Administrative Agencies and the Charter

A Background Paper

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Preface

This background paper is one of several to be released as part of the Administrative Justice Project. The project, initiated by the Attorney General, is a broad legal and policy review of the system of administrative justice. Its objectives are to ensure that:

- administrative agencies meet the needs of the people they serve;
- their administrative processes are open and transparent;
- their mandates are modern and relevant;
- government fulfills its obligations by providing the legislative and policy framework administrative agencies require to carry out their independent mandates effectively.

The Terms of Reference for the background papers are to ensure that:

- legislation is based, to the greatest extent possible, on a principled, consistent and clear articulation of the role and powers of administrative agencies;
- administrative agencies possess the procedural authority to respond flexibly, effectively and efficiently to resolve disputes by adjudicative or other means;
- compelling rationales exist for more than one "layer" of administrative appeal or review;
- courts and parties have clearer direction regarding the legislature's intention concerning matters such as the "standard of review" where a decision is challenged on judicial review or appeals.

The administrative agencies under consideration by the Administrative Justice Project are listed in tables attached to this paper as an Appendix. They do not include tribunals associated with the self-regulated professions.

The intent of this and the other background papers is to facilitate informed discussion about steps government can take to assist the work of administrative agencies. The papers provide a focus for this discussion and, it is hoped, will result in dialogue and debate within the administrative justice community. Comment will be taken into account by the Administrative Justice Project when it drafts a White Paper for release in early 2002. There will be a further opportunity for public input after the White Paper is released, before government decides on what steps it will take.

If the reader is interested, written comments may be forwarded to the author at the following address prior to March 15, 2002.

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EXECUTIVE SUMMARY

A person appearing before an administrative tribunal occasionally alleges that a provision in the tribunal's statute is inconsistent with *Charter of Human Rights and Freedoms*. The question then arises whether the tribunal has the power to decide that part of its enabling statute is inconsistent with the *Charter* and should therefore not be applied by the tribunal.

This paper explores the wisdom of legislative reform to clarify which (if any) tribunals should exercise this type of *Charter* jurisdiction. The paper does not address other *Charter* issues such as the ability of a tribunal to grant a remedy under section 24.

The legal test for whether a tribunal has the power to apply the *Charter* is a question of statutory interpretation. Did the legislature intend to grant that power? Despite the superficial clarity of this test, serious difficulties lurk behind it. In no case has the legislature expressly stated that a tribunal has (or does not have) *Charter* jurisdiction. The result is that tribunals and courts ask the broader question whether the tribunal has an express power to decide general questions of law. If the tribunal does not have this power, a range of practical factors are considered to help decide whether the tribunal has an implicit power to apply the *Charter*. The application of these factors is not always clear. The result is significant uncertainty in predicting what the courts will decide in an particular case. This uncertainty can result in significant expenditure of time and resources by parties appearing before the tribunal as well as by the tribunal itself.

When deciding a *Charter* question, a tribunal must address two issues. It must first determine whether the impugned legislative provision is inconsistent with a provision in the *Charter*. If it is inconsistent, the tribunal must then decide whether the legislation is nonetheless justified under section 1 of the *Charter*. Extensive evidence may be required to determine the section 1 issue appropriately.

A range of practical and legal factors are relevant to a policy decision about which (if any) tribunals should have the power to apply the *Charter*. The primary practical factor is whether the tribunal has the institutional capacity to decide *Charter* issues in an appropriate way. This involves issues such as the evidence heard by the tribunal, the competence of the tribunal's members to address *Charter* issues and the tribunal's procedures. Other practical factors are accessibility and the efficient use of adjudicative resources. The legal or constitutional issue arises from the lack of independence which tribunals have when contrasted with that enjoyed by judges. From one perspective, administrative tribunals are an arm of the executive. Does this mean that tribunals should not have the power to determine that a legislative provision is

constitutionally inoperative? Or does the over-riding nature of the Constitution mean that the *Charter* must be applied by tribunals when applying the law of the land?

The paper addresses these policy issues and examines possible criteria for selecting which tribunals should have *Charter* jurisdiction. The two primary criteria are to rely on existing statutory indicators (such as an express power to consider questions of law or a privative clause) or to consider non-statutory factors such as the institutional capacity and competence of a particular tribunal to decide *Charter* questions.

A decision needs first to be made whether this is an area where a clearer legislative articulation of tribunals' powers would be appropriate. If a decision is made to address this issue legislatively, the next step is to choose one of the four basic models for reform:

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

If either of the last two options is selected, the criteria for selecting which tribunals will have jurisdiction to apply the *Charter* must be identified. In addition, several procedural and remedial issues could be addressed legislatively such as whether tribunals should have the power to refer a *Charter* issue to court for determination.

The purpose of this background paper is to stimulate discussion about application of the *Charter* by administrative tribunals, in the hope that interested persons will provide comment to the Administrative Justice Project prior to preparation of the White Paper.

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1 INTRODUCTION

This paper addresses the ability of an administrative tribunal to rule that a provision in its enabling statute is inconsistent with the *Charter of Human Rights and Freedoms* and should therefore not be applied by the tribunal. The issue arises both at tribunal hearings and on judicial reviews from a tribunal decision. It results from 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 of effect.*

The question is the extent to which administrative tribunals are appropriate entities for giving effect to section 52.[1]

In deciding whether a statutory provision is inconsistent with the *Charter*, a tribunal (like a court) must address two questions.[2] 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.*

The Supreme Court has enunciated a test for identifying "such reasonable limits...as can be demonstrably justified in a free and democratic society". Both these questions need to be considered when addressing the extent to which an administrative tribunal should have the power to make *Charter* decisions.

There are other constitutional issues relevant to the jurisdictional powers of administrative tribunals. First, to what extent does an administrative tribunal have the ability to grant a remedy

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1 Section 52 does not answer this question. La Forest J. commented in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at para. 12:

> It is essential to appreciate that s. 52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the Constitution but is silent on the jurisdictional point per se. In other words, s. 52(1) does not specify which bodies may consider and rule on Charter questions, and cannot be said to confer jurisdiction on an administrative tribunal.

