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## Administrative Appeal or Judicial Review: A Canadian Perspective

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# *Administrative Appeal or Judicial Review: A Canadian Perspective*

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## I INTRODUCTION

In this paper I shall describe the Canadian experience, which has a variety of mechanisms for providing persons who are dissatisfied with an administrative decision an opportunity to have it reconsidered by a tribunal that is independent of the original decision-maker. I shall briefly assess the operation of these arrangements, and extract some general principles and pragmatic considerations that may be relevant to the construction of administrative machinery in the new South Africa. In addition to administrative review, I consider an appropriate role for the judiciary, including proposals to entrench in the new South African constitution the right to judicial review. As will become apparent, I regard administrative appeals and judicial review, not as mutually exclusive, but rather as complementary means of enhancing administrative justice.

It may be useful, though, to indicate at the outset some of the forces that seem to me to be currently operating on public administration, both in Canada, and, I suspect, in many other countries that draw from a common pool of constitutional tradition and political culture. Thinking about the exercise of administrative power in the common-law world has long been conditioned by four constitutional principles.

The first is that administrative justice at the level of the individualized decision is best served by a system of specialized review tribunals operating within an essentially adjudicative model of procedure.<sup>1</sup> The second is that, in a parliamentary system of government, accountability for the exercise of political power is adequately secured through the doctrine of ministerial responsibility, in its differing dimensions.<sup>2</sup> Third, and related to the second, is the notion that it is illegitimate to confer on public institutions policy-making power for which there is no day-to-

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<sup>1</sup> This principle was powerfully reaffirmed in England by the *Report of the Committee on Administrative Tribunals and Enquiries* Cmnd 218 (1957) (the Franks Report).

<sup>2</sup> Over the years various attempts have been made in different jurisdictions to put into working order a mechanism of accountability that palpably has been unable to meet the demands put on it by the modern administrative state. These have typically taken the form of new parliamentary committees to oversee the work of particular government departments and the making of delegated legislation, and the introduction of the office of Ombudsman.

day political accountability of the kind provided by ministerial responsibility. Fourth, overseeing both the legal and the political institutions of the administrative state stand the courts of general jurisdiction, with the power to intervene in the administrative process on grounds of procedural impropriety, deviation from statutory mandate, and unreasonableness.<sup>3</sup>

It seems to me unlikely that the modern (or should I say post-modern?) administrative state will be able to derive from these architectural principles a blueprint for designing institutions and processes that will meet the challenges facing it. On the basis of our experience in Canada, I would define as follows the most significant of these challenges.

Despite the enthusiasm for economic deregulation, which, in any event never really took hold in Canada to the same extent that it did under the Reagan administration in the United States and under Thatcher in the United Kingdom, public opinion has continued to expect government to play a leading role in tackling the major social issues of the day, and to attend to many of the problems arising from the operation of a modern market economy. New or expanded government programmes have been created in response to demands for gender and racial equity, health and safety at work, pollution control, consumer protection and income security, for example. However, two factors make it particularly difficult to satisfy these continuing and rising public expectations.

First, there appears to have been a collapse of public confidence both in the traditional political institutions as authentically representative of the people, and in the legitimating functions of the traditional political processes. The rise of the single issue pressure group, demands for more 'direct democracy', and the translation of political claims into legally enforceable 'rights' are probably both causes and consequences of the decline of the parliamentary model of government as it has been understood for most of this century.

Second, at a time of unprecedented debts and deficits in public finances, a public resistance to increased levels of taxation, and government commitments to maintaining a low rate of inflation, public programmes must be delivered within a budget that is at best static, but more often, shrinking. Learning to satisfy rising public expectations from fewer resources is likely to occupy the attention of public administrators for at least the next few years.

