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Appeals on the Merits

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Abstract

This article deals with the limitations of judicial review and the possibilities of its augmentation or replacement by a regime of appeals on the merits. The author questions some assumptions that are commonly made about appellate structures. He criticizes the "broad-brush approach" and warns that there is no panacea. The article explains why any broad regime of appeals on the merits from tribunals to courts of general jurisdiction is not an available option, and it discusses alternative structures of appeals to tribunals. Finally, it explains why it would be irresponsible to propose any appellate structure covering any substantive subject except in the context of a comprehensive study of that subject.

Keywords

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APPEALS ON THE MERITS[©]

BY TERENCE G. ISON*

This article deals with the limitations of judicial review and the possibilities of its augmentation or replacement by a regime of appeals on the merits. The author questions some assumptions that are commonly made about appellate structures. He criticizes the “broad-brush approach” and warns that there is no panacea. The article explains why any broad regime of appeals on the merits from tribunals to courts of general jurisdiction is not an available option, and it discusses alternative structures of appeals to tribunals. Finally, it explains why it would be irresponsible to propose any appellate structure covering any substantive subject except in the context of a comprehensive study of that subject.

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I. INTRODUCTION

From time to time, and perhaps more commonly in recent years, the suggestion has been heard that judicial review should be accompanied or replaced by a comprehensive regime of appeals on the merits from the decisions of tribunals and other government agencies.¹

This article includes comments on the desirability of appeals, but its primary objectives are:

1. To identify some key factors that are relevant to the choice of appellate structures.
2. To suggest the optimum processes through which decisions about appellate structures can be made.
3. To invite reflection upon some common assumptions, particularly the assumptions:
 - that appeals are a good thing;
 - that the adversary system has a natural superiority over inquisitorial or other processes; and
 - that courts of general jurisdiction are the institution of primary choice for appellate functions, at least at the upper level of an appellate structure.

While there is no consensus about the meaning of "appeals on the merits," many or most of the complaints stimulating a demand for such appeals relate to the inadequacies of fact finding in primary adjudication, the resolution of judgmental questions, and the abuse or underuse of discretionary powers. If it is to respond to these complaints, therefore, an appellate body must have the capacity and the willingness to engage in fact-finding inquiries, to resolve judgmental questions and to exercise discretionary powers, as well as to determine questions of law. For example, the jurisdiction of the Administrative Appeals Tribunal in Australia includes a complaint about the exercise of a dis-

¹ For example, this proposition underlay the creation of the Administrative Appeals Tribunal in Australia. See also K.J. Keith, "Appeals From Administrative Tribunals: The Existing Judicial Experience" (1968-1970) 5 V.U.W.L.R. 123 and Legislation Advisory Committee, *Administrative Tribunals* (Report No. 3) (Wellington: Queen's Printer, 1989). This matter was also on the agenda of the Commonwealth Law Conference held in Auckland in April 1990.

cretionary power, and the Tribunal is authorized to substitute a different decision by exercising the discretion differently.²

Any tribunal that is to perform this role with optimum efficiency would probably need the willingness and the capacity to proceed by a review of the record, field investigations and a hearing *de novo*, though not with all features of each in every case. The parties and the appellate body could refer to the record established at first instance and other documents on the file of the adjudicating agency, and could also adduce new evidence.

More restricted appellate structures are obviously possible, but the more restricted the less they are compatible with the notion of appeals on the merits.

The vocabulary of this article reflects a conviction that perspicacity in this subject area tends to be inversely proportionate to the use of the word "administrative."

II. THE DESIRABILITY OF "APPEALS ON THE MERITS"

It is hard to argue in support of such appeals without belabouring the obvious. Any decision-making process will involve some risk of error, and the correction of at least some errors may be achieved through an appellate structure. Moreover, when primary adjudication is final, there may be a risk of decisions being made in a way that is capricious, responsive to improper pressures, or otherwise indifferent to statute law. Hence, the mere existence of an appellate structure may enhance fidelity to statute law, and in other ways too it may help to keep them honest.

Appeals on the merits might also provide an intelligent vehicle for system development. Statutes are commonly passed in a skeletal form, sometimes leaving the detailed rules to subsequent adjudication. Developing those rules can involve a selection among policy options; but when the rules are made by a court on judicial review, or on a limited type of appeal, the matter is commonly perceived as one of "statutory interpretation." Policy choices are then made by a *modus operandi* that

² For further discussion, see for example, Law Reform Commission of Canada, *The Administrative Appeals Tribunal of Australia* by T.G. Ison (Ottawa: Law Reform Commission of Canada, 1989).

can be incredibly superficial, and that generally excludes any cost/benefit analysis of the alternatives. A regime of appeals on the merits could help to prevent that from happening. To achieve that goal most effectively, however, any new appellate structure would have to replace judicial review.

Some of the disadvantages of appellate structures are also obvious, such as the cost. Responsible advocacy of any new appellate structure must include an appraisal of whether the costs are going to be worth it. In some situations, there is no comparative value judgment to be made: the cost may make a new appellate structure entirely negative in its impact. For example, an education department might be willing to fund a scholarship program for students as long as the selection process can be administered cheaply, albeit with some arbitrariness. If, through the creation of a new regime of appeals on the merits, disappointed candidates had a right of appeal, the response could be to terminate the program.

Even at best, the costs of an appellate structure must come from limited resources, and public as well as private funds may be diverted from the pursuit of other social goals. Nor can it be assumed that these costs will necessarily result in any higher quality of justice. For example, in some situations, the availability of an appeal might simply create a bias in favour of those best able to afford the appellate process. Moreover, the argument that appellate structures tend to constrain the abuse of power could sometimes be misconceived. It is commonly thought that the risk of such abuse tends to increase with the degree of power. Where, therefore, an appellate body is more powerful than the institution of primary adjudication, the introduction of an appellate structure could enhance rather than mitigate the risk of such abuse.

