CHARTER JURISDICTION

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

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FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

This report addresses issues related to the *Charter* jurisdiction of administrative tribunals. In some circumstances, it may be open to one of the parties in a proceeding before an administrative tribunal to raise a question about whether a provision in the tribunal's enabling statute is contrary to the *Charter of Rights and Freedoms*. *Charter* litigation is highly specialized and complex. Administrative tribunals seldom have the legal expertise, institutional capacity or procedural rules to address these challenges effectively. Furthermore, unlike the courts where decisions set precedents to be applied in subsequent proceedings, the decisions of administrative tribunals are not binding on their future cases. A tribunal's decision on the application of the *Charter* in one context need not necessarily be considered in another. As a consequence, resources dedicated to addressing complex *Charter* challenges may not have lasting value for the tribunal, the parties who appear before the tribunal or the community at large.

Legislative clarification is required to establish which tribunals have jurisdiction to entertain a *Charter* challenge and, for those that do, when the tribunal can refer a *Charter* question to court. There must also be a process in place to ensure that notice is given to the Attorney General in those cases where a tribunal hears a *Charter* challenge.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the Project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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INTRODUCTION

Administrative tribunals hold hearings and make decisions under specific statutes. For example, the *Labour Relations Code* is the enabling or parent statute for the Labour Relations Board. It governs the types of decisions which can be made by the board. Similarly, the *Community Care Facility Act* is the enabling statute for the Community Care Facility Appeal Board.

A party to a hearing sometimes asks a tribunal to decide that a provision in its enabling statute should not be applied by the tribunal, on the basis that the provision is inconsistent with the *Charter of Rights and Freedoms*. For example, in one case, a union asked the Labour Relations Board to rule that the definition of secondary picketing in the *Labour Relations Code* was too broad and offended against freedom of expression as protected in section 2(b) of the *Charter*.[1] In other cases, the Appeal Division of the Workers' Compensation Board has considered whether a

[1] *U.F.C.W., Local 1518 v. KMart Canada Ltd*., [1999] 2 S.C.R. 1083.

provision of the *Workers Compensation Act* dealing with spousal pensions is contrary to the *Charter*.[2]

When someone raises this type of *Charter* argument at a tribunal hearing, a threshold issue is whether the tribunal has the jurisdiction or legal ability to decide this constitutional matter. If the tribunal concludes that it has this power, it must then answer two questions. First, is the impugned provision inconsistent with the *Charter* provision relied upon? If the answer to this question is yes, a second question must be asked. Is the impugned provision saved by section 1 of the *Charter*? Section 1 recognizes that *Charter* rights are not absolute and must be balanced against other values:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Both questions must be answered before a tribunal can decide whether a statutory provision is inconsistent with the *Charter*.

However, the current legal test for determining jurisdiction lacks clarity. This report considers whether legislative clarification of the power of tribunals to decide a *Charter* challenge would be beneficial.

If legislative reform would be helpful, a decision must be made about the extent to which tribunals should have the power to decide that part of their enabling statute is unconstitutional. The alternative is to leave this power to be exercised only by a court. In addition to these jurisdictional questions, this report addresses two related procedural issues and the public comments received in response to a background paper, Administrative Agencies and the Charter, released for public comment by the Administrative Justice Project in December 2001. As noted in the background paper, there are constitutional issues which can arise at tribunal hearings other than the type of *Charter* determination under discussion here.[3] This report addresses only the ability of a tribunal to decide that a provision in its enabling statute is contrary to the *Charter*.

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[2] For example, see the following decisions by the Appeal Division of the Workers Compensation Board: #93-1222, #99-1427 and #2001-0200.

[3] Administrative Agencies and the Charter, background paper prepared by the Administrative Justice Project, December 2001, at pp. 2-3. This paper is available at the Project's website: http://www.gov.bc.ca/ajp/rpts/.

