WHO SHOULD IMPOSE INTERMEDIATE SANCTIONS?

Keeping in mind the different models for institutional reform, does the Table want to see the imposition of sanctions separated from the Regulator in all four models?

Options before the Table

Three options have been put forward:

1. the Regulator, with an amended recourse system;
2. the Regulator, with the active participation of a Sector Advisory Committee; and
3. a "tribunal."

This paper provides background information primarily on the Tribunal option. It discusses a Tribunal only in the context of imposing sanctions.

The Sector Advisory Committee ("SAC"), it is assumed, would be advising on policies. The question is whether it should be involved in advice or decision-making on individual cases.

If it merely advised on individual cases, the final decision would rest with the Regulator (or Tribunal). However, it could play a more active role in the decision-making. One suggested procedure is that, if the SAC advises against the imposition of a sanction, the Regulator could no longer impose the sanction itself, but would have to seek the permission of a court to do so.

However, there are a number of hurdles in the way of involving advisory committees, like the proposed SAC, in decision-making involving individual cases.

Terminology

Many statutes create "offences," which result in "punishments" by way of fines and imprisonment. The function of imposing the punishment is separated from the investigatory function.

Some statutes provide a range of penalties or sanctions that are imposed at the administrative level. The purpose of these sanctions is to encourage compliance with the legislative requirements, not to "punish." Various forms of recourse are provided

Arguments for and against a Tribunal to impose sanctions

Tribunals are outside the normal process of government administration. Ministerial responsibility requires that laws (generally backed up by criminal sanctions for non-compliance) be administered under the direction of a Minister, who in return is accountable to Parliament.

> Example:
>
> Under the *Fisheries Act*, fisheries officers have investigatory powers much like those of as police officers. If they discover any contravention of the *Act*, they commence a prosecution under it, although for certain minor offences they can issue "tickets" similar to parking tickets, in that the offender has the option of paying the fine or appearing in court.

A Tribunal's functions lie somewhere between those of government and those of the judiciary. Nevertheless, as an exception to the normal lines of accountability, the arguments for creating a new Tribunal to impose sanctions would have to clearly outweigh the arguments against.

The following table attempts to encapsulate the various arguments that the Table has raised or could raise.

Arguments for creating a Tribunal

ARGUMENT	COUNTER-ARGUMENT
Would allow problems in individual cases to be resolved objectively and fairly without putting the political credibility of the Minister on the line	But where's the equivalent check in a Tribunal on arbitrary or biased decision-making that is provided by ministerial responsibility for departmental operations?
Tribunal's independence would shelter it from lobbying by the "untouchables." Decisions would be out in the open	
Voluntary compliance would be encouraged by confidence in the fairness of the system	
Use of administrative enforcement tools and review by an administrative tribunal reflects a broader government trend away from court proceedings or high-level departmental reviews. The shift enhances the principles of fairness, natural justice and accessibility, while allowing for a more efficient and effective system of recourse	
Need for sector input (expertise, what it	But can get sector input by other means:

means to be a charity). Cf. the Accord's call for sector participation in the delivery of programs	advisory committee, consultations, interchanges, as expert witnesses at hearings. Is this expertise so specialized that "incorrect" decisions would be reached if people with sector backgrounds did not participate directly in the decision-making?
Creating a record, appealable to Tax Court	But Tax Court creates its own record
Tribunal would be fully transparent	But would the charities involved necessarily want this? The Table has the option of recommending that the Regulator's compliance program be fully transparent

Arguments against creating a Tribunal

ARGUMENT	COUNTER-ARGUMENT
Nowhere else in the *Income Tax Act* are the investigatory and sanctioning functions separated. Would set a precedent with impacts throughout the *Act*.	
Would the number of Tier III and IV sanctions warrant setting up such an institution? Sitting in different sites?	But consider Human Rights Boards, University Discipline Boards: these serve when needed, members get a per diem, one staff person; not a big deal
This would not be an exercise in co-regulation, because any sector members would be governor-in-council appointments	
Penalty situations are no one's business but the organization involved. Organizations don't want to have their "peers" judging them	But "peers" would not be involved. Governor-in-council appointees might originally come from the sector, but would serve as knowledgeable individuals, not sector "representatives"
Conflict of interest in sector members deciding their own fate	But concern that the Tribunal would be "captured" by sector members is misplaced; sector members would likely be harsher than government members

