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 |