CURRENT LAW: A NEED FOR REFORM

The starting point in any analysis of a tribunal's power to make a *Charter* determination is section 52 (1) of the *Constitution Act, 1982*:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to extent of the inconsistency, of no force or effect.

Although the constitution is the supreme law of the land, this section does not tell us what entities have the power to make legal determinations whether a statutory provision contravenes the *Charter*. Clearly the courts can make these determinations. The present issue is whether administrative tribunals should also be able to give direct legal effect to section 52.

In one sense the legal test for whether a tribunal can exercise this *Charter* jurisdiction is straightforward. The Supreme Court of Canada stated in a case named *Cooper* that the test is one of legislative intent:[4]

> *These authorities [Douglas College, Cuddy Chicks and Tétreault-Gadoury] make it clear that no administrative tribunal has an independent source of jurisdiction pursuant to s. 52 (1) of the Constitution Act, 1982. Rather, the essential question facing a court is one of statutory interpretation – has the legislature, in this case Parliament, granted the administrative tribunal through its enabling statute the power to determine questions of law?...*
>
> *If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52 (1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute….*

The power to consider questions of law must go beyond interpreting and applying the tribunal's enabling statute. The additional step has been variously described as a power to address "general questions of law" and "the power to interpret or apply any law necessary to reach its findings".[5]

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4 *Cooper v. Canada (Canadian Human Rights Commission); Bell v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R 854 at para. 45-46 per La Forest J.

5 See *Cooper, supra*, para. 55 and *Tétreault - Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at para. 10 per Justice La Forest. See also *Martin v. Nova-Scotia (Workers' Compensation Board)*, 2000 NSCA 126, 192 DLR (4) 611 at para. 93, leave to appeal granted by SCC, June 14, 2001.

The test is one of statutory interpretation. Did the legislature intend the tribunal to have the power to decide general questions of law (and hence have *Charter* jurisdiction)? This statement of the test, however, is deceptively simple. In practice, application of the test is frequently clouded in uncertainty. *Cooper* is itself an example of this uncertainty. Six of the seven judges agreed on the general test; however, two of these judges reached a different conclusion than their colleagues about the result of applying the test in that case. (To make matters even more interesting, Chief Justice Lamer in a strongly worded dissent expressed fundamental misgivings about the test, even though he had previously agreed with it in earlier decisions of the Court.[6])

The reason for this uncertainty is that legislation does not directly address whether a tribunal has jurisdiction to deal with *Charter* challenges. Courts (and others) must therefore surmise this legislative intent. One factor frequently taken into account is "practical considerations [which] may be of assistance in determining the intention of Parliament".[7] These considerations include the institutional competence of the tribunal and issues of adjudicative efficiency.

The practical result is that it is often difficult to predict when the courts will decide that a particular tribunal has *Charter* jurisdiction.[8] Andrew Roman has described the problem as follows:[9]

> *It is now very difficult to determine whether any particular tribunal in any particular situation has jurisdiction to decide Charter issues. That is because...the test for determining this is so vague in content, and so speculative in its application.*

This uncertainty can lengthen and increase the cost of tribunal proceedings (including any related court proceedings).

Since the ability of a tribunal to apply the *Charter* is a question of statutory interpretation, the legislature has the authority to state clearly which (if any) tribunals have the power to apply the *Charter.* This point has been noted by a number of academic writers.

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6 *Cooper, supra*, para. 7:
> But in my respectful opinion, this exercise is deeply flawed because the premise upon which my colleagues rely -- that the intent to confer on tribunals a power to interpret general law in turn implies an intent to confer on tribunals a power to refuse systematically to apply laws which violate the Charter -- is suspect.

7 *Cooper, supra* at para. 59.