Unresolved questions if Table recommends a Tribunal

If the Table wishes to recommend creating a Tribunal, it will need to undertake further research and make decisions on a number of issues before formulating its proposal. For example:

- Such a Tribunal would need to be established by statute. Would this be a standalone piece of legislation (cf. the *Cultural Property Export and Import Act*), or part of the *Income Tax Act*?

- What type of expertise would members of the Tribunal need?

- How would it be accountable to Parliament—perhaps an annual report submitted through a Minister?

- Would the Tribunal have the power to make its own procedural rules? If instead procedures are to be specified in the legislation:
    - What type of hearings should it hold?
    - Would it have the power to compel witnesses to appear before it?
    - Would it be allowed to hold closed hearings if it considered this advisable?
    - Would it have the power to dispense with frivolous or vexatious applications?
    - What role, if any, would intervenors have?

- How would it be affected by government legislation of general application?
    - Are its staff "public servants"?
    - Would it be subject to Treasury Board budgetary and spending controls?
    - Would there need to be any exceptions to the access to information and privacy legislation?

Examples of Tribunals

Despite their status as "exceptions" to standard administrative practice, more than a 100 major federal tribunals are in existence. They perform a wide range of functions, some being more "administrative" and others more "judicial" in nature. The examples below concentrate on tribunals that impose sanctions, which is usually considered a "judicial" function.

Over the years, tribunals have come into existence without an overarching legislative framework to guide their design. The result is a wide variation in their powers and structure. Depending on what the Table considers desirable, it is probable that some precedent can be found. However, some features do appear to be constant, notably

tribunal members are Governor-in-Council appointees, serving "during pleasure" or "during good behaviour."

Current Process: No Tribunal, Penalties Imposed at the Administrative Level + Recourse to the Courts

The "Customs" side of the CCRA now has a system to administrative monetary penalties. The largest administrative penalty is $25,000. The penalty applies immediately, but is subject to various recourse mechanisms.

For the "Tax" side of the CCRA, the *Income Tax Act* contains numerous penalties that the CCRA can assess against a taxpayer (e.g., for not filing or for late filing, for false statements or omissions, and for late or deficient instalment payments). Generally, the penalty is based on some percentage of the tax payable. And, of course, under the *Income Tax Act*, the Charities Directorate currently imposes de-registration and Part V tax, subject to an appeal to the Federal Court of Appeal.

Example of Penalties Imposed at the Administrative Level + Tribunal as Recourse Mechanism

Civil Aviation Tribunal ("CAT")

The *Aeronautics Act* includes a range of measures designed to ensure air safety. Provisions deal with security at airports, licensing of pilots, certification of air carriers, investigation of accidents, handling of hazardous goods, etc. Transport Canada issues various licenses, permits, accreditations, and certificates in administering these provisions. The Department's inspectors are given special powers of investigation (search warrants, etc.).

If an inspector has reasonable grounds to believe a contravention has taken place, s/he must decide whether:

- to provide a "counselling session";
- to impose a financial penalty;
- to suspend, cancel or refuse to renew the license, etc.; or
- (in some cases) to proceed by way of criminal prosecution.

The Department's "Aviation Enforcement Policy Manual" sets out guidelines. These are intended to produce consistency, but they allow managers to override them where the circumstances warrant (including various listed mitigating circumstances such as honest mistakes, and aggravating circumstances, such as repeated failures). The Manual states:

> …the ultimate goal of a deterrent action is to protect the individual and the public from possible harm. The other objectives are to encourage future compliance and to deter others from contravening aeronautics legislation.

An individual or corporation receiving a financial penalty or suspension can seek recourse from the Civil Aviation Tribunal. This body is completely separate from Transport Canada. Its raison d'être is "to provide the aviation community with the opportunity to have enforcement and licensing decisions of the Minister of Transport reviewed by an independent body."