2 There is also the question of choosing an appropriate remedy. This matter is discussed below.

under section 24 of the *Charter*?[3] Secondly, can an adjudicative tribunal rely on the constitutional division of powers between the federal and provincial governments as a basis for determining the scope of its enabling statute?[4] Thirdly, there are issues around a tribunal's ability to decide non-*Charter* constitutional rights such as aboriginal rights.[5] The discussion in this paper is restricted to the issue of legislation alleged to be inconsistent with the *Charter*. These three other constitutional matters are not addressed.

2 THE LAW

Test for Charter Jurisdiction

The Supreme Court of Canada stated in *Cooper* that the test for *Charter* jurisdiction is one of legislative intent:[6]

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3 Section 24 of the *Charter* states:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

As others have noted, the French version of section 24 uses the word "tribunal" rather than "cour". For cases on a tribunal's power to grant a remedy under section 24, see, for example, *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. Typically the question of a remedy under section 24 arises in cases where the statutory provision in question is not inconsistent with the *Charter*. See, e.g., *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 20, 29 and 94.

4 A tribunal can rely on the federal/provincial division of powers to determine whether, for example, a provincial human rights tribunal can hear a complaint arising from an area within federal jurisdiction. See, e.g., *Cooper v. Canada (Canadian Human Rights Commission); Bell v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R 854 at para. 20 per Lamer C.J. and at paras. 57 and 64 per La Forest J. See also Deborah M. McAllister, "Administrative Tribunals and the *Charter*: A Tale of Form Conquering Substance" (1992) *Special Lectures of the Law Society of Upper Canada* 131 at p. 135. Determining the scope of a statute is different from determining the constitutional validity of the statute from a division of powers perspective. On this latter issue in the context of labour boards, see *Cuddy Chicks Ltd., supra*, at para. 21. per La Forest J.

5 *Paul v. Forest Appeals Commission*, 2001 BCCA 411. Much of the Court of Appeal's discussion in this case focused on the constitutional ability of the province to give an administrative tribunal jurisdiction to decide issues of aboriginal rights to land, which constitutionally fall under the exclusive jurisdiction of federal government.

6 *Supra,* para. 45-46 per La Forest J. The earlier cases referred to by La Forest J. in this passage used a three part test to identify the legislative intent: does the tribunal have jurisdiction over the parties, the subject matter and the remedy? See La Forest J.'s earlier statement in *Tétreault - Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at para. 22:

> Applying the test set forth in Douglas College and Cuddy Chicks, I find that, while the Board of Referees had jurisdiction over the parties in this case, it did not have jurisdiction over the subject matter and the remedy. The subject matter before the Board concerned not simply the determination of the respondent's eligibility for benefits, but also the determination of whether s. 31 of the *Unemployment Insurance Act, 1971* violated s. 15 of the Charter. Similarly, the remedy would have required the Board to disregard s. 31 when

> *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? As noted by the majority in Tétreault-Gadoury, supra, at p. 32:*
>
> *As I have stressed in both Douglas College and Cuddy Chicks, supra, s. 52 (1) does not, in itself, confer the power to an administrative tribunal to find a legislative provision to be inconsistent with the Charter. Rather, the inquiry must begin with an examination of the mandate given to the particular tribunal legislature.*
>
> *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.[7] The additional step has been variously described as a power to address "general questions of law"[8] and "the power to interpret or apply any law necessary to reach its findings".[9]

In those cases where the legislature has not granted an express power to decide general questions of law, the courts must decide whether there is an implicit power. In deciding whether there is an implied power, the courts take into account a range of practical factors, such as efficiency, accessibility and expertise of the tribunal. These factors are addressed in more detail below in the discussion of policy factors affecting a decision whether a tribunal should have jurisdiction to apply the *Charter.*[10]

Discussion

At one level, the legal test for jurisdiction is straightforward. It is a question of statutory interpretation. Did the legislature intend the tribunal to have the power to decide general

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> awarding the respondent benefits, assuming it found s. 31 to be inconsistent with the Charter. As I indicated above, under the legislative scheme described in the Act, such a determination rested within the jurisdiction of the umpire, not the Board of Referees.

7 *Cooper, supra*, para. 55.

8 *Ibid.*

9 *Tétreault-Gadoury, supra*, para. 10 per La Forest J. 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.

10 As noted above, this paper addresses application of the *Charter* by tribunals only in the context of whether a tribunal has the jurisdiction to ignore a provision in its enabling statute on the basis that it is inconsistent with the *Charter*.

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.[11])

The practical result is that it is often difficult to predict when the courts will decide that a particular tribunal has *Charter* jurisdiction.[12] Andrew Roman has described the problem as follows:

> *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).

Other criticisms have been leveled against the current jurisprudence. Since many tribunals were created before the *Charter* in 1982, several writers have commented that the courts rely on a legal fiction in their use of legislative intent.[13] In reality, the courts are making a policy decision, not divining true legislative intent.[14]

Another criticism of the current jurisprudence is that the current test does not always lead to an appropriate result from a policy perspective. We shall return to the policy issues below. Finally, Lamer C.J. has suggested that it is constitutionally inappropriate to allow administrative tribunals the power to ignore a provision in the statute which creates the tribunal.

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11 *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.

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

13 See, for example, M.C. Crane, "Administrative tribunals, *Charter* challenges, and the "Web of institutional relationships"" (1998) 61 *Saskatchewan Law Review* 495 at p. 506, and Andrew J. Roman, "Case comment: *Cooper v. Canada (Human Rights Commission)*" (1997) 43 *Admin. L. R.* (2d) 243 at p. 244. See also Lamer, C.J.'s dissent in *Cooper*, *supra*, at para. 7, quoted above.

14 See, for example, Debra M. McAllister, "Administrative tribunals and the *Charter*: A Tale of Form Conquering Substance", *supra,* at p. 150.

3 ANATOMY OF A CHARTER DECISION

An informed assessment of a tribunal power to apply the *Charter* requires an understanding of what is involved when a *Charter* decision is made by a court or administrative tribunal.