8 A number of these cases were discussed in the Background Paper.

9 Andrew J. Roman, "Case Comment: *Cooper v. Canada (Human Rights Commission)*" 43 Admin. L.R. (2d) 243.

Responses to the Background Paper

The Administrative Justice Project received several responses to its background paper on this *Charter* issue. All agreed that legislative clarification would be beneficial. Two suggested that although legislative reform would be good, it was not a pressing issue. Most of the responses stressed the need for legal expertise on a tribunal if it is to consider a *Charter* issue in an appropriate way.

The Law Society of British Columbia stated:

> *While the Law Society recognizes that there would be no harm in clarifying the ability of agencies to apply the Charter to their decisions, there is no real suggestion that this is a pressing issue. It is quite unlikely, in any event, that the issue of Charter application by a tribunal will be resolved in any final sense by the tribunal itself. Even if legislative reform is brought to this issue, Courts may well end up deciding the matter on a case by case basis. Again, the Law Society believes that it is important to emphasize that generic legislation on such an issue would be ill-advised. It would be inappropriate to vest power in a tribunal to make decisions about Charter applicability if the tribunal possesses no legal expertise. If reform is desired on this issue, it would be more advisable to legislate the issue by way of a specific provision in each enabling statute.*

In a somewhat similar vein, the British Columbia Council of Administrative Tribunals (BCCAT) noted:

> *The ability to decide Charter questions is not a significant matter for most tribunals. Even for those tribunals for which the issue has arisen, it is not typically seen as a priority issue, and most have been able to successfully deal with the matter.*
>
> *The experience and position of tribunals does however vary on this point. Some view it as a potential problem in that they lack the expertise and infrastructure to effectively handle complex Charter cases. Others consider it an important part of fulfilling their statutory mandate. In general, most tribunals probably prefer to have the ability to exercise this authority where necessary. However, this also raises important questions about which body has the power to order Charter remedies, and the process for involving the Attorney General.*
>
> *The British Columbia Council of Administrative Tribunals would support clarification of this matter by legislation, provided that circumstances and positions of individual tribunals would be adequately considered in any law reform. This is a matter that could be addressed in an Administrative Justice Plan for each tribunal, with the benefit of an Administrative Justice Council, and implemented through legislation as appropriate.*

The Project received responses from two lawyers in private practice. One strongly supported legislative clarification:

> *The ability to consider Charter issues must be codified and must articulate legislative intention clearly -- the legislature ought to follow one of the two Cooper minority opinions -- either all tribunals can consider them, or none do. Tribunals are able to consider certain Charter issues, but in a managed way.*

The other writer referred to uncertainty in the current law and also commented "on the need for more legal expertise on the part of administrative tribunals" and the need to take legal expertise into account when assessing a tribunal's competence to decide *Charter* issues.

Recommendation

The predictive value of the current test for determining whether a tribunal has this type of *Charter* jurisdiction is poor. The consequence is that parties and tribunals expend time and resources addressing this issue. Legislative clarification would eliminate the need to expend these resources and would result in more efficient and less expensive hearings for those using the tribunal.

> **It is therefore recommended that government clarify in legislation which administrative tribunals have jurisdiction to decide that a provision in a tribunal's enabling statute is inconsistent with the *Charter of Rights and Freedoms*. This legislative clarification could be achieved by adding a provision to the *Constitutional Question* Act.**

WHICH TRIBUNALS SHOULD EXERCISE *CHARTER* JURISDICTION?

The background paper, Administrative Agencies and the Charter, set out four options for legislative reform, clarifying which administrative tribunals should exercise this type of *Charter* jurisdiction:

1. All tribunals have jurisdiction.
2. No tribunals have jurisdiction.
3. All tribunals have jurisdiction except for certain specified tribunals.
4. No tribunals have jurisdiction except for certain specified tribunals.

The background paper also discussed criteria which might be used to identify those tribunals which might be expressly enumerated under options 3 or 4.