Individually and cumulatively these challenges are formidable, not least because trying to meet one seems almost inevitably to prejudice another. For example, tackling any of the social problems identified above requires a public administration that can withstand the political pressures that the private sector is able to exert on government to resist

<sup>3</sup> To paraphrase slightly the 'Diplock catalogue' of illegality, procedural impropriety and unreasonableness: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410.

regulation of its activities. It can seem difficult to combine the kind of firmness that may be required for this purpose with demands for increased openness of decision-making and rights of review by specialist appellate tribunals or the courts. Moreover, enhanced rights of participation in government add another strain on resources that are already spread too thinly. In the absence of public funding or other kinds of assistance for either public interest groups or vulnerable individuals, it must be doubtful whether the provision of more opportunities for formalized administrative hearings can really enhance the democratic legitimacy of the bureaucracy. And the public funding needed for effective public participation in administrative hearings held to decide technically complex and wide-ranging issues of public policy can be very large indeed. Whether the quality or public acceptability of the decisions made justify the resources and time devoted to the process is very questionable.<sup>4</sup>

## II ADMINISTRATIVE REVIEW IN CANADA: AN OVERVIEW

### (1) *Background*

For the last 20 years administrative law reform in Canada has remained largely in the realm of speculation. There has certainly been no dearth of reports addressing the shortcomings of our institutional arrangements for delivering public programmes.<sup>5</sup> For example, before its abolition in 1992, the Law Reform Commission of Canada produced a steady stream of reports on administrative law, ranging widely from studies of the structure and operation of particular federal agencies, the reform of the law of judicial review, and a proposal for a general code of administrative procedure, to more speculative pieces on topics such as public liability and the legal nature of the federal administration. None the less, legislative implementation has been conspicuously absent at both the federal and provincial levels of government.

This inertia is partly explained by the resources and energy consumed over the last ten years by Canada's ongoing constitutional crises

<sup>4</sup> In Ontario a hearing was recently held into the estimate by the Province's principal electricity producer of the likely demand for electrical power over the next 25 years, and its proposals for meeting the demand. More than 150 individuals and organizations participated; funding for their expert witnesses and lawyers was provided by the utility pursuant to the Intervener Funding Project Act RSO 1990 c I.13. However, despite the expenditure of \$30 million in intervener funding, the hearing was terminated prematurely, with no outcome; the economic recession had rendered obsolete the utility's demand projections, and put it into a perilous financial position. See generally on the financing of public participation: W A Bogart & M Valiante 'Helping "concerned volunteers working out of their kitchens": funding citizen participation in administrative decision-making' (1993) 31 *Osgoode Hall LJ* (forthcoming).

<sup>5</sup> For a convenient listing of the principal reports, and a brief description of the more important, see M Priest 'Structure and Accountability of Administrative Agencies' in *Law Society of Upper Canada Special Lectures 1992* (1993) (forthcoming).

surrounding, in particular, the status of Quebec,<sup>6</sup> and partly by adjustments made following the introduction of the Canadian Charter of Rights and Freedoms. In addition, administrative law reform that goes beyond mere tinkering tends to raise questions of political and bureaucratic sensitivity, especially when it comes to matters such as the power of ministers to appoint agency members, and any potential expansion of the power of the Department of Justice in relation to administrative tribunals.

The last systematic and comprehensive examination of issues of law and administration in Canada was undertaken by a royal commission in the late 1960s: the Inquiry into Civil Rights in the Province of Ontario (the McRuer Report). The most successful of the recommendations contained in the Report resulted in the introduction in 1971 of a single procedure to reform the remedies of administrative law: an application for judicial review replaced the separate proceedings previously needed for the prerogative orders, and declarations and injunctions.<sup>7</sup>

In most other respects, however, the McRuer Report was a dated and unimaginative document that accepted without question the Diceyan orthodoxy of the Rule of Law and the strict separation of law and politics.<sup>8</sup> Thus, it is assumed that when the state proposed to interfere with common-law rights of individuals, or to confer statutory benefits, the legislature should ensure that the conditions of entitlement, denial and deprivation were defined in the legislation as precisely as possible. The task of resolving disputed claims was therefore a legal question that should be given to administrative tribunals operating, in effect, like junior courts of law. Their procedure was to be adversarial and adjudicative in form, although without the excesses found in civil litigation conducted in courts,<sup>9</sup> and their determinations of questions of law were to be subject to judicial review.<sup>10</sup>