As well as the direct costs, there may be indirect costs that are less easily recognized or measured. For example, the existence of an appellate structure might cause the agency of primary adjudication to engage in additional record keeping, slower proceedings, and the production of reasons for decisions that are more prolix (and perhaps less comprehensible).

Another disadvantage of appeals is the delay in achieving final decisions; sometimes with damaging consequences. For example, in workers' compensation and in other systems of disability insurance, a delay in claims adjudication can delay rehabilitation; but this does not mean simply that the commencement of rehabilitation is postponed.

Delay commonly results in permanent damage to rehabilitation prospects. This is particularly noticeable in bad-back cases. Similarly in business affairs, a substantial delay in settling the legal position can sometimes inflict irreparable harm, including harm to people who are not parties to the dispute.

In some systems of public law, primary adjudication has commonly been abysmal. For example, this has been so in several of our social insurance and revenue systems, and in some of our regulatory bodies. If lawyers are involved, it is usually at appellate stages; and this may explain why, in any discussion of system reform, the legal profession tends to focus on appeals. However, the basic problems with primary adjudication are often inherent in the structure, and they are not remedied by having some of the decisions reversed on appeal. To focus on appeals can, therefore, become a diversion from, rather than a remedy for, the problems of primary adjudication. If the reasons for the deficiencies in primary adjudication are analyzed, it will often be found that a new appellate structure would not be the optimum response.

In a social insurance system, for example, primary adjudication may be highly automated. That is probably an optimum structure for most cases, but some require a careful gathering and synthesis of the evidence, discussion by the decision maker with the parties and others, sometimes field-work inquiries, and sometimes a careful consideration of medical, legal, and policy issues. Where a case requires this kind of attention, however, the need does not suddenly arise on appeal; it was there in the first place. Responding to this need by adding another layer of appeal can mean that primary adjudication remains abysmal and is only mitigated by adding more judgmental variables at the appeal stage. The result can be a regime of unequal justice, favouring those who persist in the appellate process to the detriment of those who acquiesce in primary decisions.

A more effective reform would be a screening process to identify the cases that require the more sophisticated attention, so that they can receive that attention in primary adjudication. The conduct of each matter should be entrusted to someone with the authority and the ability to make decisions at whatever level of sophistication may be required, and to make all necessary communications prior to and after the decision. This must include personal investigation and the receipt of evidence and argument first hand. In subject areas where the volume is high, it is only when primary adjudication has been designed to reach the

right answers in the first place that an appellate structure has a reasonable chance of working well to correct the occasional errors.

With regard to regulatory agencies, appellate structures also have downside risks. One example appeared in news reports in 1990. A fire was burning out of control at Hagersville, Ontario. It was in a dump of about thirteen million tires. Toxic smoke rose from the fire and the oil that it produced may have percolated into neighbouring wells. Hundreds of people fled their homes. Over a year previously, the Ministry of the Environment had issued an order for the dump to be cleaned up, but the operator had made the order the subject of appellate adjudication. It is no surprise that during the fire, the Minister of the Environment complained that the operator could have spent his resources on cleaning up the dump rather than on legal process.

It is not a purpose of this article to attempt any overall assessment of the social utility of appeals, or to complete a catalogue of their advantages and disadvantages. Nor have the disadvantages been mentioned to suggest that appeals are always counter-productive. They are mentioned simply to explain why, in any consideration of appellate structures, the option of "no appeals" should not be ruled out.

There appears to be a broad consensus that any system of appeals from the decisions of government agencies (including tribunals and government departments) should generally be confined to those decisions of government that can be seen as adjudicative in character. Thus, appellate structures are not generally advocated for decisions made in the preparation of legislation or in international diplomacy; or for decisions relating to the maintenance of buildings, the preparation of budgets, the awarding of contracts, *et cetera*.

Even with regard to decisions that are commonly or sometimes perceived as adjudicative, there are many in respect of which a right of appeal could be counter-productive. These might include:

1. Decisions made in complex situations, perhaps involving multiple parties, where adjudication is by a costly and sophisticated process that includes procedural fairness. In some jurisdictions, decisions relating to the licensing of television and radio stations might be an example.
2. Decisions made between parties or groups with such unequal resources that an appellate structure could simply give an unfair advantage to one party or group.

3. Rationing decisions, for example, relating to grants, prizes, appointments, promotions, and some scholarships.
4. Decisions that require a balance to be struck between a concentrated private interest and a more dissipated public interest, and where appeals would only be taken one way, thereby creating a distortion against the public interest. With respect to licensing systems and pollution control, for example, more levels of appeal could simply add to the chain of people who have a power of veto over action that might be taken in the public interest. Moreover, if the political or bureaucratic pressures operating on primary adjudication already create a distortion in favour of a private interest, an appellate structure might result in one distortion being compounded, perhaps synergistically, by another.
5. Decisions of a tribunal that was composed to achieve a balance of sectional interests: for example, a labour relations board.
6. Licensing decisions of a type where eligibility depends upon a performance test, such as driving licences. An opportunity to be retested might be more appropriate than a right of appeal.
7. Decisions of a tribunal that has been specially constituted to make an expert judgment: for example, a panel of medical specialists.
8. Decisions in the exercise of a discretion. Such decisions commonly are considered suitable for appeals on the merits, though in some situations, there may be little to be said for having the discretion of one person substituted for that of another. If a matter is so important that the discretion should be exercised at a higher level, it would usually be better to have the case elevated to that level in the first place rather than on appeal. Even with regard to discretionary powers, however, there may be situations in which an appellate structure can provide a corrective influence; such as where primary adjudication is subject to an improper political pressure from which the appellate body is immune.
9. Decisions of a tribunal which is itself an appellate body at the apex of a decision-making structure, so that the addition of another level of appeal would create an unnecessary increase in the number of decision-making levels.