Responses to the Background Paper

The responses from the Law Society and BCCAT included comments on which tribunals should exercise this type of *Charter* jurisdiction. The Law Society commented that this type of constitutional issue often is ultimately decided in court in any event. It also stressed the importance of legal expertise for any tribunal making this kind of decision. BCCAT said that most tribunals probably would like to have this *Charter* jurisdiction; however, it also commented that some tribunals lack the expertise and infrastructure to handle this type of issue appropriately. Both the Law Society and BCCAT recommended a tribunal-by-tribunal review rather than generic legislation. The importance of legal expertise was referred to by a lawyer in private practice. Another lawyer stated that either all tribunals or no tribunals should have this *Charter* jurisdiction.

Discussion

A fundamental question is whether a tribunal has the institutional capacity to deal with a *Charter* question in an appropriate manner. This point was referred to in the responses received by the Administrative Justice Project and in the cases discussed in the background paper.

Charter questions typically require extensive and sometimes complex legal and factual analysis. As noted earlier, two legal questions must be answered. Is the impugned legislative provision inconsistent with a provision in the *Charter*? If yes, is the legislation nonetheless justified under section 1 of the *Charter*? Both questions usually require an appropriate factual record before the legal issues can be properly answered.

A recent decision of the Supreme Court of Canada regarding a *Charter* decision by the British Columbia Labour Relations Board illustrates the sub-questions which must be addressed under section 1 of the *Charter*:[10]

> *The aim of analysis under s. 1 of the Charter is to determine whether the infringement of a Charter right or freedom can be justified in a free and democratic society. Following the tests elaborated initially in R. v. Oakes, [1986] 1 S.C.R. 103, and subsequently in cases including Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, and Thomson Newspaper, it is incumbent on the respondent and the Attorney General as the parties seeking to uphold the restriction on a Charter freedom to show on a balance of probabilities that such an infringement can be justified. To satisfy this burden, they must demonstrate that the objective sought to be served by the legislative restriction is*

[10] *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 at para. 34 per Cory J. for the Court.

> *of sufficient importance to warrant overriding a constitutionally protected right or freedom. Only a significantly pressing and substantial objective can meet this requirement. They must also demonstrate that the legislative restriction is proportional to the objective sought by the legislature. In determining proportionality, three factors must be examined. First, the measure chosen must be rationally connected to the objective. Second, it must impair the guaranteed right or freedom as little as reasonably possible. And third, there must be proportionality between the importance of the objective and the deleterious effects of the restriction and between the deleterious and salutary effects of the measure. The analysis must be undertaken in the context of labour relations.*

When a legislative provision is challenged under the *Charter*, the Attorney General (on behalf of the government) will in many cases need to lead evidence to inform the tribunal's judgment of whether, for example, the legislative provision reflects "proportionality between the importance of the objective [of the provision] and the deleterious effects of the restriction and between the deleterious and salutary effects of the measure". This evidence can be both extensive and complex.

In those cases where a tribunal decides that a provision in its enabling statute is inconsistent with the *Charter*, it must then decide upon an appropriate remedy. Frequently this will be simply a decision that the provision is inoperative and does not apply to the case before the tribunal. (The decision of an administrative tribunal does not legally apply to other cases in the way that a decision of the British Columbia Supreme Court does.) In some cases, however, this will not produce an appropriate remedy.[11]

A tribunal's institutional capacity to decide *Charter* questions includes factors such as:

- procedures and timelines which allow for adequate consideration of the complex evidentiary and legal questions inherent in this type of *Charter* question;
- use of evidence which is sufficiently reliable to form a basis for concluding that a statutory provision is constitutionally unacceptable;
- subject matter expertise;
- legal expertise.

These issues were explored in the background paper.[12] For tribunals which do not have the necessary institutional capacity (including relevant legal expertise), there can be little doubt that they should not exercise a jurisdiction to decide whether a statutory provision contravenes the *Charter*.

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[11] See the discussion of this matter at page 7 of the background paper.

[12] Pages 8-11.