Apart from a nod in the direction of the desirability of the 'expertise' of specialist tribunals, McRuer had no sympathy at all for the idea that the tribunal should use its understanding of the programme it was administering to fill in the inevitable gaps in the statute and to resolve its

<sup>6</sup> Despite the agreements for constitutional change by the federal and provincial governments at Meech Lake in 1987 and at Charlottetown in 1992, neither received the necessary endorsement: the Meech Lake Agreement was not ratified by all the provincial legislatures, and the Charlottetown Accord was roundly rejected in a national referendum.

<sup>7</sup> Judicial Review Procedure Act RSO 1990 c J.1.

<sup>8</sup> For a critique see J Willis 'The McRuer Report: lawyers' values and civil servants' values' (1968) 18 *U Toronto LJ* 351.

<sup>9</sup> Another statutory emanation of the Report was the Statutory Powers Procedure Act RSO 1990 c S.22, a uniform code of administrative procedure applicable to many of Ontario's tribunals. For proposals for reform that take into account a much broader range of procedural and structural issues, see *Directions: Review of Ontario's Regulatory Agencies* (1989) (the Macaulay Report), chapters 4 and 8.

<sup>10</sup> This proposal was not adopted in its entirety. Privative clauses have continued to be used to protect some tribunals (especially those in the area of labour relations and employment law) from judicial review, except for jurisdictional error. However, over the last 20 years there has been a general growth of statutory appeals on questions of law from other administrative tribunals to the courts.

ambiguities. The Report shows similarly little understanding of the institutional character of the more sophisticated administrative agencies, and why an essentially curial model of procedure does not satisfactorily address many of the procedural and substantive issues that face regulatory bodies. McRuer regarded administrative tribunals as essentially court substitutes, to be used when the value of the rights at stake, or the likely volume of claims to be handled, did not justify invoking the courts, except as a last resort to resolve questions of law.

To the extent that it was either impracticable or undesirable to reduce through statutory rules the administration of a programme to a series of justiciable issues, McRuer concluded that any residual discretion involving a significant degree of policy choice should be exercisable by ministers. It was both necessary, and sufficient, that the exercise of political power was subject to political accountability through the traditional political institutions and processes. Thus, McRuer opposed conferring on independent tribunals substantive rule-making power, and thought that the checks imposed through the Legislative Assembly on the making of delegated legislation by the executive rendered a general notice and comment requirement superfluous.

Twenty five years on, it is clear that the goals of ensuring effectiveness, efficiency, fairness and democratic legitimacy cannot be met in the contemporary administrative state through a combination of judicialized public administration and the traditional political process. Indeed, like Dicey, McRuer tended to overlook the complexities and varieties of the governmental machinery that he was describing.

In areas such as land-use planning and local government, and the regulation of major utilities, for example, administrative agencies, operating with a substantial measure of independence from the main line departments, had for years exercised important policy-making functions. Even in areas that appeared more obviously 'judicial', such as labour arbitration and the regulation of labour relations by labour boards composed of nominees of management and organized labour and an independent chair, there had developed a body of procedures, interpretative approaches and remedies that were informed by the experience and perspectives of the specialized decision-makers, and that effectively distinguished them from the ordinary courts of law.

## (2) *Appeals and review: a brief guide*

To attempt here to describe with any degree of accuracy and comprehensiveness the provisions for administrative appeal and review in Canada today would be both tedious and unhelpful. Arrangements at both provincial and federal levels of government have been made without any articulated body of principles of institutional design and without any agency charged with keeping a watching brief on the operation of the administrative machine. None the less, it is possible to identify some general patterns in the absence and appearance of administrative appeals, and, when they do exist, some recurring categories.