For situations in which an appeal on the merits is considered desirable, it may be helpful to consider the institutional possibilities.

III. THE CHOICE OF FORUM

A. *Courts of General Jurisdiction*

As appellate bodies, courts are generally perceived in the legal profession as having a greater legitimacy than other tribunals. They may also enjoy a greater immunity than some other appellate bodies from some types of political or other pressures. For many reasons, however, courts of general jurisdiction have no capacity or potential as a forum for any broad regime of appeals on the merits.

One problem is that the cost, delay, and formality of legal processes in the courts can create an inequality of access that is incompatible with any ideal of equal justice. Even for cases in which these factors do not impede access, they can cause significant damage. Many tribunals were created in the first place to avoid these problems, and it would be counter-productive to introduce them in an appellate structure.

In other ways too, appeals to the courts would be incompatible with the rationales for the creation of tribunals. By establishing a variety of tribunals, legislatures adopted a pluralistic patchwork. In so doing, they decided, among other things, that adjudicative power should be distributed more widely. The goals, values, and methods to be applied in these tribunals were not to be those of a legal elite, but were to be drawn from broader sections of the community. Appeals to the courts would tend to defeat that democratizing move.

Related to this, the courts are still oriented in the protection of private interests, commonly corporate interests. While the influence of private law has been moderated by the influence of *Canadian Charter of Rights and Freedoms*³ litigation, this has not diminished, and it may have enhanced, the focus on private interests. Statutes for the protection of long term public interests tend to be seen in the courts as aberrational. Often a balance has been struck in the legislative process between public

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

and private interests, and the legislation provides for the refinement and detailed application of that balance in subsequent adjudication. If a tribunal has been established for that purpose, any regime of appeals to the courts would create a risk of shifting that point of balance against the public interest.

Again, disputes about government decisions often result from ambiguities in statute law. The intelligent resolution of such disputes commonly involves policy choices. When such a matter goes to a court that is unfamiliar with the subject, however, it is sometimes treated as “a question of interpretation.” The use of that term allows questions of policy development to be decided without advertence to the consequences, and without any reasons for decision that relate to the significance of what is being done.

An unfortunate example of “legal reasoning” can be seen in a trilogy of cases that went to the Supreme Court of Canada on occupational health and safety.⁴ The question was whether the provinces have any jurisdiction in relation to occupational health and safety in respect of those industries that lie within federal regulatory jurisdiction for labour relations and other purposes. The Court decided in the negative. If this question were to be decided with a sense of purpose, one would surely expect the reasoning to include at least an appraisal of:

1. Exactly what the problems are in occupational health and safety, including the fundamental causes of occupational disablement and premature death;
2. What types of regulatory and enforcement action are most likely to reduce the casualty and severity rates;
3. Which level of government can provide that kind of action;
4. If the answer to three is both, then which is in the best position to provide that kind of action; and
5. Whether health and safety achievements would be greater by concurrent or by single jurisdiction.

Only the last of these points was mentioned, and none of them was addressed seriously in lengthy judgments that proceeded by legal reasoning.

⁴ *Commission de la santé et de la sécurité du travail v. Bell Canada*, [1988] 1 S.C.R. 749; *Canadian National v. Courtois*, [1988] 1 S.C.R. 868; *Alltrans Express v. Workers' Compensation Board of British Columbia*, [1988] 1 S.C.R. 897.

Even if such a hazardous process is inevitable in the role of the courts as the arbiters of federalism, it would not be in the public interest to have decisions on other aspects of public law also made without advertence to the significance of what is being done.

The choices made in appellate adjudication often involve policy options, and they are an integral part of system development. When the options relate to system design, an intelligent process for making the choices often requires the co-ordination of law making, budgeting, and executive action. Usually it requires long term planning and sometimes it also requires co-ordination with other government agencies. It is this ongoing and co-ordinating responsibility, with a perception of consequences and an awareness of interactions, that makes the ordinary courts generally unsuitable as policy makers in public administration. Moreover, consistency and coherence in system design and policy development can be difficult to maintain if the process is subject to intermittent interventions by a body that is variable in its composition, has different reference points, a different range of vision, possibly different values, and no continuous responsibility for further decisions.

A related concern is the procedures used in courts of general jurisdiction, and the influence that courts can have on the procedures of other bodies. Many subject areas were excluded from the courts in the first place for legitimate reasons that included apprehensions about the appropriate model for adjudication. For example, it may have been decided that adjudication in a particular subject area should not be by an adversarial process.⁵ It may have been decided to use primarily inquiries initiated by the decision maker, perhaps including field-work. Various systems were adopted for decision making by tribunals and other agencies, and the resulting procedural diversity was only partly accidental. To a large extent, that diversity reflects deliberate planning to achieve particular goals in different subject areas. Those goals could well be threatened by appeals to a court that would, almost inevitably, be a homogenizing influence in favour of the adversary system and to the disparagement of procedural diversity.