The CAT holds two types of hearings. A review hearing is an open hearing before one member of the CAT, at which witnesses can be heard and cross-examined. An appeal hearing is held before three CAT members and is based on the record previously established at the review hearing. The decision from the appeal hearing is final and binding.

The CAT employs 8 full-time persons: the Chair, the Vice-Chair, and 6 staff. In addition, some 25 part-time members are appointed by order-in-council from around the country. CAT members are selected on the basis of their knowledge and experience in aeronautics, including aviation medicine. The CAT is itinerant, normally sitting where the alleged infraction occurred.

In 2000-01, the CAT had a caseload of 350 cases, and managed to resolve 241 of them.

The CAT has been recognized as a best practice in the review of administrative-based enforcement actions. Transport Canada has received Cabinet approval to change the Tribunal's name to the Transportation Appeal Tribunal of Canada, with responsibility in future for reviewing administrative decisions taken under other legislation (*Canada Transportation Act*, *Canada Shipping Act*, *Railway Safety Act*, and *Marine Transportation Security Act*).

In 1997, the CAT's budgetary expenditures were $901,000. The new Transportation Appeal Tribunal of Canada is estimated to cost $1.5 million. These figures were calculated on the CAT's average cost per hearing of $8,000. Two-thirds of Transport Canada's sanctions were initially challenged, but only a quarter of these challenges resulted in a hearing. The parties in the remaining cases used opportunities to address and resolve issues prior to the hearing.

Examples of Sanctions Imposed Only by a Separate Tribunal

Human Rights Tribunal

Mandate — Hears cases relating to discrimination and pay equity referred to it by the Canadian Human Rights Commission. Has jurisdiction over federal agencies, as well as banks, airlines and other federally regulated employers and providers of services.

Conducts inquiries and hearings.

Account-ability	Submits a report directly to Parliament
Sanctions	May make orders to cease a discriminatory practice, to take measures to redress the practice, and to compensate the victim. Can impose a penalty of up to $20,000 if the discriminatory practice was engaged in recklessly or willfully. Orders can be treated as orders of the court.
Caseload	In 2000, held 167 hearing days on discrimination cases and 111 hearing days on pay equity cases. Involved 72 cases.
Staffing	Members: 2 full-time members (who must be members of a Canadian bar for at least 10 years) and up to 13 part-time members, appointed by Governor-in-Council. Current members have various backgrounds, but most have legal training and all must have experience in human right issues. Chair and Vice-Chair appointed for up to 7 years; other members for terms up to 5 years. Appointments are renewable. Provisions for removal of members for misconduct, etc. Registrar's office has a staff of 16.
Cost	Expenditures in 2000-01: $2.9 million

Competition Tribunal

Mandate	The Tribunal is a court of record. It hears and determines all applications under Parts VII.1 and VIII of the *Competition Act* (the non-criminal forms of non-compliance with the legislation) and issues orders. Matters covered include deceptive marketing practices; mergers; abuse of dominant market position; and restrictive trade practices. The Tribunal has no investigatory or advisory functions; its only task is to hear applications and issue orders. Orders can involve both remedial measures and monetary penalties (up to $50,000 for an individual). Temporary prohibition orders can also be issued if a prima facie case of non-compliance is brought to the Tribunal. (The *Competition Act* has a separate stream of criminal "offences" that are handled by the courts. These deal with price-fixing, bid-rigging, false representations, and deceptive telemarketing.)
Account-ability	As a court, the Tribunal is not accountable to Parliament
Sanctions	Appeal lies to the Federal Court of Appeal. Appeal on a question of fact requires leave of the Federal Court of Appeal.
Caseload	2000-01: 37 hearing days, handled 10 applications and 90 notices, orders and directions.

Staffing — Members: up to four judges from the Federal Court-Trial Division, plus up to 8 lay members, selected for their expertise in economics, business, accounting, marketing and other relevant fields. Although all are Governor-in-Council appointments, the judicial members are selected on the recommendation of the Minister of Justice, and the lay members on the recommendation of the Minister of Industry. The Governor in Council may establish an advisory council of persons knowledgeable in economics, industry, commerce or public affairs to advise the Minister of Industry on the appointment of lay members.