(a) *Economic regulation*

I include in this category the statutory regimes established for the regulation of economic activity: the development, transmission to market, and export of oil and natural gas, the regulation of the 'natural monopolies' (electricity and gas, railways, and telephone services, for example), broadcasting, competition, and issuing and trading in securities. Typically, decisions are made by an independent administrative tribunal with original jurisdiction. The hearings that are held before individual orders are made (for example, to approve a tariff of rates that the regulated industry may charge) can be lengthy and complex and can involve a plethora of interested parties and interveners. Regulatory agencies typically have their own staff to assist with the administrative arrangements associated with managing the hearings, providing expertise on technical matters, compiling summaries of the evidence, and giving legal advice.

Over the years, many of these agencies have held non-statutory hearings before formulating policies or guidelines to be used in the exercise of their legal power to decide individual cases. For instance, the Canadian Radio-television and Telecommunications Commission held public hearings at which the representatives of the broadcasting industry, public interest groups and interested individuals made submissions on the Commission's draft policy respecting the minimum Canadian content of programmes that would be required of broadcasters as a condition of their licence.

Typically, there is no provision for a statutory right of appeal on the merits from the decisions of these bodies to some other independent tribunal. More common, however, is a right of the tribunal or of the parties to refer questions of law and jurisdiction to the courts.

An oddity of Canadian administrative law is that there are a number of statutory appeals from independent regulatory agencies to the Cabinet, at either the provincial or federal level, depending on the jurisdiction within which the agency operates. Cabinet appeals have been widely condemned on the grounds that success often depends on short-term political considerations of the most partisan kind, and Cabinet secrecy shrouds the decision-making process.<sup>11</sup> They are also said to undermine the morale of agency members and staff, and to jeopardize the integrity of the agency process. None the less, governments have been very reluctant to abandon this instrument of ex post facto control over agency decision-making, and tend to invoke as justification the conventions of the parliamentary system, and the principle that significant issues of public policy should be decided by

<sup>11</sup> See in particular *Att Gen for Canada v Inuit Tapirisat of Canada* [1980] 2 SCR 735 (duty of fairness not applicable to a Cabinet appeal from a decision of the CRTC determining telephone tariffs: the Cabinet's power was 'legislative' in nature).

those who are responsible to the people through the legislature and the conventions of cabinet government.<sup>12</sup>

*(b) Land-use planning and environmental protection*

As in most countries, the statutory regimes in Canada governing the regulation of land use are extraordinarily complex; the appeal structures alone are difficult to describe in a way that is suitable for present purposes. In Ontario, there is a right of appeal to an independent administrative tribunal, established at the provincial level of government, against many land-use decisions by municipal officials and elected councillors. For example, a local development plan, or a municipal zoning by-law may be appealed on the ground that it is inconsistent with a provincially approved plan, or is otherwise unlawful or unreasonable.<sup>13</sup> At the micro-level, an appeal may also be made to an independent tribunal by a person who has been refused permission to sub-divide land, or to use her land in a way that deviates somewhat from the requirements of the applicable planning by-laws.

Independent administrative tribunals are also entrusted with responsibility for deciding whether to grant the approval that is necessary before development projects that are liable to have adverse effects on the environment are undertaken. Some of these hearings have been monumental in scale, lasting for three or four years.<sup>14</sup> Enormous sums of public money have been spent on funding interveners, and on the necessary preparations by the proponents. Many observers have concluded that these trial-type hearings are a very poor way to make public policy on important, technically complex and multi-faceted issues.<sup>15</sup> However, in a climate in which the traditional political process seems to be able to muster very little public confidence, alternative processes are far from clear.

*(c) Professional and vocational licensing*

The regulation of admission into the professions, and the administration of discipline to members against whom complaints of incompetence or unethical conduct are made, are for the most part left to statutory self-regulatory professional bodies. The investigation of complaints, and the proceedings of the disciplinary committees that adjudicate charges of

<sup>12</sup> See, for example, the Broadcasting Act SC 1991 c 11, which both authorizes the Cabinet to issue to the CRTC 'directions of general application on broad policy matters' (s 7), and retains the right of appeal to Cabinet from CRTC decisions (s 28).

