Administrative Law CAN

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# Limits and Sources of Administrative Laws

* Consider a spectrum of review
  + Policy decisions---------------------------------------------adjudicative decisions
  + Decisions closer to adjudicative decisions are subject to more reviews by the court
* **Administrative tribunals are not institutionally independent (they are only independent to various degrees)**
* Efficiency and expediency are key advantages of tribunals

## Power of Tribunals

* **Administrative tribunals have no inherent power and all its powers are derived from its enabling statute**
  + Tribunals are masters of their own procedures, subject to fairness and statutory requirements (*Prassad*) – tribunals can create whatever procedure it wants as long as it meets the statutory requirements and does not breach procedural fairness or the constitution
  + Statutes sometimes do not elaborate every single power, but courts consider necessary implied powers based on the wording of the act, its structure and its purposes (*Bell*)
    - Statutes should not be interpreted technically to avoid sterilization
    - Courts must refrain from unduly broadening the powers of regulatory authorities through judicial law making

# Constitutional Limitations of Tribunals (and Statutory Limitations)

* What the tribunal can and cannot do is subject to the requirements below, in order

## Constitution Act 1867

* + - Constitution Act 1867, Section 96-101 is interpreted to give an **independent judiciary**
      * **Can also be used to imply the rule of law**
    - Section 96 is interpreted to give the courts power for **judicial review**
      * There have been attempts by legislatures to oust the courts via a privative clause, but the courts do not listen to this
      * Right to judicial review is constitutionally protected under Section 96-101
      * Section 96 only gives federal government the power to appoint judges, not the provinces
      * Provinces cannot create tribunals that are **insulated from Section 96 review nor can they create a tribunal exercising Section 96 judicial powers** (because that effectively means creating a Section 96 court) (*Residential Tenancies Act* and *Crevier*)
        + **But can the feds do this?** There is an example because the judicial review of federal administrative tribunals were lifted from the Section 96 courts into Section 101 courts by virtue of the Federal Court Act

**I would argue that this does not mean the feds can just lift judicial review but not the provinces**. The judicial review must land in the hands of an independent judiciary.

### Test for Whether a Tribunal is Acting like a Section 96 Court

* *Re Residential Tenancies Act*

1. Historical inquiry
   * Whether the impugned power broadly confers to a power exclusively exercised by a superior court at the time of Confederation
   * **Interpret broadly to ensure protection of S. 96 courts**
2. Is the impugned power a “judicial” power as opposed to an administrative or legislative power?
   * Judicial power is where there is a private dispute between parties, adjudicated through the application of rules and consistent with fairness/impartiality
   * Questions of policy are those involving competing views of the collective good of the community – these are not judicial powers
   * It is the subject matter rather than the apparatus of adjudication that is determinative (*Residential Tenancies*)
3. Has the power in its institutional setting changed its character sufficiently to negate broad conformity with superior jurisdiction?
   * The power is not to be considered in a detached manner (*Residential Tenancies*)
   * It is possible for tribunals to exercise powers and jurisdiction once exercised by s.96 courts (*Tomko*)
     1. **Depends on the context of the exercise of the power, ie:**
        1. merely subsidiary/ancillary to general administrative functions assigned to the tribunal or
        2. powers that are necessarily incidental to the achievement of broader policy goals of the legislature (*Crevier)*
     2. **grant of power only invalid when adjudicative function is a sole or central function of the tribunal so that the tribunal can be said to be operating like a Section 96 court (***Crevier*)

## Charter of Rights and Freedoms

* Charter could apply in two dimensions
  + Procedure
    - Charter could require that the tribunal adopt certain procedures
  + Substantive Decision
    - Charter could require a particular remedy because a Charter right has been violated
* **but there is a problem on whether ATA tribunals can apply the Charter**

## Quasi-Constitutional Grounds (Human Rights Legislation)

* + **but there is a problem on whether ATA tribunals can apply Human Rights Code**
  + Human Rights code are quasi-judicial and statutes should be interpreted to conform with human rights legislation

## Statutes

### Interpretation Act

1. Interpretation Act sometimes have definitions for very common words, ie. “day”
2. Sets the context for how the statutes in the jurisdiction should be construed

### Judicial Review Procedure Act

* **Applies to all judicial reviews sought in BC**
* Section 8 gives the court **discretion** to refuse to grant relief (ie. laches)
* Under this statute, judicial review does not have a time limit, but courts under Section 8 can refuse

### Administrative Tribunals Act

* + **does not apply to every single administrative tribunal in BC**
  + review the list of tribunals from 2007/2009, there are some differences
  + Sections
    - 11 – power to make rules regarding its own procedures
    - 14 to 15 – power to make interim and permanent orders
    - 18 – power to dismiss an application for failing to comply with tribunal orders and rules
    - 31 – power to summarily dismiss an application on various grounds
    - 44, 45, 46.1 to 46.3 – powers to review constitutional issues and apply human rights legislation
      * See section on Constitutional application for more information
    - 58 to 59 – standards of review

### Enabling Statute

* **Must always review the enabling statute, there could be procedures set out or otherwise**
* No need to go to the common law if the statute gives the outcome

# Procedural Fairness

* Easier to challenge a decision under procedural fairness
* **Administrative tribunal is not allowed to make arguments that their procedures are fair**
* Courts and law students are accustomed to the court process and easier to challenge
* **Legislatures can oust the common law on procedural fairness, subject to the Charter**
  + **If the statute provides for procedural fairness, no need to apply the common law**

## Sources of Procedural Fairness

* Sometimes called natural justice
* *Audi alteram partem* (hear the other side)
* *Nemo judex in sua causa* (no one should judge their own case)

## Steps in Finding Procedural Fairness under Common Law

### Threshold Question: Is this the kind of decision that should attract some kind of procedural right?

* Generally if it affects an individual’s rights or an exercise of governmental power, there are minimum entitlements to procedural fairness

### What is the content of procedural fairness in this case?

* Once the courts have passed the threshold the question they must find:
  + The level of procedural fairness (using *Baker* factors), and THEN
  + Specific procedures required to meet the level of procedural fairness

### Bias and Independence

### Institutional Decision Making

# Substantive Review

# Is it a specific decision or a rule/soft law being challenged?