Where the adversary system is inappropriate in primary adjudication, it may also be inappropriate for any appeal. The matters decided by tribunals and other agencies often involve multiple public

⁵ See, for example, British Columbia, *Report of the Commissioner* by Charles W. Tysoe (Victoria: Queen's Printer, 1965) at 353-55.

and private interests which have been accommodated by the procedures of the agency. Some of these interests would never be represented by advocacy at a hearing. It would seldom be an improvement to have such decisions subject to appeal to a court that is geared to the adversary system, that usually insists upon a respondent, and that usually functions at its best in a context of bilateral conflict.

Another concern relates to the talent that can be attracted for tribunal positions. Appeals to the courts could tend to enhance a perception of tribunals as "inferior." Indeed, that deprecating term has long been used by the courts. Yet the presiding role in some of our boards and commissions involves a mixture of adjudicative, executive, and legislative functions, and it may include policy planning, coordination, and implementation. Where this is so, the demands upon a board president can require an intellectual calibre higher than that which is commonly found in judicial appointments. Brighter people may be unwilling to accept such appointments if their decisions, made in the context of long term planning and complex interactions, are subject to disturbance by episodic interjections from people who do not have that breadth and length of vision, or that depth in the subject. Thus appeals to the courts could mean a downgrading of the calibre, the structural options, and the potential achievements of many boards and commissions.

Another concern about appeals to courts is the risk of a further decline in the notion of justice according to law. There has been a retreat from that notion, particularly over the last thirty years. In private law subjects, doctrinal rules are being eroded by an expansion of judicial discretion. In judicial review, the erosion of fidelity to law came even earlier when the courts substituted judicial discretion for legislative sovereignty, particularly in overriding the privative clauses.⁶ With the *Charter*, the validity of all statutes and regulations is now a matter of judicial discretion. The resulting paradox is that we are moving in the direction of more lawyers but less law.

This concern is particularly relevant to the high volume subjects in which decisions are made by tribunals or other agencies. Those

⁶ These were the statutory provisions that gave a tribunal exclusive jurisdiction to determine all issues of law and fact arising under the act creating the tribunal, and forbade the review of a tribunal decision in any type of court proceedings. The courts refused to read those sections to mean what they said.

responsible for system design must determine to what extent decisions should be made by predetermined criteria and to what extent the outcome should be a matter of discretion. In deciding how many variables the system can accommodate and how much (if any) discretion is optimum, the designer must consider questions of administrative and adjudicative feasibility and of aggregate cost, as well as individual rights and public policy objectives. This breadth of vision may result in the use of categories that subsequently appear too rigid to a judge of general jurisdiction, particularly if the court has detailed evidence of sympathetic circumstances in the particular case. Thus if a court really exercised an appellate jurisdiction "on the merits," there could be a temptation to substitute judicial discretion for justice according to law, and to produce a result that could not, and probably should not, be applied in other like cases. An improvement might have been achieved in the quality of justice in one case, but only at higher adjudicative cost, only by sacrificing equality before the law, and perhaps also by sacrificing other social goals.

In social insurance systems in particular, a more sophisticated regime might be achieved by adding more variables to the criteria of eligibility; but a higher proportion of the aggregate budget may then go to administration and adjudication, with a corresponding reduction in benefits. A good maxim in the design of social insurance is "try to keep it simple." That goal could be sacrificed if appeals on the merits really were decided by courts of general jurisdiction. Indeed, it may well be a recognition of this that sometimes persuades the judges themselves to restrict their role when cases relating to social insurance systems go to a court on judicial review or on appeal.

Moreover, courts, and particularly appellate courts, are more centralized than many other agencies of government. Any appellate structure could be decentralized more fully if the appeals lay to a body that was not a court. If an appellate body is to be accessible to ordinary people, if it is to resolve issues of credibility, or if its work involves questions of medico-legal interaction, it is crucial that its operation be as local as possible.

There would, in any event, be an overriding difficulty in any plan for appeals on the merits to courts of general jurisdiction. There is no way of providing for it. Legislative attempts to confer a broad appellate jurisdiction on a court in relation to a tribunal have commonly met a fate similar to that of the privative clauses. Judges like to define their own

jurisdiction, and with regard to the scope of their own functions, they commonly decline to be bound by statute law. Privative clauses enacted by legislatures to curtail the jurisdiction of the courts have commonly been overridden or discarded on judicial review, and the judges have substituted their own judgment on the scope of their jurisdiction. Conversely, when legislatures have provided for an unrestricted appeal from a tribunal to a court, the judges have tended to shrink the scope of that appellate jurisdiction to a point at which it is indistinguishable from judicial review.⁷ Reid and David have stated: "Numerous judgments attest to the tendency of courts to construe narrowly powers of appeal from tribunals. Even explicitly broad powers may be cut down, for the courts appear to prefer a narrowly supervisory role rather than one of general review. Thus, despite the grant of extensively wide appellate powers, courts will usually prefer to interfere only where there has been an error of jurisdiction, or of law or principle, or mistake of fact, and will refrain, if possible, from substituting their opinions for the tribunal's, particularly that of an expert tribunal."⁸

Nor should this be surprising. The desire of judges to maintain control over the scope of their own functions is not whimsical. As well as reflecting a power struggle, it may reflect a perceived need for efficiency in the use of their time. Any public institution, including a court, must ration the allocation of its resources. Traditionally, this has been done in courts by delay, cost and formality, as well as by confining the range of issues that can be adjudicated. It has sometimes been done by confining any appellate role of courts to questions of jurisdiction and law.