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 may require an appropriate factual record before the legal questions 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*:[15]

> *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 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 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

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15 *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.

decision that the provision in inoperative and does not apply to the case before the tribunal.[16] What should happen, however, if the only reasonable way of remedying the situation is to read in words that do not exist in the legislation?[17] The courts will do this in some circumstances, typically where treating a provision as inoperative would adversely affect a large group of people.[18]

4 THE POLICY QUESTION

Introduction

One of the goals of the Administrative Justice Review is to increase certainty about the roles and powers of administrative agencies. Since the ability of a tribunal to apply the *Charter* is a question of a statutory interpretation, the legislature has the authority to state clearly which (if any) tribunals have the power to apply the *Charter.*[19]

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16 See the discussion below on the precise legal nature of a decision by a tribunal that a statutory provision should not be applied.

17 The difficulty in selecting an appropriate remedy can be illustrated by a somewhat simplistic example. If the legislature was to enact a provision for a cash payment "to fathers with either blond or black hair", it might well be challenged by a father with brown hair (or a mother with any colour of hair). If a court was to accept that this provision was inconsistent with section 15 of the *Charter* and not saved by section 1, it would then have to decide on a remedy.
A decision declaring the entire provision inoperative would be of no assistance to the brown haired father challenging the provision and would deny the payment to fathers fortunate enough to have blond or black hair. A decision deleting merely the words "with blond or black hair" would provide for payment to all fathers (but not mothers) but would result in a greater total expense than originally intended by the legislature. A decision reading in the words "or any other father or mother" would greatly increase the government expenditure. The court would have to ask itself whether, in these circumstances, the legislature would have enacted an increased payment for any group of parents.
Similar remedy questions would face an administrative tribunal dealing with this issue. The only difference would be that, in strict law, the tribunal's decision would have application only to the particular case in front of it. The decision would not have the broader effect of a declaration by a superior court. The legal and practical nature of tribunal decisions is discussed further below in the context of the constitutional and legal policy factors relevant to whether tribunals should have jurisdiction to address *Charter* challenges to legislation.

18 See the discussion of these remedial questions in *Schachter v. Canada*, [1992] 2 S.C.R. 679.

19 A number of writers have suggested that legislative action would be an appropriate response to the question of which administrative tribunals have power to apply the *Charter*: McAllister, *supra*, p. 159; Marilyn L. Pilkington, "Legislative responsibility for the jurisdiction of tribunals to adjudicate constitutional rights and remedies" (1992) *Special lectures of the Law Society of Upper Canada* 181 at pp. 184 and 189; John M. Evans, "Administrative tribunals and *Charter* challenges: Jurisdiction, discretion and relief" (1997) 10 *CJALP* 355 at 363-364 where he refers to a suggestion by Ron Ellis; Crane, *supra* at p. 527. Both Pilkington and McAllister comment that tribunals need to be a properly equipped if they are to decide *Charter* issues.

There are five broad options:[20]

i. All tribunals have jurisdiction
ii. No tribunals have jurisdiction
iii. All tribunals have jurisdiction except for certain specified tribunals
iv. No tribunals have jurisdiction except for certain specified tribunals
v. Status quo (courts decide the issue on a case by case basis)

In addition to these primary options, there are a number of secondary options. The latter would include the criteria for selecting which tribunals would be exceptions to a general rule that no (or all) tribunals would have jurisdiction to apply the *Charter*. These secondary options are discussed later in this paper.

Uncertainty whether a particular tribunal does or does not have the power to apply the *Charter* incurs additional cost and delay for parties appearing before the tribunal. In addition, the lengthening of tribunal hearings in order to deal with this threshold issue reduces a tribunal's ability to deal with both other cases and other aspects of its mandate. For this reason, there appears to be a good argument for legislative action clarifying the jurisdiction of tribunals to apply the *Charter.*[21]

The remainder of this discussion therefore addresses the policy factors relevant to which of the first four options set out above should form the basis for any legislative action.

Jurisdiction or No Jurisdiction

The factors relevant to the policy decision whether a tribunal should have *Charter* jurisdiction have been discussed in both the academic literature[22] and court decisions. They are of two types:

i. practical
ii. legal/constitutional

Practical Factors

In court cases, the discussion of the practical factors usually takes place in the context of assessing the "practical considerations [which] may be of assistance in determining the intention

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20 These options are variations on those described by Roman, *supra*, at p. 245.

21 This issue, however, remains open for discussion during the period for public input following release of paper.

22 See *Roman, supra*; Crane, *supra*; et al.

of Parliament".[23] The practical factors fall into two broad groups. The first consists of those relevant to the question whether the tribunal is an appropriate form (in a practical sense) for resolving the *Charter* issue. The second deals with efficiency questions.

La Forest J. identified a number of the practical issues in the following passage from *Cooper*:[24]

> *In considering whether a tribunal has jurisdiction over the parties, the subject matter before it and the remedy sought by the parties, it is appropriate to take into account various practical matters such as the composition and structure of the tribunal, the procedure before the tribunal, the appeal route from the tribunal, and the expertise of the tribunal.*

He elaborated on this in the following passage:[25]

> *In the present case the practical advantages in having the Commission consider the constitutionality of its own statute are limited. First, since the Commission is not an adjudicative body it cannot be considered a proper forum in which to address fundamental constitutional issues. As this Court has previously found, there is no requirement for anything more than a "paper hearing" for the parties before the Commission. Although I readily acknowledge that the informal and accessible process of administrative bodies may well be a considerable advantage to a party, as compared to the regular court system, there comes a point where a body such as the Commission simply does not have the mechanism in place to adequately deal with multifaceted constitutional issues. For example, the Commission is not bound by the traditional rules of evidence. This means that it is open to the Commission to receive unsworn evidence, hearsay evidence, and simple opinion evidence. Such an unrestricted flow of information may be well suited to deciding the threshold question facing the Commission, but it is inappropriate when determining the constitutional validity of a legislative provision. In the latter case, suitable evidentiary safeguards are desirable. Related to this problem is the concern that one of the aims of the Commission, to deal with human right complaints in an accessible, efficient and timely manner, would be disrupted and interfered with by allowing the parties to raise constitutional issues before the Commission. Such issues would of necessity require a more involved and lengthy process than is presently the case. In my view, it was not the intention of Parliament that the Commission's screening function become entangled in this manner.*
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> *A second and more telling problem in the case of the Commission is its lack of expertise. In Tétreault-Gadoury, supra, I pointed out, at p. 34, that an Umpire under the Unemployment Insurance Act was a Federal Court judge which would ensure that a complaint received "a capable determination of the constitutional issue". Similarly in both Douglas/Kwantlen and in Cuddy Chicks, supra, the expertise of labour boards and the assistance they could bring to bear on the resolution of constitutional issues was recognized. In contrast this Court has made clear in Mossop, supra, at pp. 584-85, and reiterated in Gould v. Yukon*

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23 *Cooper, supra* at para. 59. Other judicial discussions include *Martin, supra*, at para. 96 ff.

