Remedies

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| **At the Tribunal: pg. 7-9** |

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| 1. **Statutory Authority**
	* Starting point = enabling statute
		+ Some will have their remedies enumerated + some have discretionary powers to fashion the remedy they see fit
	* A tribunal cannot make orders that affect and individual’s *rights, privileges,* or *interests* without authority from its enabling statute
		+ ***Inuit Tapirisat***
2. **Novel administrative remedies**
	* Composition, structure, mandate = different than courts
		+ No inherent jurisdiction like the **s.96** courts
	* Can implement novel, remedial strategies
		+ HOW? – remain seized over time, less constrained by formal rules, can consider polycentric issues
		+ Due to broader public policy mandate tribunals can try to develop remedies that address underlying structural/systemic problems in a forward looking (not retrospective) manner
		+ Cross the public/private divide by maintaining ultimate accountability for programs but outsourcing implementation to private 3rd parties
3. **Case law on novel administrative remedies**
	* ***McKinnon v. Ontario*, (OHRC 2002)** – systemic racism/discrimination in the workplace, attempted to affect systemic changes, agency had the power to do so, but they were incredibly ineffective
		+ Raises issues of good faith compliance, whether the law can simultaneously enforce rights/redress wrongs/cure systemic problems etc.
	* ***Moore v. BC*, (SCC 2012)** – student was discriminated against as an individual based on his dyslexia, children with disabilities discriminated against on a systemic basis due to funding cuts, HRT overstepped its reach in crafting a systemic remedy intended to reach across the entire province
4. ***Charter* remedies**
	* **s.24(1)** – anyone whose rights or freedoms as guaranteed by this Charter have been infringed or denied can apply to a *court of competent jurisdiction* to obtain *such remedy as the court considers appropriate* and just in the circumstances
		+ Tribunals can examine Charter questions – ***Cooper***, it is not a “holy grail”
	* Two part-test from ***Conway*, (SCC 2010)** when deciding if a tribunal is a *court of competent jurisdiction*
		+ Look to the enabling statute + ask if this court can decide questions of law + if so has this power been removed by the legislature?
		+ Next, if this is a court of competent jurisdiction ask on a case-by-case basis if *this board* has the jurisdiction to grant the remedy sought?
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| **Enforcing Orders Against Parties: pg. 9** |

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| 1. **Tribunal seeks to enforce its own order**
	* By itself = very rare, only when the remedy is not challenged
		+ Eg. the Competition Tribunal, ***Administrative Tribunals Act*** can help re: schedule a hearing, dismiss an application etc.
	* By transforming it into a court order = more common
		+ Party disobeys a tribunal order, then ***Statutory Power Procedure Act*** allows tribunal to apply to court for order requiring person to comply
		+ Can now enforce in the same way as a court order – *contempt proceedings*
2. **Party seeks to enforce the tribunal’s order**
	* Can bring an action against another party in court to enforce order = tough sell
		+ More likely to succeed the close the tribunal order to a type the court would enforce + court is convinced w/out a statutory pwr. to this effect
3. **Criminal prosecution**
	* There is a catch-all in the ***Criminal Code*** = used very rarely + only if no other punishment expressly provided by law
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| **Challenging Administrative Action (Internal, External, Statutory Appeal) : pg. 10** |

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| 1. **Internal tribunal mechanisms**
* Look to its *enabling statute* – power to rehear and reconsider decisions?
* Is it part of a multi-tier administrative agency w/*internal appeals* available?
* Unless these are provided for, the *only* avenue is *judicial review*
1. **External non-court mechanisms**
* Ombudsperson, FOI Commission, auditor-general etc.
1. **Using the courts: statutory appeals – this remedy is the *norm***
* Look to its *enabling statute*
* Must be here b/c no inherent jurisdiction over tribunals
* To which court? What can you appeal? When?
* Statute will also tell you scope of available appeal – determined *entirely* here
* *De novo*? Limited to question of law?
* Determined by how closely it mirrors mandate/expertise of court
* By right = appeal is automatic
* By leave = either original decision maker, more commonly the appellate body
* Stay of proceedings?
* Power to stay enforcement of order pending appeal, indicative of how legislative view the tribunal in question, lots of trust?
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| **Challenging Administrative Action (Judicial Review): pg. 10-14** |