The areas to be covered by any new regime of appeals on the merits would be fact finding, judgmental issues, and discretionary powers. Judges are often willing to decide such matters if the issue relates to a penalty, or some other question that seems familiar to a

⁷ See, for example, *Union Gas v. Sydenham Gas*, [1957] S.C.R. 185. Subject to a leave requirement, the statute allowed an appeal from the Board to the Court of Appeal "upon any question of law or fact." That is the broadest prescription of appellate jurisdiction that is normally used in legislative drafting. Yet the Supreme Court of Canada decided that no appeal would lie on a question of public convenience and necessity.

⁸ R.F. Reid & H. David, *Administrative Law and Practice*, 2d ed. (Toronto: Butterworths, 1978) at 453.

court.⁹ In other cases, however, judges are reluctant to enter these areas, not only because of the resources required, but for other reasons, such as the need for consistency and a lack of expertise in the subject area.

Since a reassessment of "the merits" commonly requires an investigation of the facts, any appellate body that is to perform that role must have the authority and the willingness to reconstruct the facts, and that must include a willingness and perhaps an obligation to conduct an evidentiary inquiry. It is this role that is repugnant to the tradition of common law courts in relation to appeals. Thus, any statutory creation of a broad appellate jurisdiction on the merits would not prevail against the necessity to ration scarce resources and the traditional perceptions of judges about the nature of their appellate roles.

Courts are more willing and able to conduct an evidentiary inquiry when an appeal lies to a single judge; but that can have the disadvantage of substituting individual for group values. For this as well as other reasons, it is not generally appropriate for an appeal from a well-constituted and specialist board. However, it can be viable for appeals from some government agencies in some subject areas, particularly where primary adjudication is by a single official in a government department.

B. Courts of Specialized Jurisdiction

Many of the problems mentioned above could be overcome by a regime of appeals to specialized courts, but that is not usually an available option. The provinces have no constitutional power to appoint judges of superior courts, and in the federal system, there has been a strong tradition against the creation of superior courts of specialized jurisdiction.¹⁰

If such courts could be created for public law functions, however, they would have several advantages over courts of general jurisdiction. The most obvious are expertise in the subject and the absence of

⁹ See, for example, *College of Physicians and Surgeons of Ontario v. Gillen* (1990), 1 O.R. (3d) 710.

¹⁰ For example, the refusal to create a separate court of admiralty and the blending of federal adjudication into one federal court structure.

competitive pressures within the institution for the allocation of resources to cases in other subject areas. Compared with tribunals, a superior court of specialized jurisdiction would have the advantage that it could be empowered to make final decisions about the scope of its own jurisdiction. Indeed, this structure would have the greatest potential for avoiding review by courts of general jurisdiction.

C. General or Specialized Appellate Tribunals

To whatever extent that it may be desirable to have appeals on the merits to a tribunal, should it be one of broad jurisdiction (that is, multi-subject) or one specializing in a particular subject? The relevance and cogency of the arguments vary from one subject to another, and it would be a mistake to assert any overall conclusion.

An appellate tribunal of broad jurisdiction may achieve more independence than a specialized tribunal from political or departmental pressures. Also, if the primary decision maker is a regulatory body that has been captured by the industry that it is supposed to regulate, a specialized appellate tribunal may be vulnerable to the same capture.

However, there are sometimes good reasons for preferring a specialized appellate body. A tribunal of broad appellate jurisdiction might be attended by lawyers whose expertise lies in the processes of the tribunal rather than in a substantive subject. A specialized tribunal may attract lawyers who specialize in the laws and policies of the substantive subject, and it may also attract specialist lay advocates. Advocacy from these groups may be more focussed on the law of the subject, the merits of the case, and the public policy objectives of the system. Moreover, because of its concentration on a particular subject area, a sectoral appellate tribunal may be more sensitive to unrepresented interests. Also, subject area concentration may facilitate familiarity with the detail of a system so that a sectoral appellate tribunal is able to make a final disposition of a case more often, with fewer references back for further decisions by the agency of primary adjudication.

Specialization might also facilitate the use of procedures that are tailored to the subject area. For example, in health and safety matters, it is sometimes crucial that decisions be made quickly; that there be no adjournments or delays, at least not without making an interim order. In some other subject areas, it may be in the public interest, or at least

harmless, to proceed at a slower pace. A tribunal of broad jurisdiction might find it difficult to operate at differing speeds in relation to different subjects. In other ways too, a broad appellate jurisdiction might create a damaging pressure against procedural diversity.

Where it is considered desirable to include interest group nominees in the composition of a tribunal, that can probably be accommodated more readily if the tribunal is one of specialized jurisdiction. Also, in relation to some subject areas, it may be desirable to have a tribunal that is primarily appellate but which has some original jurisdiction.¹¹ That too may be easier to accommodate in a specialized tribunal.

Specialization may also be more appropriate where a series of decisions must be made over time and where consistency and coordination are important. Business licensing may sometimes be an example. A specialized appellate tribunal may also be more appropriate where decisions of an adjudicative nature are interwoven with field-work and the provision of services. Examples can be found in rehabilitation of the disabled.

Sometimes adjudicative decisions may be interwoven with departmental or political policies; for example, in transport. It could be legitimate to have a sectoral appellate structure that has some connection, properly recognized by statute, with the development of departmental or government policy.

Other arguments could favour sectoral appeals in relation to some subjects but a tribunal of broader appellate jurisdiction in relation to others. For example, the expertise required for appellate adjudication in some subjects might be designed more readily into a specialized tribunal. In other subject areas, the reverse could be true. Related to this is the resolution of appeals from the exercise of discretionary powers. Some of these decisions might be made most intelligently by the breadth of vision that is more likely to be found in an appellate tribunal of broad jurisdiction, while others could be made more intelligently by the depth of expertise that is more likely to be found in a specialized appellate body.