24 *Supra*, para. 47.

25 *Supra*, paras. 60-61.

> *Order of Pioneers, [1996] 1 S.C.R. 571, at pp. 599-600, that a human rights tribunal, unlike a labour arbitrator or labour board, has no special expertise with respect to questions of law. What is true of a tribunal is even more true of the Commission which, as was note in Mossop, is lacking the adjudicative role of a tribunal.*

Although these comments were made in the context of a tribunal described as non-adjudicative, they are equally applicable to an assessment of whether an adjudicative tribunal should exercise *Charter* jurisdiction.

An interesting aspect of the discussion of these factors is their two-edged nature. For some writers, a particular issue such as evidence is an argument in favour of tribunals having *Charter* jurisdiction, while for others evidentiary matters lead to the opposite conclusion. This ambivalence can be seen even in individual judges. As noted above, La Forest J. expressed concern that tribunals' ability to use non-court types of evidence militated against them having *Charter* jurisdiction. Several years earlier, however, he referred to a similar argument but added:[26]

> *There are, as well, clear advantages for the decision-making process in allowing the simple speedy, and inexpensive processes of arbitration and administrative agencies to sift the facts and compile a record for the benefit of a reviewing court.*

This latter view has support in academic writers such as John M. Evans.[27]

Competence and expertise are often cited as a factor which may help identify which tribunals should have *Charter* jurisdiction. The courts sometimes draw distinctions between the relative expertise of different types of tribunals. For example, the Supreme Court has referred to the expertise of labour boards as a factor supporting a power to use the *Charter* as a basis for not applying a statutory provision.[28] Not everyone agrees with this approach. One writer has referred to the courts' assessment of the relative expertise of tribunals as "guesswork".[29] In the view of another writer, the lack of legal training of many tribunal members is exacerbated by the fact that parties are frequently not represented by legal counsel at a tribunal hearing.[30]

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26 *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at paras. 55 and 59.

27 *Supra*, at p. 361. See also Debra M. McAllister, "The Role of Tribunals in Constitutional Adjudication" (1991) 1 *National Journal of Constitutional Law* 25 at p. 74.

28 See, for example, the passage by La Forest J., quoted above from *Cooper*, para. 61; and *Cuddy Chicks Ltd., supra*, at para. 16.

29 Roman, *supra*, at p. 249.

30 Debra M. McAllister, "The Role of Tribunals in Constitutional Adjudication" (1991) 1 *National Journal of Constitutional Law* 25. She refers to the following argument at p. 74:

Accessibility is obviously an important factor. Tribunals are, for the most part, more accessible to members of the public than are the courts.

The above factors relate to whether the tribunal is an appropriate forum in a practical sense: does it have the institutional competence, resources and procedural machinery to deal with the complex issues and evidence which typically arise in *Charter* cases? In those situations where a tribunal may meet these criteria, the question of adjudicative efficiency remains.

Efficiency, like evidence, is a factor which can cut both ways. On one hand, 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 is argued that, since *Charter* issues will almost certainly end in the courts in any event, it makes more sense not to use tribunal time dealing with these complex questions which they are ill prepared to address appropriately. The two sides of the efficiency argument are reflected in *Cooper*. For the majority, La Forest J. stated:[31]

> *To my mind the relevant practical considerations do not argue in favour of having the Commission consider Charter issues. Without question there is on the surface an attraction and efficiency, at least for the complainant, in having the constitutional matter first heard by the Commission. That will always be so, however, and in the present situation I am of the view that the reality would in fact be different. It is likely that in a case such as the one presently before us the decision of the Commission on the validity of a provision of the Act under the Charter would be the subject of judicial review proceedings in the Federal Court. It would be more efficient, both to the parties and to the system in general, to have a complainant seek a declaration of constitutional invalidity in either the Federal Court or a provincial superior court. In such a setting the question can be debated in the fullness it requires and the proper expertise can be brought to bear on its resolution.*

In contrast, McLachlin J. wrote in her dissent:[32]

> *Applicants like the appellants suffer the greatest prejudice from a ruling that the Commission has no choice but to ignore the Charter challenge and to proceed on the basis that the law is valid. They must first launch their complaint with the Human Rights Commission, knowing that this is a useless pro forma step. When the complaint is refused, as it inevitably must be, they must then bring an action in Federal Court for a declaration that the section of the Canadian Human Rights Act at issue offends the Charter and is invalid. The requirement of this pro forma*

> ...tribunals are frequently composed of lay people having no legal training. When faced with a complex *Charter* issue, which may be poorly argued by unrepresented parties, the tribunal is left to make a decision in a legal vacuum, which will be a problem regardless of how extensive the factual record is.

31 *Cooper*, *supra*, para. 62.

32 *Ibid*., para. 74.

> *step can only serve to discourage complainants from challenging the constitutionality of a provision of the Canadian Human Rights Act.*

The above passages address efficiency from the perspective of individual parties. There is also the question of efficiency from the larger tribunal perspective. Since *Charter* questions are by their nature complex, one of the arguments is that a power to deal with *Charter* questions will have an adverse impact on a tribunal's efficiency.[33] It reduces the tribunal's ability to deal with an often heavy case load in a timely manner.