Currently operates with 2 judges and 5 lay members.

Questions of law are determined only by the judicial members.

Members are appointed for fixed terms of up to 7 years, during "good behaviour," and may be reappointed.

Registrar's office = 14 staff.

Cost — Expenditures in 2000-01: $1.6 million

Examples of Tribunals with Many Functions, Including the Imposition of Sanctions

Canadian Radio-television and Telecommunications Commission ("CRTC")

Mandate — Regulates and supervises 5,900 Canadian broadcasting and 61 telecommunications service providers and common carriers within federal jurisdiction.

Among other things, the CRTC processes applications from broadcasting undertakings and telecommunications carriers; hears complaints from consumers and conducts investigations; and ensures compliance with the applicable legislation.

Account-ability — Reports to Parliament through the Minister of Canadian Heritage. Various mechanisms for political involvement, e.g., the Minister resolves conflicts between the CBC and the CRTC; Cabinet can issue directions on broad policy matters to the CRTC; Cabinet can also set aside a CRTC decision and refer it back to the CRTC if it appears contrary to policy.

Sanctions — Can, after a public hearing, suspend or revoke a license. Can hold an inquiry to determine the existence of non-compliance with the legislation or the conditions of a license, and if non-compliance is found, order the person to comply. Such orders can be treated as orders of the court.

The legislation also contains various offences with fines on summary conviction, e.g., for broadcasting without a license (for an individual the maximum fine is set at $20,000 for each day the offence occurs).

Appeal on a question of law or jurisdiction lies to the Federal Court of Appeal. The CRTC's findings of fact are binding and conclusive.

Caseload — In 1999, handled 1,754 broadcasting and 1,533 telecommunications applications. Issued 1,230 orders.

Staffing — Cabinet may appoint up to 13 full-time and 6 part-time members, for renewable terms of up to 5 years. No special expertise is set out in the legislation, but a member must be a Canadian citizen and at arm's length to telecommunications undertakings.

400 employees.

Cost — Operating budget 2000-01: $39.6 million

Canada Industrial Relations Board "CIRB"

Mandate — As an "independent, representational, quasi-judicial tribunal," CIRB is responsible for interpreting and administering Part I (Industrial Relations) and certain provisions of Part II (Occupational Safety and Health) of the *Canada Labour Code*. It has jurisdiction over some 700,000 employees in federally regulated industries (interprovincial transportation, broadcasting, banking, long-shoring and grain handling) and private sector employees in the far North.

CIRB performs a wide range of industrial relations functions: it certifies trade unions; investigates complaints of unfair labour practices; issues cease and desist orders in cases of unlawful strikes and lockouts; renders decisions on jurisdictional issues, etc.

Almost all orders and decisions of the CIRB are final, and not subject to question or review in any court.

Account-ability — Reports to Parliament through the Minister of Labour [?]

Sanctions — CIRB operates by issuing orders, including orders to compensate an employee for lost wages. These orders can be given the status of court orders.

The *Canada Labour Code* also contains some criminal "offences", such as illegal lockouts and strikes. Fines on summary conviction for "Industrial

Relations" offences range from $400 to $10,000. For "Occupational Health and Safety" offences, conviction on indictment can lead to a fine of to $1 million and up to 2 years' imprisonment.

Caseload — In 1999, the CIRB received 884 cases. During the year, the Board held 62 hearings and issued written decisions in 209 cases.

Staffing — Numbers are flexible, but currently has 11 full-time members and 5 part-time members. The Chair and 2 Vice-Chairs must have experience and expertise in industrial relations. The remaining members of the Board are divided equally among representatives of employers and of employees. Members are appointed by Governor-in-Council on the recommendation of the Minister of Labour, after the Minister has consulted with organizations representing employers and employees.

Appointments for the Chair and Vice-Chairs are for up to 5 years, and for the remaining members, up to 3 years. Appointments are renewable. There is provision for removal of members for misconduct, etc.

97 employees.

Cost — Expenditures in 2000-01: $11.2 million