Similarly, with regard to speed and economy, there is no *a priori* reason why an appellate body of broader jurisdiction would be more or less expensive, or faster or slower, than specialized appellate bodies,

¹¹ For example, the Workers' Compensation Appeals Tribunal in Ontario.

though it may be so in particular subject areas. The same could be said of decentralization. The larger caseload that a tribunal of broader jurisdiction could attract may facilitate decentralization; but in some subject areas, a specialized tribunal might be able to decentralize more effectively, perhaps using local part-time members.

Similarly, with regard to equality, it might seem that a tribunal of broad jurisdiction would produce a more even quality of justice for people and corporations in different socio-economic groups; but this could be an illusion. For example, inequality of access would be created almost automatically by the location of the tribunal. Certain needs and interests might be served by having it on the fifteenth floor of an office tower in the business section of a city, while other needs and interests would be served by locating the tribunal at a suburban shopping centre.

IV. AN ADVERSARIAL OR INQUISITORIAL MODEL

The suggested advantages of an appellate tribunal (rather than a court of general jurisdiction) are generally the converse of the points mentioned under heading III.A. above. In particular, one could expect (or at least hope) that a tribunal would be more accessible, more economical, more expeditious, more cognizant of multiple or public interests, and more willing to review the merits, including the facts and the exercise of discretionary powers. It would also probably show a higher standard of deference to statute law.¹² Another advantage of a tribunal is the option of proceeding on an inquisitorial rather than an adversarial model. That is the option being discussed under this heading.

Following the experience of the prerogative courts, it became a common law tradition to denigrate and even to despise inquisitorial processes; but modern tribunals using such procedures are a far cry from the Star Chamber and the Court of High Commission. The features of an inquisitorial model that might be advantageous to certain types of inquiry include economy, speed, the coalescence of investigation (including field-work) with adjudication, initiative in the seeking of evidence, the use of public funds to obtain evidence, the reduction of controversy by the use of tribunal experts, and the avoidance of

¹² This was a noticeable feature of the Administrative Appeals Tribunal in Australia.

therapeutic damage from the controversial nature of adversarial proceedings. An inquisitorial process can also be more accommodating to multiple interests, and in particular, more sensitive to interests that would not be represented in any adversarial process.

Where a tribunal is intended to function on an inquisitorial model, this must be reflected in the qualifications for appointment, the location of the tribunal, the physical plant, staff, budget, and procedures. The tribunal would not depend upon advocacy, but advocacy would be permitted and it would play a supplementary role. Paradoxically, advocacy can sometimes be more effective in the context of an inquisitorial process. The more discursive interaction can enable the advocate to understand more clearly the concerns of the tribunal, and *vice versa*. To ensure that prompt appellate decisions operate as a quality control device in relation to primary adjudication, any attempt at conciliation by the tribunal should generally be prohibited.

The file used in primary adjudication should usually form part of the material considered by the appellate body, and so should any manual of adjudicative criteria used in primary adjudication. Any sloppiness or other deficiencies in reaching initial decisions would then be exposed to the corrective and deterrent influence of the appellate tribunal. It would also be more difficult for decisions in primary adjudication to be made according to a regime of secret law.

While an appeals tribunal established on an inquisitorial model can have great potential, its political feasibility probably depends upon whether the proposed tribunal is one of specialized or general jurisdiction.¹³ The predisposition of the legal profession and the influence of the courts in favour of the adversary system are so strong that the use of an inquisitorial model, or any other procedural alternative to the adversary system, has to be justified; and it is generally difficult to produce any justification except in the context of a particular subject area.

¹³ In Australia, it is not considered politically feasible for the Administrative Appeals Tribunal to function on an inquisitorial model, and that is so regardless of any judgment on the value of that model in relation to any subject.

V. WHETHER SECTORAL APPEALS SHOULD BE EXTERNAL OR INTERNAL

Where a specialized appellate structure is created for a particular subject, it must be decided whether the appellate tribunal should be external (*i.e.*, outside the agency of primary adjudication) or internal (*i.e.*, within the same agency as primary adjudication). Where there is a pyramid structure with two levels of appeal, the most common argument is that the final level should be external, but a more cogent argument could often be made that the intermediate level of appeal should be external.¹⁴

While it is customary to assume and assert that an external appellate body must be superior to an internal one, there is commonly no basis for that conviction. Neither structure is superior in every respect. My experience in this relates primarily to workers' compensation in Canada. While experience in, and impressions from, these systems may not have universal significance, they may well be of general interest.

A. *Advantages of an External Appellate Body*

External appellate tribunals generally hold hearings, or at least recognize a right to a hearing upon request. This right has not been recognized so consistently by internal appellate bodies. Related to this, it is normal for the decisions of external appellate tribunals to be made by the people who conducted the hearing. That has not always been the case with those internal appellate bodies whose members are part of or closely related to the line-management structure.

External appellate bodies sometimes enjoy a greater immunity from political pressures. They may, therefore, achieve a higher standard of fidelity to law. However, this immunity may be limited to the honeymoon period.

Even basic fact finding in a government agency can be distorted if it is subject to political pressures, or to institutional isolation and intellectual incest. The latter can take an insidious form if the opinions

¹⁴ For an example of this structure, see the *Workmens' Compensation Amendment Act*, S.B.C. 1973, c. 92.

of an internal expert are always accepted at face value and without cross-examination. If the same expert dominates at all levels of adjudication, the result may be worse than the denial of any right of appeal. External appellate bodies have done much to solve this problem in workers' compensation.