Before leaving practical considerations, there is a small amount of anecdotal information on how tribunals feel about exercising *Charter* jurisdiction. None of it is conclusive. The Administrative Justice Project held a consultation workshop in September, 2001, with a number of people, primarily representatives from most of the adjudicative tribunals in this province. The purpose of the workshop was to obtain input on the matters addressed in this and other background papers by the Administrative Justice Review. On the question of tribunals' experience in applying the *Charter*, the views expressed were mixed. One of the larger tribunals expressed satisfaction with its power to address *Charter* issues at first instance. Its representative noted that this power enabled the tribunal to create "the factual matrix for the court to consider around the constitutional or the *Charter* issue." Similarly, one of the larger appeal boards stated that it had had no difficulty addressing *Charter* issues. In contrast, a representative from another tribunal alluded to the complexity and time consuming nature of *Charter* issues. One tribunal representative felt that "most tribunals try to stay away from" *Charter* issues.

The practical wisdom of *Charter* jurisdiction[34] was squarely addressed in a 1995 decision by a panel of the Ontario Workers' Compensation Appeals Tribunal.[35] Although the panel concluded that it had the power to consider a *Charter* challenge, its reasons for decision state:

> *It is apparent from the trend of recent Supreme Court of Canada decisions that that Court is firmly of the view that it is important wherever possible to have* Charter *challenges dealt with first at the quasi-judicial level. This Panel is not as sanguine as the Supreme Court as to the good sense of that policy. It imposes, in our view, a responsibility on administrative justice system agencies of a nature which even the most sophisticated are ill-equipped to shoulder.*

There is no consensus among judges, practitioners and academics about the implications of the practical considerations relevant to a policy on *Charter* jurisdiction for administrative tribunals.

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33 *Cf.* Crane, *supra*, p. 503.

34 As noted earlier, this paper does not address the question whether a tribunal is a competent court for the purpose of granting a remedy under section 24 of the *Charter*.

35 Decision No. 534/90R.

For example, evidentiary issues are used to argue both in favour of and against tribunal jurisdiction. Probably the most that can be said is that there is broad agreement that labour relations boards can exercise this jurisdiction appropriately. There is, however, another group of factors to be considered.

Legal and Constitutional Factors

In addition to the practical factors discussed above, there is an important constitutional issue which must be addressed in any assessment whether tribunals should have jurisdiction to deal with *Charter* challenges to their enabling statutes. The Supreme Court of Canada has ruled that 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*:[36]

> *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*. What is the effect of the tribunal's decision?

Superior courts[37] 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 applies (in strict law) only to the facts of the particular case before the tribunal.[38]

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36 *Supra*, para. 3.

37 For provincial purposes, the superior courts are the British Columbia Supreme Court, the British Columbia Court of Appeal and the Supreme Court of Canada. In contrast, the Provincial Court is an "inferior court", as was the former County Court. The distinction between superior courts and inferior courts derives from the historical development of the English courts, on which Canadian courts were based historically. The distinction is not based on whether the judges to the courts are appointed by the federal government pursuant to s. 96 of the *Constitution Act*.

38 The same is true for decisions of an inferior court such as the Provincial Court.

The Supreme Court has on more than one occasion confirmed that a tribunal decision on invalidity is not "a binding legal precedent" and "is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the smallest superior courts."[39]

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:[40]

> *…the distinction between declarations of invalidity and refusals to apply is hard to sustain.*
> *…*
> *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 Lamer C.J.'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 will 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.

This judicial disagreement about the significance of a tribunal's decision that a statutory provision is inconsistent with the *Charter* leads into Chief Justice Lamer's broader concern that administrative tribunals are not a constitutionally appropriate forum for addressing the constitutional validity of legislation:[41]

> *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,*

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39 *Cuddy Chicks, supra*, at para. 17 per La Forest J. See also *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at para. 50. per La Forest J.; *cf.* Crane, *supra*, at p. 500.

40 *Supra*, paras. 17 and 19.

41 *Cooper, supra*, para. 13.

> *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.*

After referring to an earlier decision on judicial independence, Lamer C.J. added:[42]

> *The Court (per Le Dain J.) identified three feature of courts which made them independent security of tenure, financial security, and independence "with respect to matters of administration bearing directly on the exercise of its [i.e., the courts'] judicial function" (Valente, supra, at p. 708). In the context of Charter adjudication, these features help to insulate the courts from interference, inter alia, by elected legislatures, and thus ensure that the courts can safeguard the supremacy of Charter rights through the vehicle of s. 52 of the Constitution Act, 1982. Conversely, the absence of these features in tribunals makes them unsuited to measuring legislative provisions against the requirements of the Charter and to overturning the will of the democratically elected representatives of the Canadian people.*

Lamer C.J.'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, McLachlin J. (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:[43]

> *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 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.*
> *…*
> *This Court has repeatedly held that administrative tribunals empowered to decide questions of law may consider Charter questions…. This conclusion reflects the principle that tribunals must apply the law of the land in its entirety. If the tribunal is in power to decide questions of law, then that power goes not to part of the law but to all the law; absent an indication that Parliament intended to exclude Charter issues from the tribunal's purview, the courts should not do so by judicial fiat.*
> *...*
> *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 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*

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42 *Cooper, supra*, para. 15.

43 *Cooper, supra*, at paras. 78, 81 and 83.

> *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.*

Elsewhere in her decision, McLachlin J. equated the power of administrative tribunals with that of the inferior provincial courts with respect to deciding questions of law arising in proceedings before the tribunal "in so far as such tribunals have been give the power by Parliament to decide questions of law."[44]

More recently, Chief Justice McLachlin (writing for an unanimous court) commented on the place of administrative tribunals in the Canadian constitutional framework. Although *Ocean Port* did not involve the *Charter* jurisdiction of a tribunal, it did raise questions about the independence of administrative tribunals and their relationship both to the courts and to the governments which created them:[45]

> *…Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.*
>
> *This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 (the "Provincial Court Judges Reference"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges – both in fact and perception – by insulating them from external influence, most notably the influence of the executive: Beauregard v. Canada, [1986] 2 S.C.R. 56, AT P. 69; Régie, at para. 61.*
>
> *Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure*

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44 *Cooper, supra*, para. 99. Her Ladyship did not address Lamer C.J.'s concerns about judicial independence and the separation of powers.

