THE POWER OF ADMINISTRATIVE TRIBUNALS TO GRANT INJUNCTIVE RELIEF

I. Background

In preparation for its meetings on February 11-13, 2002, the Joint Regulatory Roundtable (JRT) has asked whether a specialized tribunal would be able to issue injunctions.

II. Facts

In the chapter on sanctions, which we received by email on January 28, 2002, it is proposed that injunctions be issued by a tribunal. These injunctions would be issued in situations where they are needed to protect the public interest or prevent the loss of charitable assets. The author of the chapter on sanctions writes:

> ¶59 The second related subject involves the use of injunctions by the regulatory authority. Very occasionally, the Regulator is confronted with situations where immediate action is needed to protect the public interest or to prevent the loss of charitable assets. The actual or potential harm is of sufficient magnitude and irreversibility as to justify the Regulator seeking a court injunction to curtail the damage until the matter can be sorted out under normal procedures.
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> ¶60 This power already exists, albeit in undefined form. We would give the Tribunal the power to issue such orders, and legislatively define "public harm" to include situations where there are reasonable grounds to believe that:
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> - tax-subsidized donations from the general public are not being applied for charitable purposes, or
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> - the general public is being misled either that they can use their contributions to claim a charitable tax benefit, or that their contributions will be used for a charitable purpose.

In essence, this section seems to indicate that instead of going to court to receive an injunction, the injunction would be issued by the specialized tribunal whose existence the JRT is currently contemplating.

III. Issues

This proposal raises the following issues:

i) Whether, as a matter of law, an administrative tribunal can issue the type of injunction sought; and,

ii) Whether there are any policy considerations to be taken into account if such injunctive powers were created.

IV. Short Answer

i) Yes. Administrative tribunals that issue interlocutory injunctions have existed in the past and have been upheld as constitutionally valid in certain circumstances.

ii) Yes. The JRT should consider why it would like the power to issue injunctive relief to be granted to the tribunal. Is it for matters of convenience, to further a policy objective of the law of charity, etc.? If the reasons for granting this power to the tribunal do not focus on furthering a policy objective, then the tribunal may be seen as usurping the functions of the court. If such is the case, then the JRT may wish to consider using a court for injunctions. Finally, the JRT may also consider whether the desired purpose for issuing injunctions fits properly within the regulatory objectives of the tribunal or if it is more appropriate within the regulatory framework set up for charities within the provinces.

V. Discussion

The type of injunction that the JRT is considering is best described as an 'interlocutory injunction' since it stops the impugned action until the matter can be sorted out under normal procedures[1].

As a general principle, a court will not strike down the powers of administrative tribunals if these powers do not infringe on the powers granted to courts under s. 96 of the Constitution[2].

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[1] See A. Burrows, *Remedies for Torts and Breach of Contract* 2nd Ed., (London: Butterworths, 1994) who defines and interlocutory injunction as:

> …one made at an earlier stage in the proceedings which is to last only until the trial at the latest. It is generally expressed to continue in force 'until the trial of this action or further order'. (at 390)

[2] Decided in the seminal cases of *Labour Relations Board of Saskatchewan* v. *John East Iron Works*, [1948] 4 D.L.R. 673 and *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714.

In *Tomko* v. *Nova Scotia (Labour Relations Board)* [1977] 1 S.C.R. 112, the majority of the Supreme Court of Canada held that although the power to issue a cease and desist order is equivalent to a Superior Court's power to grant an injunction, the Board's power was *intra vires* the legislature of Nova Scotia due to the way that the Board was required to play out its function. Unlike a Court, the Board made its own investigations before deciding whether an injunction should issue, it was required to issue an injunction if satisfied that there was an unlawful work stoppage and to do so irrespective of any balance of convenience. Other differences noted were that no undertaking as to damages was required under the statutory regime, nor did it seem that the common law requirements of full disclosure or clean hands were needed.

The Supreme Court also noted that the statute in question made allowance for efforts at settlement before or after the making of an interim cease and desist order. In the Supreme Court's opinion, this element evidenced the policy considerations of the Nova Scotia legislature (i.e. the fluidity and volatility of labour relations and the necessity to seek an accommodation between employers and trade unions). The Court observed that in pursuit of these policy objectives, the use of a cease and desist order to restore the lawful *status quo ante* was a rational way of dealing administratively with a rupture of peaceful labour relations.

It is therefore possible for an administrative tribunal to possess the power to issue injunctions. However, such a grant of power may be found to be invalid by the courts if the primary purpose of moving this function from the courts to the tribunal is not related to the furtherance of a policy objective for which the tribunal was established. For example, moving the power to grant injunctions to a tribunal for reasons of convenience could be seen as an attempt to create a court under the guise of a tribunal and it may be preferable to consider the use of a court over a tribunal for this function.

A brief review of the majority of federal tribunals that provide for injunctive relief shows that, as a practical reality, most use the superior courts to obtain an injunction. However, one strong example of statutory injunctive relief is found in the *Competition Act* R.S.C. c. c-34. With respect to certain matters, the Competition Tribunal can issue injunctions, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief[3].

[3] The relevant provisions of the *Competition Act* read as follows:

> **104.** (1) Where an application has been made for an order under this Part, other than an interim order under section 100, the Tribunal, on application by the Commissioner, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.
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> (2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

As a final note, the JRT may wish to consider the reasons behind issuing injunctions in light of the role of the federal regulator. If the harm that the JRT is aiming to prevent deals with issues beyond charitable status for tax purposes, it could be more appropriate for another regulatory body in the charities realm, such as the province, to issue injunctions. This matter may be more clearly addressed once the issue of institutional reform has been fully addressed.

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(3) Where an interim order issued under subsection (1) is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.