In those situations where a tribunal may have the institutional competence to decide a *Charter* issue in an appropriate manner, efficiency is a factor which must also be considered.

From the perspective of the parties to a dispute, an argument can be made that it is more efficient to deal with all relevant issues in a single hearing at first instance -- rather than requiring a party to initiate court proceedings either during or after the tribunal hearing. On the other hand, it has also been argued that, since *Charter* issues frequently end in the courts in any event, it makes more sense not to use tribunal time dealing with these complex questions. This argument is particularly strong where a tribunal lacks the institutional competence to deal with a *Charter* issue appropriately. These two sides of the efficiency argument are reflected in *Cooper*.[13]

A second aspect of efficiency is from the perspective of the tribunal itself. Since *Charter* questions are by their nature complex, a power to deal with *Charter* questions could have an adverse impact on a tribunal's efficiency and ability to deal with an often heavy case load in a timely manner. The significance of this factor depends on the frequency and length of *Charter* hearings. For example, the Appeal Division of the Workers' Compensation Board has faced repeated challenges to a provision in the *Workers Compensation Act* dealing with spousal pensions.[14] Since tribunal decisions (unlike a court declaration)[15] are not legally binding on future cases, the issue must be readdressed each time it arises.

Although efficiency is a factor which can sometimes cut both ways, it is generally more efficient not to expend time on a *Charter* challenge at the tribunal hearing. If a party does not otherwise obtain the result desired in the tribunal's decision, the *Charter* issue can subsequently be raised on judicial review or appeal to court[16] from the tribunal's decision.

In addition to institutional capacity and adjudicative efficiency, there is a constitutional issue which should be addressed in any assessment of whether tribunals ought to have jurisdiction to deal with *Charter* challenges to their enabling statutes. The Supreme Court of Canada has ruled that

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13 *Cooper*, *supra*. at para. 62 per La Forest (for the majority) and at para. 74 per McLachlin J. (dissent).

14 Three of these cases are referred to above in footnote 2.

15 See the discussion below at footnote 18.

16 An appeal to court exists only where it has been created by statute.

it is legally appropriate for at least some tribunals to exercise this jurisdiction. Chief Justice Lamer, however, reached an opposite conclusion by the time he wrote his dissent in *Cooper*:[17]

> *I fear that in seeking to give the fullest possible effect to the Charter's promise of rights-protection, the previous judgements of this Court may have misunderstood and distorted the web of institutional relationships between the legislature, the executive and the judiciary which continue to form the backbone of our constitutional system, even in the post-Charter era. This distortion has been achieved by giving administrative tribunals access to s. 52. But in my opinion, s.52 can only be used by the courts of this country, because the task of declaring invalid legislation enacted by a democratically elected legislature is within the exclusive domain of the judiciary. I should make it very clear at the outset of my reasons that I am not addressing the role of administrative tribunals in relation to s. 24 (1) of the Canadian Charter of Rights and Freedoms.* [emphasis added]

This passage raises the question of what precisely a tribunal does when it decides that a statutory provision is inconsistent with the *Charter*.

Although tribunals do not have the formal ability to grant a declaration of invalidity, Chief Justice Lamer expressed the view in *Cooper* that, for all practical purposes, a tribunal's decision of invalidity had much the same effect as a court declaration:[18]

> *The de facto equivalence between refusals to apply and declarations of invalidity decisively demonstrates that tribunals, when they refuse to apply their enabling legislation under s. 52 of the Constitution Act, 1982, are improperly exercising the role of the courts.*

Part of the rationale for Chief Justice Lamer's position is that a decision by a tribunal that a statutory provision in its enabling statute is inconsistent with the *Charter* will have practical implications beyond the particular case before it. For example, parties may be less likely in the future to pursue or resist a claim which depends on the impugned statutory provision even though the tribunal is not in law bound to follow its earlier decision.[19]

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17 *Supra*, para. 3.