45 *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, at paras. 22 - 24.

> *required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract* Charter *requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament of the legislature and, absent constitutional constraints, this choice must be respected.*

This passage shows clear similarities to parts of Lamer C.J.'s dissent in *Cooper* (quoted above). It reflects the unique nature of administrative tribunals:[46]

> *…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.*

Criteria for Identifying Selected Tribunals

A decision about which (if any) administrative tribunals should have *Charter* jurisdiction depends on an assessment of policy factors, both practical and constitutional. If a decision is made that at least some tribunals should have this jurisdiction, a decision must then be made about the criteria for identifying these selected tribunals.

As noted above, the courts have focused their attention on whether the legislature has either expressly or implicitly granted a tribunal the power to decide general questions of law. From a policy perspective, this is only one of several ways of identifying which tribunals should have *Charter* jurisdiction.

Existing Legislation

If one focuses on existing legislation as the tool for identifying tribunals, there are several tests which could be used. (The use of tools other than wording in the current legislation is discussed below.)

The most obvious criterion is whether the legislature has granted the tribunal an express power to decide questions of law. The following tribunals currently have this power:[47]

- Employment Standards Tribunal
- Residential Tenancy Arbitrators
- Securities Commission
- Workers' Compensation Board

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46 *Ocean Port, supra*, at para. 32.

47 This list does not include any self-regulatory tribunals which may have an express power to decide questions of law. As noted earlier, tribunals of the self-regulated professions do not fall under the scope of the Administrative Justice Project.

- Workers' Compensation Board -- Appeal Division
- Workers' Compensation Board -- Criminal Injuries Section

For each of these tribunals, the power is defined as a power to decide questions of both fact and law.[48] A conspicuous omission from this list is the Labour Relations Board. Although it has a strong privative clause, its enabling statute does not contain a provision expressly conferring a power (in so many words) to decide questions law.[49]

A second possible criterion would be to use the existence of a privative clause as the critical factor. The ability of a party to seek judicial review of a tribunal decision flows from the inherent supervisory jurisdiction of the British Columbia Supreme Court.[50] A privative clause is a legislative provision which limits the availability of judicial review. The privative clause in the *Workers' Compensation Act* is a lengthy example of this type of provision:[51]

> *The board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the board on them is final and conclusive and is not open to question or review in any court, and proceedings by or before the board must not be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court, and an action must not be maintained or brought against a governor, officer, appeal commissioner or employee of the board in respect of an act, omission or decision done or made in the belief that it was within the jurisdiction of the board; and, without restricting the generality of the foregoing, the board has exclusive jurisdiction to inquire into, hear and determine….*

Most privative clauses are considerably shorter. Although there is much variation in content,[52] the tribunals listed below all have some form of privative clause:

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48 There appears to be no provincial statute expressly giving the power to decide questions of law but silent on questions of fact. Following the approach of the Supreme Court of Canada in cases such as *Cooper, supra*, this list does not include tribunals where, for example, an appeal lies on questions of law from decisions of the tribunal.

49 It does, however, contain a provision allowing the Board to refer to a panel of the Board a "question of law respecting the interpretation of this Code" [*emphasis added*]: s. 120 of the *Labour Relations Code*.

50 Judicial review is separate from appeal. A right of appeal exists only when expressly created by statute. The ability of the British Columbia Supreme Court to review decisions by an administrative tribunal is discussed at more length in a separate paper which addresses the question of the standard of review exercised by the court.

51 *Workers' Compensation Act*, R.S.B.C., chapter 492, s. 96 (1).

52 Privative clauses can contain one or more of the following: (i) a finality clause, (ii) a no *certiorari* clause and (iii) an exclusive jurisdiction clause; *cf.*, Jones and de Villars, *Principles of Administrative Law* (3rd ed.) (Carswell, 1999), pp. 694-695. For recent comments by the Supreme Court of Canada on the content of privative clauses, see, for example, *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at para. 17; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 30; *Ivanhoe Inc. v.*

- BC Benefits Appeal Board
- Board of Parole
- Building Code Appeal Board
- Disaster Financial Assistance Appeal Board
- Employment Standards Tribunal
- Labour Relations Board
- Liquor Appeal Board
- Motor Carrier Commission
- Motor Dealers Customer Compensation Fund
- Public Service Appeal Board
- Residential Tenancy Arbitrators
- Travel Assurance Board
- Utilities Commission
- Workers' Compensation Board
- Workers' Compensation Board -- Appeal Division[53]
- Workers' Compensation Board -- Criminal Injuries Section
- Workers' Compensation Board -- Medical Review Panels

Although use of a privative clause reflects a legislative intent about the deference which the courts should accord to decisions of the tribunal, the simple use of any privative clause as the criterion for *Charter* jurisdiction leads to some unusual results. One reason for this is that several of the possible reasons for using a privative clause are unrelated to whether the legislature wanted to grant a power to determine questions of law broad enough to include *Charter* questions.[54] A possible option would be to discriminate between those tribunals with very strong privative clauses and those with comparatively weak clauses.

Another possible statutory indicator might be the existence of a statutory appeal from the tribunal to the courts. The following table lists those tribunals from which there are appeals to either the British Columbia Supreme Court or the Court of Appeal.

United Food and Commercial Workers, Local 500, 2001 SCC 47 at para. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at paras. 24 and 27; and *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*. [1998]1 S.C.R. 1079 at para. 59.

53 Although the Appeal Division of the Workers' Compensation Board enjoys the Board's general privative clause (section 96 of the *Workers Compensation Act*) for appeals on compensation claims, it has a less fulsome privative clause (section 212(3)) when hearing appeals under Part 3 of the *Act*.

54 For example, a private clause may be used when an important aspect of the board's decision making is the application of policy or special expertise. These factors probably explain the use of privative clauses for boards such as the Building Code Appeal Board and the Disaster Financial Assistance Appeal Board.