Also, because external appellate bodies do not have administrative responsibilities, they may focus more effectively on the role of adjudication, including the identification of issues of law and fact, and any problems of medico-legal interaction.

External appellate bodies generally give better reasons for decision, though they are often verbose. Also, they sometimes read as if they were written for a court on judicial review. This undermines their value as explanations to the parties or as guidance for primary adjudicators.

An advantage often claimed for an external appellate structure is that it will be independent of primary adjudication; but that is a red herring. The ordinary court system is often revered as a model; yet, the independence of appellate courts from primary adjudication is in some ways less than that of an internal appellate body in a tribunal structure. A court of appeal may be separated from a trial court in the statutes and in other formal documents, but the two courts may blend in other ways. For example, the judges are appointed in the same way, they come from the same profession, usually the same socio-economic background, and they may be on the same social circuit. The two courts may share the same building and some of the same support services. Yet these features are not generally considered to impair the validity of that appellate structure. With an internal appellate body in a tribunal structure where an appeal lies to the commissioners of a board, the appeal may be to people who are geographically separated from the primary adjudicators, who come from a different professional background, who are appointed in a different way and who may (in relation to any particular appeal) have a broader outlook.

Obviously it would be objectionable if the adjudicators or the managers of primary adjudication could direct or control the appellate body, but internal appellate structures need not and commonly do not operate in that way. For example, where the final appeal lies to the commissioners of a board, the appellate body may be giving direction to primary adjudication, not *vice versa*. In that respect, the structure may be similar to the ordinary court system in which appellate bodies give

direction to primary adjudicators with regard to the criteria to be applied.

B. Advantages of an Internal Appellate Body

Internal appellate bodies have generally been more expeditious. Indeed, the incredible delays of some external structures have frustrated the achievement of policy objectives, such as income continuity and rehabilitation.

An internal appellate structure also promotes consistency at all levels of adjudication. Since the final appellate body has executive responsibility in relation to primary adjudication, it can ensure that the precedents established in the appellate process are followed. Moreover, external appellate bodies do not have a constant vision of the larger volume of cases being decided in primary adjudication. Hence they may tend to introduce more judgmental variables than the system can accommodate. The result may be either to make the system excessively complicated, or to produce unequal justice by applying different criteria at the final level of appeal from those applied in primary adjudication. Two bodies of law then emerge, one for cases decided in primary adjudication and another for cases decided on appeal.

Related to this, appellate adjudication is sometimes policy making. Thus, in the exercise of their quasi-legislative roles, an appellate tribunal and the agency of primary adjudication might pursue conflicting policies if they are not under common direction.

An internal appellate structure can also facilitate the use of appeals as a medium for quality control in primary adjudication. Where a decision is reversed on appeal, the tribunal can consider what caused the error in the first place and whether some change is required in primary adjudication. For example, a change may be required in relation to instructions, training, qualifications, personnel selection, workload, records systems, working conditions, or whatever. Because an external appellate body has no executive responsibility in relation to primary adjudication, it tends to focus more exclusively on getting the right answer to the case under appeal. It has, therefore, less potential as a beneficial influence on the quality of primary adjudication. Moreover, because an internal appellate structure can play this role of quality

control, it can also tend to facilitate the decentralization of primary adjudication.

The creation of an external appellate tribunal can also weaken the range of people who can be attracted as executives in relation to primary adjudication. Where appeals are external, the management of primary adjudication is likely to be seen as primarily an administrative function and, therefore, as requiring someone with a managerial/administrative background. Such a person may be less sensitive to fidelity to law, procedural fairness, the therapeutic significance of procedural options, and other requirements for a good quality of adjudication.

With an internal appellate structure, where the president of the appellate body also has an overriding executive power in relation to primary adjudication, this diversity of functions can make the combined role more attractive than either role on its own. Also, because many of the executive functions do not require fixed-time appointments, appeals can be scheduled at short notice. In some conditions, therefore, this structure may facilitate the hearing of appeals without delay.¹⁵

Internal appellate bodies also seem better at preserving informality, and at avoiding unnecessary adjournments or preparatory steps. Moreover, although internal appellate bodies sometimes fail to hold hearings when required, external appellate bodies sometimes hold unnecessary hearings.¹⁶ Internal appellate bodies may also be less dependent upon advocacy and more inclined to engage in field-work. Where that is so, the focus may be less on the documents and more on the realities.

Again, defects in the substantive law of the subject that are discovered by appellate bodies can sometimes be remedied most readily by a concurrence of adjudicative experience and regulation-making power.¹⁷ It can be exasperating for an applicant to be told that the tribunal recognizes the injustice being suffered but has no power to prescribe a remedy. Cynicism among the clientele of the system is an understandable consequence if the only people by whom they have an

¹⁵ This is the way that it worked during my term as Chairman of the Workers' Compensation Board of British Columbia.

¹⁶ That is, where no hearing has been requested by any of the parties and no need for a hearing is apparent to any member of the tribunal.

¹⁷ For example, *Re the Measurement of Partial Disability: Decision No. 8 (1973-74)*, 1 Workers' Compensation Reporter 27 (W.C.B.C.).

opportunity to be heard are people who announce that they have no power to rectify an injustice. This problem can be minimized if the final level of appeal is internal and is blended with the responsibility for regulation making.

Internal appellate bodies also seem better at achieving finality for all issues in dispute. They can respond to all issues that are outstanding at the time of the appellate adjudication. External appellate tribunals are sometimes confined to issues that have been determined in primary adjudication, or at an intermediate level of appeal. Thus an external appellate structure can produce interagency ping-pong.

Finally, internal appellate structures generally operate at a lower cost.