18 *Supra*, para. 19. Superior courts (such as the British Columbia Supreme Court) have the power to grant a declaration that a statutory provision is constitutionally invalid. This declaration becomes part of the general law and must be applied by all tribunals and government, unless the decision is overturned on appeal to a higher court. In contrast, a decision of an administrative tribunal is not "a binding legal precedent" and "is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts" (*Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at para. 17 per La Forest J.).

19 See, however, the discussion above at footnote 14.

This judicial disagreement about the significance of a tribunal's decision that a statutory provision is inconsistent with the *Charter* leads to Chief Justice Lamer's broader concern that administrative tribunals are not a constitutionally appropriate forum for addressing the constitutional validity of legislation:[20]

> *The constitutional status of the judiciary, flowing as it does from the separation of powers, requires that certain functions be exclusively exercised by the judicial bodies. Although the judiciary certainly does not have an interpretive monopoly over questions of law, in my opinion, it must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution of Canada, and particularly the Charter. The reason is that only courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature. Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government, are not suited to this task. I must stress again, however, that questions of this sort relate to s. 52 of the Constitution Act, 1982; I do not address s. 24 (1) of the Charter.*

Chief Justice Lamer's key concern is that only the courts have the necessary independence from government to be entrusted with the weighty responsibility of deciding whether a particular statutory provision is unconstitutional.

None of the other judges in *Cooper* expressed agreement with Chief Justice Lamer's concerns. In particular, Justice McLachlin (as she then was) vigorously disagreed with his views. She rejected the view that tribunals (or at least some of them) should not have the power to make decisions on *Charter* validity:[21]

> *Two related principles of general application governed the question before us. The first is the general rule that all decision-making tribunals, be they courts or administrative tribunals, are bound to apply the law of the land. In doing so, they apply all the law of the land, including the Charter…Section 52 of the Constitution Act, 1982 proclaims the Constitution as the "supreme law" of Canada. Citizens have the same right to expect that it will be followed and applied by the administrative arm of government as by legislators, bureaucrats and the police. If the state sets up an institution to exercise power over people, then the people may properly expect that that institution will apply the Charter.*
> *...*
> *The second principle of general application to the question before us is this: a tribunal's ruling that a law is inconsistent with the Charter is nothing more, in the*

[20] *Cooper, supra*, para. 13.

[21] *Cooper, supra*, paras. 78 and 83.

> *final analysis, than a case of applying the law of the land – including the most fundamental law of the land, the Constitution….Laws are not struck down by judicial fiat, but by operation of the Charter and s. 52 of the Constitution Act, 1982….The fact that invalidation of laws under the Charter is linked to inconsistency rather than the action of a particular court, undercuts the suggestion that striking down laws under the Charter is the prerogative of a particular court.*

More recently, Chief Justice McLachlin (writing for a unanimous court) commented on the place of administrative tribunals in the Canadian constitutional framework:[22]

> *…tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of the government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.*

This passage shows clear similarities to parts of Chief Justice Lamer's dissent in *Cooper* (quoted above).

The courts' pronouncements on this point provide no definitive guidance – apart from judicial acceptance that a tribunal can entertain and rule on *Charter* challenges to its empowering statute if the legislature intended to confer that power on the tribunal. But the question remains: What policy should inform legislative action in this area?

Recommendations

The first decision is whether to adopt the all-or-nothing approach to giving tribunals the power to decide *Charter* challenges. Both the Law Society and BCCAT recommended against such an approach. Giving all tribunals this *Charter* jurisdiction would result in a number of tribunals exercising the jurisdiction without the necessary institutional competence to do so appropriately. The only solution would be to alter the way in which these tribunals operate to ensure they had the necessary institutional capacity. Apart from resourcing and other issues, such an approach would in some cases result in a fundamental change to the nature of the tribunal and would lessen its effectiveness in carrying out its broader legislative mandate.