Statutory Appeals

To BC Supreme Court:	BC Marketing Board Coroner's Office Farm Practices Board Fire Commissioner Forest Appeals Commission Health Care and Care Facility Review Board Land Reserve Commission Medical Services Commission (only with respect to decisions under section 37 of the *Medicare Protection Act* Medical Services Commission -- Health Care Practitioners Special Committee for Audit Mineral Tax Review Board Property Assessment Appeal Board
To Court of Appeal:	Commercial Appeals Commission Expropriation Compensation Board Labour Relations Board -- Labour Arbitration Board Motor Carrier Commission Racing Commission Securities Commission Utilities Commission

Although there is some overlap with the previously discussed statutory indicators, the existence of a statutory appeal to the courts produces a quite different list of tribunals.

Is reliance solely on existing statutory provisions an appropriate tool for identifying which tribunals should have *Charter* jurisdiction? More than one academic commentator has questioned the wisdom of relying on statutory indicators of legislative intent:[55]

> *...we must refocus our attention on the substance of the problem, which is institutional capacity and accessibility of the decision maker, rather than the shadow of the intention of the Legislature as revealed through express or implied authority to decide questions of law.*

Non-statutory Criteria

If one rejects the use of existing statutory indicators as the sole tool for identifying which tribunals should have *Charter* jurisdiction, another mechanism must be used. There is a variety of non-statutory criteria which could be chosen:

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[55] McAllister, "Administrative Tribunals and the *Charter: A Tale of Form Conquering Substance*", *supra*, a p. 133 (see also pp. 158 and 159).

- institutional competence of the tribunal to render decisions on complex legal issues and particularly on *Charter* issues
- expertise of the tribunal and specialized knowledge of its members
- procedural machinery available to the tribunal
- accessibility
- degree of respect enjoyed by the tribunal in the larger community
- stability and longevity of the tribunal

A number of the above criteria were discussed earlier in this paper. These and other criteria could be used independently or in conjunction with statutory indicators such as a privative clause or an express power to decide questions of fact and law.[56]

The Administrative Justice Project looks forward to receiving comment on the criteria for selecting those tribunals which should exercise *Charter* jurisdiction.

If one agrees that some but not all tribunals should have *Charter* jurisdiction, the selection of these tribunals raises interesting and potentially difficult questions.

5 PROCEDURAL AND REMEDIAL TOOLS

A number procedural and remedial matters should be addressed irrespective of what tribunals may have *Charter* jurisdiction.

Procedural Tools

Tribunals with Jurisdiction

If a decision is made that one or more tribunals should have *Charter* jurisdiction, several practical matters should be addressed. First, should the tribunal have a discretion to decline exercising its *Charter* jurisdiction? A closely related matter is whether the tribunal should have the statutory authority to refer a *Charter* issue to court.

Since it is difficult 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 the general power to decide the issue. Procedurally the matter could arrive in court either by way of judicial review or appeal from the tribunal's final decision, or by way of a reference to court. In the latter situation, the tribunal's hearing would be adjourned pending the outcome of the court reference. An advantage of giving

[56] For example, a selection of these criteria could be applied to a list of tribunals with a privative clause of some type.

a tribunal this discretion would be to allow it to deal with the exceptional cases where it concluded that it should not exercise its power to make a *Charter* decision.[57] A disadvantage of granting such a discretion is that it adds another issue for argument and decision by the tribunal.

Secondly, if one or more tribunals are to have *Charter* jurisdiction, consideration should be given to removing any possible doubt that notice must be given to the Attorney General prior to a tribunal dealing with the *Charter* issue. 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".[58] 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. 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 perhaps be amended to remove any lack of clarity that it applies to both court and tribunal proceedings.

Tribunals without Jurisdiction

In those cases where a tribunal does not have *Charter* jurisdiction, there is an issue whether the tribunal should be given the statutory power to refer the matter to court for resolution prior to the tribunal's hearing the case before it. At the present time, a party can (in appropriate circumstances) obtain a court order prohibiting a tribunal from proceeding with a hearing. Apart from the legal obstacles to obtaining an order of prohibition on judicial review, there is also the factor that an order of prohibition is useful only as a defensive tool. It gives no assistance to a party seeking to obtain a benefit on the basis that the statutory provision denying the benefit is constitutionally invalid. An appropriate legislative amendment could be made if it was decided that tribunals should be given the discretion to refer a *Charter* issue to the British Columbia Supreme Court.[59]

Remedial Tools

The range of remedies used by the courts when dealing with a legislative provision inconsistent with the *Charter* was discussed above. The most frequent remedy is simply a declaration that a

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57 *Cf.* Crane, *supra*, at p. 507, footnote 37; and Evans, *supra*, at p. 364.

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

particular provision is invalid and inoperative. In the context of a decision by a tribunal, this would be a decision that a statutory provision was inoperative insofar as it applied to the facts of the case before the tribunal.

As discussed above, however, "striking out" a provision will not always provide an appropriate remedy. In some cases, reading in additional words will be required. The ability to add words to a legislative provision raises the constitutional propriety of *Charter* jurisdiction for tribunals in a more acute form than simply a jurisdiction to read down or strike out part of a legislative provision.[60] An argument can be made that there should be legislative guidance as to the extent of a tribunal's remedial powers for those tribunals with *Charter* jurisdiction. In the absence of an express statutory power to read in additional words, there is a good argument that tribunals, being creatures of statute, do not have that power.[61]

6 SUMMARY OF OPTIONS

The options with respect to *Charter* jurisdiction for administrative tribunals fall into three groups. The first consists of the primary options on the extent to which tribunals should have *Charter* jurisdiction. In addition, there are two groups of secondary options: (i) criteria for identifying selected tribunals and (ii) procedural and remedial matters.

Jurisdiction

The five primary options are as follows:

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
5. Status quo (courts decide the issue on a case by case basis)

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59 The legislative provision could be contained in a *Statutory Powers and Procedures Act* if one were enacted, or could be placed in a already existing statute such as the *Judicial Review Procedure Act*.

60 For a discussion of the propriety of a tribunal's reading words into a statute, see Crane, *supra*, at p. 506, footnote 35. See also Evans, *supra*, at pp. 365-366.

