

## **SESSION #5**

### **Remedies**

**Moderator: Lillian Ma, Landlord and Tenant Board**

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**Justice David J. McCombs, Ontario Superior Court of Justice**

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**Jeffrey Berryman: Remedies before Administrative Tribunals: What can be learned from the Common Law?**

The New 'Law of Remedies'

- Most academics recognize the following emerging patterns in the common law of remedies:
  - o Stretching the compensation principle: traditional focus on actual loss has been stretched so that damages are measured by the defendant's gain (e.g. plaintiff's lost opportunity to bargain, etc.).
  - o The centrality of intangible or non-pecuniary losses.
  - o Courts using remedies and private law as a regulatory function (claims including punitive damages and remedies that lead to disgorgement).

Functions Performed by Remedies

- Compensation: placing the claimants in the position they would have been in had the injury not happened.
- Deterrence: awards of punitive damages and public law damages for violation of protected rights.
- Punishment: seeking to measure either societal condemnation or retribution for the egregious conduct.
- Restitution: restoring back to the claimant that which has been taken by the defendant.
- Disgorgement: often sought where there is wrongdoing to the claimant, but where the claimant has suffered no or little compensable loss (ex. giving up profits).
- Coercion: injunction, specific performance or some other court order backed up with a threat of contempt of court.
- Self-help: generally, the common law is antagonistic towards self-help relief and a claimant must invoke some court or tribunal process before recovering the property.
- Vindication: operates to validate the claimant's understanding that a right has been violated and is an expression of societal concern against the erosion of the rule of law.

Examples:

- Landlord and Tenant Board – compensating the tenant for loss of property

- Consider the following example, Landlord breach to properly maintain roof results in water damage to the tenant's 4 year old computer equipment.
- What valuation should be used?
  - Indemnity value? There is no market for a 4 year old computer.
  - Insurance value? Not determinative as these values reflect the terms of the policy and the relationship between insurer and insured.
  - Replacement value? Although the claimant may experience a significant improvement in the condition as compared to their position prior, the courts lean towards this approach. This is called betterment.
  - Canadian Courts have adopted essentially two positions with respect to 'betterment'
    - Court must be satisfied that the claimant is entitled to the cost of reinstatement over diminution in value.
    - Court must be satisfied that the claimant will spend the fund on buying the replacement (fixity of intention test).
- Human Rights Tribunal of Ontario – compensation for loss of dignity
  - At present, the common law does not have an explicit action which recognizes injury to a person's dignity.
    - How do you quantify dignity? Raises similar issues as the quantification of pain and suffering.
  - The language of the new Code appears to be tracking in the direction of the conventionalism principle for the quantification of damages: where the Court both makes and reinforces current awards based on a host of comparators, and a general desire to maintain consistency.
  - *Arunachalam*
    - The Tribunal awarded \$4,000. That amount was awarded for a number of harassing statements over the period of a month in relation to the complainant's pregnancy.
    - *Arunachalam* sets out the right approach to the assessment of damages for loss of dignity, feelings and self-respect.
      - Envisages a type of tariff approach that is adjusted periodically for inflation.

### **Justice David J. McCombs: Tribunal Remedies and the Supervisory Role of the Courts**

#### The Broad Scope of Administrative Law

- Administrative Law governs the exercise of power delegated by statute.
  - Parliament or Provincial Legislature passes statutes and regulations giving powers to government bodies (i.e. boards, tribunals) or individuals (i.e. Ministers)
  - To varying degrees, the Superior Courts have a limited supervisory role with respect to all statutory decision-makers.

#### The Power to Decide

- Power of Tribunal comes only from its governing statute.

- The powers granted by the statute often include:
  - o creating regulations
  - o creating policy

#### Limits on Tribunal's Power

- Tribunal's enabling statutes and regulations set out key elements and limits on its exercise of delegated power.
- In addition to the statutory limits on a tribunal's authority, two other types of limits apply:
  - o Common Law Limits
  - o Constitutional Limits

#### Judicial Review: Determining the Reach of the Tribunal's Authority

- The degree of the tribunal's discretion determines the reach of its power.
- Look to the statutory language:
  - o **Limited discretion** → where the statute contains objective language, specific factors, limited and enumerated considerations
  - o **Wide discretion** → where the statute contains open-ended, permissive and subjective language

#### Judicial Review: Standard of Review

- Determination of "standard of review" is important because it often determines the outcome.
- *Dunsmuir* scolded lawyers and judges for making the determination of standard of review too complicated.
  - o Notions such as "pragmatic and fundamental approach" replaced with "standard of review analysis".
  - o Notions of "patent unreasonableness" and "reasonableness *simpliciter*" are collapsed into a single standard of reasonableness.
- Determining the Standard of Review for Remedial Orders:
  - o Reviewing court to consider the precise nature and function of the tribunal, including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision including the existence of a privative clause and the nature of the issue being decided.
  - o In some cases the court will have to recognize that the decision-maker has to balance the adverse impact of a decision on the rights and interests of those directly affected against the public purpose involved.
- Deference in Review of Discretionary Decisions
  - o Courts give "considerable deference" to tribunals when reviewing the exercise of ... discretion and determining the scope of ... jurisdiction". (*Baker*, para. 53)
  - o Where the statute confers broad choices, "courts should not lightly interfere", and should give "considerable respect to decision-makers when reviewing the manner in which discretion was exercised". (*Baker*, para. 53)
  - o However, silence in reasons makes the judiciary uncomfortable. You have to be transparent in your thinking to minimize the chance of having the court interfere with your findings.