A general rejection of this type of *Charter* jurisdiction for tribunals would be consistent with the view that it is constitutionally inappropriate for administrative tribunals to ignore a provision in their empowering act on the basis that it offends against the *Charter*. It would, however, result in a

tribunal such as the Labour Relations Board not being able to deal with a *Charter* challenge during the course of hearing. The all-or-nothing approach does not appear to be appropriate.

The other reform options involve giving *Charter* jurisdiction to some but not all tribunals, which raises the question: What criteria should inform the decision about which tribunals should exercise this jurisdiction? Institutional capacity is critical. Without it, no tribunal should have this type of *Charter* jurisdiction.

To the extent that it provides assistance, adjudicative efficiency should also be considered. When one takes into account both institutional capacity and adjudicative efficiency, the most appropriate reform is for no tribunal to exercise this *Charter* jurisdiction except perhaps for a tribunal such as the Labour Relations Board.

The Labour Relations Board stands out from other tribunals in its institutional capacity to address in particular the section 1 analysis[23] required in any *Charter* challenge. For example, it has legal expertise, subject matter expertise and procedures and timelines which allow for adequate consideration of the complex evidentiary and legal questions inherent in this type of *Charter* question. Furthermore, apart from the board's own significant institutional resources, parties to a *Charter* challenge before the board typically have the legal and financial resources to address in a meaningful way the various issues which must be dealt with in a *Charter* challenge.

It is therefore recommended that:

> **No administrative tribunals have jurisdiction to determine that provisions in their enabling statutes are contrary to the *Charter* unless this jurisdiction is expressly enumerated.**
>
> **The list of enumerated tribunals with this type of *Charter* jurisdiction be strictly limited.**

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22 *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, at para. 32.

23 See the discussion above at footnote 10.

PROCEDURAL REFORM

There are a number of ancillary procedural issues which could be addressed by legislation – apart from any reform on the substantive question of which tribunals should exercise this *Charter* jurisdiction. The background paper set out the following procedural options:

- For tribunals with *Charter j*urisdiction
  - Give the tribunal a statutory discretion to decline exercising the jurisdiction and to refer the matter to court.
  - Amend the *Constitutional Question Act* to remove any possible doubt that notice must be given to the Attorney General in those cases where there is a *Charter* challenge to the validity of legislation.
- For tribunals without *Charter* jurisdiction
  - Enact legislation allowing the tribunal to refer a *Charter* matter to court for determination before the tribunal hears the case before it.
  - Maintain the status quo concerning the availability of judicial review before the tribunal has heard the case.

Power to Refer to Court

The background paper asked whether tribunals, with or without the power to entertain a *Charter* challenge, should have the power to refer a *Charter* question to court for determination prior to completion of the tribunal's hearing. There is little to be said for giving such a power to tribunals that do not have this type of *Charter* jurisdiction. It would delay completion of the tribunal hearing, perhaps for a significant time. The question is not so straightforward, however, for a tribunal such as the Labour Relations Board with power to hear a *Charter* challenge to a provision in its enabling statute.

The recommendations in this report reflect a view that, for a tribunal such as the Labour Relations Board, it is usually more appropriate for a *Charter* challenge to be addressed at the hearing before a tribunal. It is difficult, however, to envisage all future circumstances. Cases may arise where it is clear to a tribunal that the most efficient and appropriate way of resolving a particular *Charter* question is to leave it for resolution by the court, even though the tribunal has a general power to decide the issue. This could be achieved by giving the tribunal a power to refer the matter to court. The tribunal's hearing would be adjourned pending the outcome of the court reference. An alternative would be simply to give the tribunal a power to decline the *Charter* jurisdiction. The result would be that a party not otherwise content with the tribunal's final decision could seek resolution of the *Charter* issue by judicial review from the tribunal's final

decision.[24] (This situation would parallel that of tribunals with no jurisdiction to deal with a *Charter* challenge.)

