid* at para 87.



a strange way to conceptualize the relationship between citizens and the state.<sup>181</sup> To make a claim, therefore, the appellants had to plead that their rights were particularly well-defined, based on specific legislative criteria, and that the respondents had specifically assured them that imports that affected their economic interests would only be banned where there was scientific evidence of risk.<sup>182</sup>

After dealing with the negligence claim, the majority of the court goes on to consider a matter not pleaded: the novel possibility of a *public law* claim for monetary damages, which the majority describes as a “responsible, incremental change to the common law founded upon legal doctrine and achieved through accepted pathways of legal reasoning ... [which] does not throw into doubt the outcomes of previous cases, but rather offers better explanations for them, leading us to a more understandable, more coherent law of liability for public authorities.”<sup>183</sup> Rather than trying to adapt ill-fitting private law principles to public law contexts (or, in their words, “using a screwdriver to turn a bolt”),<sup>184</sup> the majority argues for drawing on underlying principles of administrative law and judicial review to create a new test: that as a matter of public law, courts should grant relief, including monetary relief, when (1) “a public law authority acts unacceptably or indefensibly in the administrative law sense,” and when (2) “as a matter of discretion, a remedy should be granted.”<sup>185</sup> The majority insists that, the limits of the prerogative writs and judicial review aside, underlying public law principles support courts’ discretion to grant monetary relief. Moreover, there are times when the goal of adequately compensating the harmed, or perhaps the quality of a public authority’s conduct (if it is, for example, exceptionally poor or clearly in violation of a duty), justifies a court exercising its discretion to grant a new species of *public law* monetary damages.

The *obiter* in *Paradis Honey* has begun to provoke discussion, as was surely its intention, not only about the imperfections of existing private law jurisprudence vis-à-vis public actors, but also about the public law foundations on which administrative law rests, and about the limits of the prerogative writs and judicial review.<sup>186</sup> It is too soon to say whether Justice

181 *Ibid* at paras 119-130.

182 *Ibid* at paras 90-91.

183 *Ibid* at para 118; see also para 145.

184 *Ibid* at para 127.

185 *Ibid* at para 132. The content of the first requirement—what constitutes unacceptable or indefensible action in administrative law—is the subject of most of the rest of this textbook. Basically, it usually requires that the administrative actor act outside the range of reasonableness. The content of the second requirement—the fact that judicial review and its remedies are discretionary—has been discussed above.

186 See e.g. *Patrong v Banks*, [2015 ONSC 3078](#) at paras 69-78 (partially endorsing the majority’s argument and arguing for a broader understanding of the state’s private law liability); but see *Carhoun*, *supra* note 175 (citing *Paradis Honey*, *supra* note 179 before proceeding with a conventional tort law analysis); Paul Daly, “Rethinking Public Authority Liability in Tort: *Paradis Honey Ltd v Canada*, 2015 FCA 89” (13 April 2015) at Administrative Law Matters, online: <<http://www.administrativelawmatters.com/blog/2015/04/13/rethinking-public-authority-liability-in-tort-paradis-honey-ltd-v-canada-2015-fca-89/>>. Justice Stratas’s reasons in the case have also attracted interest for his discussion at paras 134-137, of how the “margin of appreciation” that courts grant administrative decision-makers on judicial review may be narrower or wider, depending on the nature of the decision-maker. Thus far, the Supreme Court has taken a dim view of this suggestion, preferring an approach that seems more focused on the nature of the question at issue: *Wilson*, *supra* note 101 at paras 18-39. For more on this, see Chapters 11 (Standard of Review: Back to the Future?) and 12 (Making Sense of Reasonableness).

Stratas's argument in favour of a public law monetary damages remedy will gain traction. What we can say at this stage is that the proposed change would not be incremental, at least at the level of theory. At the level of application, though, it may be: recognizing a public law remedy in money damages may actually provide us with a more coherent and explicit explanation for outcomes that courts already sometimes reach. Given the ongoing desire by parties for a remedy in money damages and given the narrowness of the tort of misfeasance in public office, we can expect more action around this issue.

## V. CONCLUSION

A goal of this chapter has been to locate judicial review within the larger administrative law landscape. By understanding the concerns that animate administrative law generally, we can begin to understand the outlines of this parallel universe of actions and remedies. Administrative law remedies are the product of history, and of democratic and rule-of-law priorities, often acting in tension with each other. They need to be considered in light of the tug of war between courts and legislators as demonstrated by, for example, legislators' creation of internal appeal mechanisms and courts' periodic circumvention of those internal appeals in favour of immediate judicial review. Another recurring theme is the tug of war between tribunals and the courts that oversee them, in terms of courts' willingness to recognize and give effect to potentially creative and uncourtlike tribunal remedies. These tensions are emblematic of a deeper contest between deeply held values around the rule of law on the one hand, and administrative expertise, efficiency, and democratic accountability on the other.

Administrative law remedies are also path-dependent, meaning that they have been shaped by their historical origins in the prerogative writs and by subsequent, sometimes piecemeal, attempts to modify judicial review. If we were to design a set of remedies out of whole cloth today, it is not obvious that we would decide to set up two separate mechanisms for accessing the courts (that is, statutory appeals and judicial review). We might create an overarching administrative review tribunal like Quebec's instead. Perhaps, as well, there was an earlier juncture at which we could have developed a public law remedy for monetary damages, and perhaps it would have spared us a bit of confusing caselaw along the way. Freed of the historical baggage of the prerogative writs, a court might have even imposed monetary damages on the Crown for its failure to consult and accommodate in the *Gitxaala Nation* case. Yet without genuinely sweeping reform, administrative law remedies will continue to be influenced by their historical roots, and the scope of those remedies in turn will continue to influence the development of administrative law as a whole. Even as these remedies continue to evolve, they will be informed by the particular history and rules that govern this parallel legal universe.

In part as a corrective to the heavy conventional emphasis on judicial review and its idiosyncrasies, this chapter tries to situate judicial review remedies within a larger context. Myriad other remedies are available at different stages of administrative action. Rich debate exists concerning appropriate tribunal functioning and the proper scope of tribunal action. Tribunals develop remedies that are novel, by court standards, because they are differently constituted than courts are. It is in part the heterogeneity and depth of this experience that underlies the modern instinct that courts should show some respectful deference in exercising judicial review of tribunal decisions. Regardless of how we may feel about any particular

decision, this chapter also counsels respect for that difference. A conversation about administrative law remedies illustrates the larger point that animates much of this volume: judicial review and court-centred processes, which make up the bulk of this book, are nevertheless just one, final stage of administrative law and practice. It should not limit our appreciation of, and approach to, the complex and varied forms that front-line administrative action can represent.

## SUGGESTED ADDITIONAL READINGS

### CASES

*Canada (Attorney General) v PHS Community Services Society*, [2011 SCC 44](#), [\[2011\] 3 SCR 134](#) (“the *Insite* case”).

*Canada (Prime Minister) v Khadr*, [2010 SCC 3](#), [\[2010\] 1 SCR 44](#).

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

*McKinnon v Ontario*, [2003] OJ No 893 (QL) (Div Ct).

*Paradis Honey Ltd v Canada*, [2015 FCA 89](#), [382 DLR \(4th\) 720](#).

*Setia v Appleby College*, [2013 ONCA 753](#).

### 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.