61 This matter is clouded, however, by the fact that the technical nature of the remedy is dependent on the linguistic structure of the legislative provision. If the statute begins by granting a benefit to everyone and then sets out an unconstitutional exception, striking out the exception expands the scope of the legislation. On the other hand, if the legislation grants a benefit to a specific group and that group is unconstitutionally narrow, striking out the provision will narrow the scope of the legislation (no one will receive the benefit).

Secondary Options

If a decision is made that at least some tribunals will have *Charter* jurisdiction, a number of other issues must be addressed.

Criteria for Identifying Selected Tribunals

There are two basic options for the identification of those tribunals which would have *Charter* jurisdiction.

Option 1: Rely on indicators in the existing wording of the enabling statute for a tribunal. The following are possible indicators:

- express statutory power to decide questions of law
- privative clause
- statutory right of appeal to either the British Columbia Supreme Court or the Court of Appeal

Option 2: Use non-statutory criteria, possibly in conjunction with statutory wording. Non-statutory criteria could include matters such as the institutional capacity and competence of the tribunal.

Procedural and Remedial Matters

The following options should be considered:

- For Tribunals with Jurisdiction
  - Give the tribunal a statutory discretion to decline exercising the jurisdiction and/or 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 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.

The Administrative Justice Project looks forward to receiving comment on these options.

APPENDIX:
BRITISH COLUMBIA'S ADMINISTRATIVE JUSTICE AGENCIES

Note: This list of agencies is from tables appended to the Terms of Reference for the Administrative Justice Project.

Administrative Agency	Included Agencies or Programs	Responsible Minister
Agricultural Marketing Boards	BC Marketing Board, Broiler Hatching Egg Commission, Chicken Marketing Board, Cranberry Marketing Board, Egg Marketing Board, Grape Marketing Board, Hog Marketing Board, Milk Marketing Board, Mushroom Marketing Board, Sheep and Wool Commission, Tree Fruit Marketing Board, Turkey Marketing Board, Vegetable Marketing Commission	Agriculture, Food and Fisheries
BC Benefits Appeal Board	BC Benefits Tribunal	Human Resources
Board of Parole		Public Safety and Solicitor General
Building Code Appeal Board		Community, Aboriginal and Women's Services
Children's Commission		Attorney General and Minister Responsible for Treaty Negotiations
Commercial Appeals Commission	Appeals under the Company Act, Credit Union Incorporation Act, Financial Institutions Act, Mortgage Brokers Act, Real Estate Act, Society Act, Cemetery and Funeral Services Act, Consumer Protection Act, Credit Reporting Act, Debt Collection Act, Motor Dealer Act, Travel Agents Act, Pension Benefits Standards Act, Home Owner Protection Act	Public Safety and Solicitor General
Commissions of Inquiry under Inquiry Act		Attorney General and Minister Responsible for Treaty Negotiations
Community Care Facility Appeal Board		Health Services / Minister of State for Intermediate, Long Term and Home Care
Coroner's Office		Public Safety and Solicitor General
Criminal Record Review Adjudicators		Public Safety and Solicitor General
Criminal Record Review Appeal Board		Public Safety and Solicitor General
Disaster Financial Assistance Appeal Board		Public Safety and Solicitor General
Electrical Safety Appeal Board		Community, Aboriginal and Women's Services
Elevating Devices Appeal Board		Community, Aboriginal and Women's Services
Employment Standards Tribunal		Skills Development and Labour

Administrative Agency	Included Agencies or Programs	Responsible Minister
Environmental Appeal Board	Appeals under the Commercial River Rafting Safety Act, Pesticide Control Act, Waste Management Act, Water Act, Wildlife Act and Health Act	Water, Land and Air Protection
Expropriation Compensation Board		Attorney General and Minister Responsible for Treaty Negotiations
Farm Practices Board		Agriculture, Food and Fisheries
Financial Institutions Commission		Finance
Fire Commissioner		Community, Aboriginal and Women's Services
Forest Appeals Commission		Forests
Forest Practices Board		Forests
Gaming Commission		Public Safety and Solicitor General
Gas Safety Appeal Board		Community, Aboriginal and Women's Services
Health Care and Care Facility Review Board		Health Services
Human Rights Tribunal	Human Rights Commission, Human Rights Advisory Council	Attorney General and Minister Responsible for Treaty Negotiations
Labour Relations Board	Industrial Inquiry Commissions, Labour Arbitration Boards	Skills Development and Labour
Land Reserve Commission		Sustainable Resource Management
Liquor Appeal Board		Public Safety and Solicitor General
Manufactured Home Park Dispute Resolution Committee		Public Safety and Solicitor General
Mediation and Arbitration Board		Energy and Mines
Medical and Health Care Services Appeal Board		Health Services
Medical Services Commission	Health Care Practitioners Special Committee for Audit	Health Services
Mental Health Review Panels		Health Services
Mineral Tax Review Board		Provincial Revenue
Motion Picture Appeal Board		Public Safety and Solicitor General
Motor Carrier Commission		Transportation
Motor Carrier Reconsideration Panel		Transportation
Motor Dealers Customer Compensation Fund		Competition, Science and Enterprise
Power Engineers and Boiler and Pressure Vessel Safety Appeal Board		Community, Aboriginal and Women's Services
Private Post Secondary Education Commission		Advanced Education
Property Assessment Appeal Board		Community, Aboriginal and Women's Services

Administrative Agency	Included Agencies or Programs	Responsible Minister
Property Assessment Review Panel		Community, Aboriginal and Women's Services
Public Service Appeal Board		Management Services
Racing Commission		Public Safety and Solicitor General
Residential Tenancy Office		Public Safety and Solicitor General
Review Board (Criminal Code)		Attorney General and Minister Responsible for Treaty Negotiations
Securities Commission		Competition, Science and Enterprise
Travel Assurance Board		Public Safety and Solicitor General
Utilities Commission		Energy and Mines
Workers' Compensation Board	Medical Review Panels, Review Board, Appeal Division, Criminal Injuries Compensation Section	Skills Development and Labour