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| 1. **A discretionary remedy – should the court grant JR?**
* Inherent jurisdiction of courts to check administrative action as per *rule of law*, judicial review is exceptional + *always discretionary*
* Exception = *habeas corpus* – ***Khela***
* Decision = caught in tension between the *rule of law* + *democracy* re: Parliament’s decision to empower tribunals – ***Domtar***
* Moving away from a “qualified rule of law” in ***Domtar*** + its institutional dialogue back to a more court-centred approach
* Now uphold ROL w/out interfering w/administrative power – maybe refuse JR out of deference to tribunal’s unique role as per ***Domtar***
* Look to 5 factors from ***Khosa*** + 1 from ***Mining Watch*** re: when *not* to grant JR– applicant’s delay, failure to exhaust adequate alternative remedies, mootness, prematurity, bad faith, balance of convenience to parties
1. **Court says yes, then see if the tribunal whose actions are being challenged is a public body**
* WHY? – JR is a toll exclusively to check administrative action
* Factors = functions/duties, sources of power/funding, presence/extent of governmental control, whether government would have to occupy the field if body wasn't performing this function, body’s power over the public, nature of its members/how they are appointed, nature of their decisions re: impact on individuals, constituting documents, relationships to other parts of the government
* ***McDonald v. Anishinabek Police Services*, (Ont. Div. Ct. 2006)** – chief’s decision stemmed from a Code of Conduct, not a statute, held to be public enough b/c the prerogative writes have evolved to *extend to all bodies established through bodies resulting from the Crown’s legislative power*
* **Test: if a decision-maker fulfills a public function or if the decision making has public law consequences then the duty of fairness applies (procedural fairness) + decision is subject to JR (on a standard of review of correctness)**
1. **If this is a public body, then ask if the party apply for JR has the standing to do so**
	* Actual parties to the action have standing
	* Parties w/a collateral interest might have ‘public interest standing’ as per ***Downtown Eastside*, (SCC 2012)**
	* Tribunals cannot defend their own actions (usually – ***Ontario Energy Board***)
2. **To which court should the party seeking JR apply?**
	* Different than statutory appeals = answer *cannot* be found in the enabling statute
	* Provincial courts + Federal Courts have inherent jurisdiction
* **Test: is the source of the impugned authority’s power provincial or federal?**
* BUT – note certain overarching provincial statutes can stipulate which court JR can be applied for in – ***Judicial Review Procedure Act*** (Ontario)
1. **Has the party seeking JR missed any deadlines?**
	* Statutes impose quite tight deadlines – 60 days from time impugned decision is communicated ***Federal Courts Act***, 60 days general limit in BC under the ***Administrative Tribunals Act***
	* Courts can extend timeline: reasonable explanation for delay, no substantial prejudice in extending, party can demonstrate *prima facie* relief grounds
2. **Has the party seeking JR exhausted all other adequate means of recourse?**
	* Look to the *enabling statute* – but sometimes these are inadequate + can skip a step and come to JR
		1. Tribunal doesn't have authority over/unwilling to address issue raised – ***Matsqui Indian Band***
		2. Appellate tribunal doesn't have power to grant remedy the appellant requests – ***Evershed***
		3. Internal appeal must be based on the record but no evidence re: the appellant – ***VSR Investments***
		4. Evidentiary errors on the record + appellate tribunal no power to correct – ***Cimolai***
		5. Alternate procedure = too inefficient/costly – ***Violette***
	* Parliament = no JR by the FC when there is a statutory right of appeal to the FC (***Federal Courts Act***)
	* ***Harelkin v. University of Regina*, (SCC 1979)** – internal appeal mechanism, he skipped a step + sought JR, look to the following factors re: whether there is an adequate alternative remedy: procedure on appeal, composition of appeal body/implications, efficiency, expediency, costs
		1. **Test: one must show more than a prior violation of procedural fairness to skip a step – “The courts should not use their discretion to promote delay + expenditure unless there is other way to protect a right.”**
3. **What remedies can you get on JR?**
	* Rooted in old writs, underlying order is not necessarily stayed BUT once appeal is granted then it is
		+ *Certiorari* – cause to be certified, most common, courts asks for record of proceedings for review re: excess of jurisdiction
		+ *Ex post facto* – quashing
		+ *Prohibition* – stops the proceedings of any tribunal/board/person exercising judicial functions outside jurisdiction/discretion
		+ *Mandamus* – often combined w/*certiorari*, directions when court sends something back for reconsideration
		+ *Declaration* – states the legal position of parties/law that applies to them, used to clarify law/private party’s rights under a statute
	* ***Judicial Review Procedure Act*** – in BC, transforms writs into statutory remedies (no broadening though), no time limits
	* ***Administrative Tribunals Act*** – in BC for provincial tribunals, tribunals must sign on, courts have no inherent jurisdiction so must exhaust all alternative remedies or JR is completely ousted
	* ***Federal Courts Act*** – applies to federal tribunals, do not sign on it applies automatically, more relaxed public standing test, 3 day limitation period, **s.18.1(4)**  sets out grounds of very (not standards), remedies encapsulate the old writs – power to award is discretionary
		+ Acting w/out jurisdiction, procedural fairness, error or law, erroneous finding of fact
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| **Private Law Remedies: pg. 9** |

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| 1. **Damages**
	* Tribunals cannot award damages, must use *private* *law* to attack a tribunal decision
		+ Eg. tort law – ***Odhavji***
	* Damages also not available when an administrative action is challenged on *judicial review*
	* Enabling statute might allow it to impose *damage-like* remedies
		+ Eg. penalties, sanctions
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