Giving a tribunal the discretion to refer a *Charter* challenge to court would allow it to deal with exceptional cases where the tribunal concluded that it should not exercise its power to make a *Charter* decision.[25] A disadvantage of granting such discretion is that it adds another issue for argument and decision by the tribunal. On balance, however, the preferable route is for a tribunal such as the Labour Relations Board to have the discretion to refer a *Charter* challenge to court for a decision.

It is recommended that a tribunal with jurisdiction to decide this type of *Charter* issue have a discretionary power to refer the *Charter* question to the British Columbia Supreme Court.

Notice under the *Constitutional Question Act*

The *Constitutional Question Act* requires that the Attorney General be given notice when the validity or applicability of an enactment is challenged in "a cause, matter or other proceeding".[26] The purpose of the notice is to give the Attorney General (on behalf of the government) an opportunity to defend the validity of the provincial legislation being challenged. Although a decision of invalidity by an administrative tribunal does not have the strict legal effect of a declaration of invalidity by a court, it nonetheless can have serious implications. The wording in the *Constitutional Question Act* is broad enough to include tribunal proceedings; however, it should be amended to remove any lack of clarity that it applies to both court and tribunal proceedings.

It is recommended that the *Constitutional Question Act* be amended to remove any possible doubt that it applies to tribunal hearings in which a constitutional question is raised.

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[24] In those cases where there is a right of appeal to court, the *Charter* challenge could be raised by that route. A party could also attempt to rely on the somewhat limited availability of judicial review before a tribunal has heard the case.

[25] *Cf.* M.C. Crane, "Administrative tribunals, *Charter* challenges, and the "Web of institutional relationships"" (1998) 61 *Saskatchewan Law Review* 495 at p. 507; and John M. Evans, "Administrative tribunals and *Charter* challenges: Jurisdiction, discretion and relief" (1997) 10 *CJALP* 355 at p. 364.

[26] R.S.B.C. 1996, c. 68, s. 8. Notice must be given to the attornies general of both British Columbia and Canada.

CONCLUSIONS AND RECOMMENDATIONS

Charter challenges to a tribunal's enabling statute do not arise frequently at tribunal hearings. Nonetheless legislative clarification of which tribunals have this type of *Charter* jurisdiction would be beneficial. It would provide clarity and certainty around this aspect of a tribunal's jurisdiction and powers. The result would be a more efficient use of time and resources by both tribunals and the parties appearing before them.

The appropriate legislative reform is a general rule that no tribunal has this power unless expressly given it by the legislature. In addition, the two procedural reforms recommended in this report would help optimize the way in which this type of *Charter* issue is resolved. The result of these reforms would be a more appropriate resolution of *Charter* challenges to a tribunal's empowering statute than presently occurs.

As informal and less costly alternatives to the courts, administrative tribunals are not necessarily well-suited to deciding complex constitutional questions, including those that arise under the *Charter*. In order to contain the costs of administrative proceedings, eliminate uncertainties and delays and ensure that administrative processes remain open and accessible to people who may not be represented by legal counsel, legislative amendments are required to clarify which administrative tribunals have jurisdiction to hear a *Charter* challenge. Accordingly, it is recommended that:

Government clarify in legislation which administrative tribunals have jurisdiction to decide that a provision in the tribunal's enabling statute is inconsistent with the *Charter of Rights and Freedoms*. This legislative clarification could be achieved by adding a provision to the *Constitutional Question* Act.

No administrative tribunals have jurisdiction to determine that provisions in their enabling statutes are contrary to the *Charter* unless this jurisdiction is expressly enumerated.

The list of enumerated tribunals with this type of *Charter* jurisdiction be strictly limited.

A tribunal with jurisdiction to decide this type of *Charter* issue have a discretionary power to refer the *Charter* question to the British Columbia Supreme Court.

The *Constitutional Question Act* be amended to remove any possible doubt that it applies to tribunal hearings in which a constitutional question is raised.