It may sometimes be possible to capture most of the advantages of internal and of external appellate structures by making the intermediate level of appeal external and the final level internal. If the intermediate appeal is normally final on questions of fact, the parties would know that the conclusions of fact have been freed from any pressures that might operate in the internal system. At the same time, the final appellate tribunal would be able to develop a coherent body of law and to ensure that its decisions are followed in primary adjudication. Those decisions would probably also be followed at the intermediate level of appeal. The problem of conflicting policy sources might then be avoided.

VI. MAKING THE DECISIONS ON APPELLATE STRUCTURES

This article is not written to promote further discussion of appeals on the merits. Indeed, one of its goals is to warn against any treatment of appeals on the merits as a discrete subject. The risk is that such discussion might lead to commissions of inquiry making recommendations relating to appeals in the abstract, rather than in a study of a substantive subject. To promote any appellate structure as a panacea that can be spread with beneficial effect across the full range of adjudicative decisions made by government would be no more intelligent than to believe that nineteenth century market theory can be spread with beneficial effect across all government functions.

One concern is that any study that was limited to appellate structures would have a wrong emphasis. Since impact analysis would be

impeded by the lack of a subject area context, general principles or ideological aspirations would probably receive a benevolent weighting; and "reasoning" could easily become a substitute for inquiry. Conclusions could then be reached in a way that was flippant, or at least indifferent to the significance of what was being done. Uniformity would probably have an undue influence, and for all of these reasons, public policy objectives would be likely to suffer. Moreover, the extent to which procedural and institutional diversity are useful or senseless could not be judged fairly in a study that was limited to appellate structures and which, therefore, would have a bias in favour of uniformity. For these reasons, as well as others, a broad-brush approach to appeals on the merits could be seen as partisan in the arena of political conflict. It might also be seen as special pleading for the legal profession.

Other forms of bias are also likely to occur in any broad-brush approach. For example, a demand for appeals on the merits can be nurtured by assertions of general principle, but objections to such appeals would usually depend upon evidence that is subject-specific, and which is therefore unlikely to be produced except in the context of an inquiry into a substantive subject. Moreover, the development of such evidence may depend on expertise in disciplines other than law, while the broad-brush approach is most likely to be adopted, if at all, in an inquiry conducted by lawyers.

The introduction of appellate structures where they may be inimical to the public interest is not the only risk with the broad-brush approach. Even where a new structure of appeals on the merits could operate with beneficial effect, it may still be less than an optimum response to the problems of adjudication in a particular system, and it could become a diversion from more realistic ways of solving those problems. For example, in workers' compensation in Canada, it has been a perennial problem that the compensation boards have commonly not complied with the statutes. A likely explanation is that the incidence of political power is different in the legislative process from what it is in subsequent administration and adjudication. The failures to comply with the Acts reflect ongoing political pressures not to comply. The problem was alleviated only slightly by judicial review. It has been alleviated further by the new external appeals tribunals; but the problem persists. The primary need is for an analysis of the political pressures

operating on the boards and of the structural changes that would be necessary to alleviate those pressures.

This is one example of a broader point. The significance of appellate structures cannot be understood in isolation from policy making, regulation making, finance, economic and political pressures, triggering devices, investigative techniques and strategies, the nature and structure of primary adjudication, and sanctions. Any study of these matters requires a concentration on a substantive subject, including the adjudicating agency, its goals, policies and methods. The *modus operandi* for this type of study must include field-work, and often survey work. A relevant part of the study must be an analysis of the economic, political, and bureaucratic pressures operating upon the system and which may tend to promote or defeat the policy objectives of the agency.

For these reasons, it would be irresponsible to propose any appellate structure for any substantive subject except in the context of a more comprehensive study of that subject.¹⁸ An analysis of the problems of the system, the substantive law, the interests affected, the policy goals and the institutional practices and pressures must come first. It is only in that context that the structures for primary adjudication and for appeals (if any) can be considered in a way that will enable the implications of the choices to be understood. Recognition of appeals on the merits as a discrete subject in law reform would invoke the methodologies of a bull in a china shop.

VII. CONCLUSIONS

The arguments relating to appeals on the merits have been canvassed above, and it would be superfluous to repeat them. It may be useful, however, to conclude by mentioning some of the reasons for concern.

The legal profession has long espoused the protection of private rights, and that ideology has done much to shape the approach of the courts on judicial review. A proclaimed goal has been to constrain the excess or abuse of public power. Today, however, at least in Canada, the

¹⁸ Such studies used to be undertaken by royal commissions, but that practice has become less common.

greatest problems in public administration reflect a failure to pursue public policy objectives. These problems involve not the excess or abuse of power, but inertia and underachievement through the underuse of power. With regard to pollution control, for example, the need is for a careful analysis of the restraints that curtail government action, be they political, economic, bureaucratic, or legal restraints.

We live in a world from which species of animals are disappearing every year. If this pattern continues, it can surely be only a matter of time before the human race finds its place on the disappearing list. If governments really are going to protect the health and survival of the world's population, structural changes in public administration must be made to increase controls. It is difficult to envisage any expansion of appellate structures that is likely to be adopted in relation to pollution that would not tend to aggravate the problem.

No doubt there are some subjects in which revisions of, or additions to, appellate structures would be in the public interest; but the matter should be approached cautiously, only in a study of a substantive subject, and without any initial assumption that appeals are a good thing. Any attempt to expand appeals on the merits by a broad-brush approach would be irresponsible. Indeed, in relation to some subjects, human survival may depend upon restraining rights of appeal, and a more decisive assertion of what may seem to some like arbitrary power.