- Limits to Judicial Deference
  - o However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter. (*Baker*, para: 56)
  - o Deference does not mean subservience (*Dunsmuir*, para. 48)
- Applying a Reasonableness Standard of Review
  - o A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. (*Dunsmuir*, para. 47)
  - o The issue is not whether the court agrees with the decision. Instead, the court has to recognize the expertise of the tribunal and defer to its decision if it falls within a range of possible, acceptable outcomes.

#### Avoiding Judicial Intervention

- Importance of clear reasons: clear chain of reasoning allows for meaningful review by courts.
- Explain where you derive your authority from.
- If there is a range of possible remedies, explain why you've chosen a particular remedy.
- Explain how you are balancing the competing interests of the parties directly affected and other public interests that are engaged.
- When granting a remedy, be sure to stay within your statutory power, adhere to common law principles of fairness as well as Charter values.

#### Remedial Powers under the Charter

- *R. v. Conway* [2010] 1 S.C.R. 265 recently affirmed a tribunal's right to make remedial orders under the Charter, provided that the remedy sought is one that the legislature intended would fit within the statutory framework of the particular tribunal.
- Most Charter-related relief does not require a Charter remedy under s. 24(1). Usually, the remedy can come from the tribunal's statutory power, the common law, or be based on the tribunal's duty to make its decision with regard to Charter values.
- Pitfalls in entering Charter waters:
  - o Must first determine if relief sought fits within tribunal's statutory framework
  - o Must make finding of Charter infringement
  - o Procedural complexities
  - o Standard of review—correctness

### **Lorne Sossin: Evaluating Remedial Performance**

#### Why Evaluate Public Bodies?

- Tribunals, agencies, boards and commissions are public bodies which spend public dollars in order to fulfil a public mandate set out in legislation. To whom are they accountable for the effectiveness of their remedies? Do those remedies fulfil the statutory mandates of the tribunals?

- The independence of adjudicative tribunals and their role in advancing public policy objectives have been confirmed by the Supreme Court of Canada. Remedies lie at the heart of independence; but does accountability undermine independence?

#### Criteria for Evaluation

- A robust form of evaluation should be something a Tribunal is ahead of the curve of, otherwise, an evaluation will happen later and may result in cutbacks, etc.
- A Tribunal should always be prepared to speak to its internal guidelines and measures that have been taken to address issues of consistency and fairness if an issue should ever arise.
- Criteria for Evaluation:
  - o Fulfilment of statutory purpose
  - o Quality of reasoning, fact-finding, etc
  - o Consistency and coherence in decision-making (guidelines, transparency, public legal education)
  - o Reputation/satisfaction among users, advocates, stakeholders, the public, etc.
    - It will take a very long time to turn around public reputation that a particular body does not have the intellectual or substantive “chops” to carry out its mandate.
  - o Impact of remedial decisions on intended parties (e.g. HPARB decisions on health colleges)
  - o Value for money, cost effectiveness (e.g. provincial audits)
    - Is it an effective use of public money? While some tribunals will grow and adapt with time, there are also those that fall to the side and become less useful.

#### Forms of Evaluation:

- Annual Report; Parliamentary Oversight
- Independent Oversight (e.g. Auditor General, Integrity Commissioner, Ombudsman)
- Judicial Review
- Ministerial Accountability
- Internal Review, Supervision by Chair
- External Review (consultants, academic studies, etc)
- Media (investigative journalism, etc)

#### Methodologies for Evaluation:

- Tracking decisions, collecting data & monitoring impact
- Exit surveys & questionnaires
- Qualitative studies (interviews and observation)
- Quantitative studies (randomized control studies, etc)
- Comparative studies
- Historical studies
- Normative studies

#### Cases and Cautionary Tales:

- Financial Services Commission/Tribunal Study for Expert Commission on Pensions
- *Alberta Public Agencies Governance Act* S.A. 2009 c.A-31.5 (“mandates and roles” document) (s.12(a) “Every public agencies shall make all reasonable efforts to fulfill its mandate...”)

- Social Benefits Tribunal –Provincial Auditor’s ODSP Value-for-Money Audit in 2004-2006
  - o SBT was the subject of a curious audit, in which a number of decisions were overturned.
- Immigration and Refugee Board –media reports of regional and member inconsistency in rejection/acceptance rates
- Fairness Committee Report on Securities Adjudication (2005)