<sup>13</sup> There is no longer an appeal to the Provincial Cabinet from the decisions of the Ontario Municipal Board; however, if the Minister certifies that a zoning by-law or a plan may affect a matter of provincial interest, any decision of the Board is subject to Cabinet review: see Planning Act RSO 1990 c P.13 ss 17(16)-(18), 34(27)-(29).

<sup>14</sup> The best known is the hearing being held by the Environmental Assessment Board into applications to log a vast area of northern forest; the Board is called on to formulate and apply policy that will best accommodate in the public interest the competing claims of (for example) the logging companies, Native peoples, local communities and municipalities, and various recreational users.

<sup>15</sup> See n 4.



unprofessional conduct have become increasingly judicialized. A remarkably wide right of appeal lies from decisions of the disciplinary committees of the various professional bodies to a court of general jurisdiction.<sup>16</sup> Courts have none the less sometimes wondered whether it is appropriate for them to substitute their judgment on a matter that is more within the expertise of the members of the committee than the court.<sup>17</sup> Interestingly, in the area of health discipline complainants who are dissatisfied because the complaints committee of a College has not referred a matter to the disciplinary committee have a right of appeal to an independent board.<sup>18</sup>

In Ontario, there is a common pattern to many of the administrative arrangements made for the licensing of vocations, trades and businesses in the interests of protecting consumers from the dishonest, incompetent and financially unstable. Licence applications are initially determined by municipal or provincial government officials, as are decisions to revoke a licence. Decisions that are adverse to the applicant or licensee are subject to a *de novo* appeal to an independent administrative tribunal. There is commonly a broad right of appeal from this tribunal to the courts.<sup>19</sup>

(d) *Labour and employment law*

The tribunals established to regulate collective labour relations and to protect individual employee rights for the most part determine disputes between non-governmental actors. Of course, public authorities may be involved as employers, although the employment relationship between the Crown and its employees is governed by a separate legal framework which is similar in many respects to that regulating other employment relationships.<sup>20</sup>

Thus, labour relations boards administer the statutory regime of collective bargaining. This function is performed through the exercise of powers to certify: the trade union chosen by a 'collective bargaining unit' of employees to be their sole bargaining agent; to protect the rights bargained for in the collective agreement; and to prevent unfair labour

<sup>16</sup> For example, the Health Disciplines Act RSO 1990 c H.4 s 13(2) provides:

'An appeal under this section may be made on questions of law or fact or both and the court may . . . exercise all the powers of the committee . . . and for such purposes the court may substitute its opinion for that of the committee.'

The bulk of the administrative law case load of the Ontario Court (General Division), including both applications for judicial review and statutory appeals, is handled by a three-judge Divisional Court; while a large number of judges rotate through this court, a core of senior members sit regularly enough to acquire an expertise in administrative law.

<sup>17</sup> See, for example, *Re College of Physicians and Surgeons of Ontario and K* (1987) 36 DLR (4th) 707 at 726.

<sup>18</sup> Health Disciplines Act ss 6–10.

<sup>19</sup> For an overview of the provisions for review and appeal in professional and vocational licensing, see *Access! Task Force on Access to Professions and Trades in Ontario* (1989) ch 11.

<sup>20</sup> For example, the Public Service Staff Relations Act RSC 1985 c P-35 creates a regulatory regime that governs the collective labour relations of the federal Crown and its employees.

practices. Specialist boards perform these functions with respect to the Crown and its employees.<sup>21</sup> Legislation requires disputes arising from the collective agreement to be referred to arbitration, and arbitration may also be used when the parties are unable to agree on the terms of a new collective agreement. Claims by employees that they have been denied their statutory rights are adjudicated by officials with various titles such as employment standards officers,<sup>22</sup> and adjudicators.<sup>23</sup> These statutory protections are particularly important for non-unionized employees.

There are generally no administrative appeals from the decisions of these bodies, although grievances will reach arbitration only after often elaborate domestic remedial provisions have been exhausted. Typically, opportunities for judicial review are kept to a minimum by strong statutory privative clauses.<sup>24</sup> The administration of labour legislation, and of the agreements made by the parties, enjoys a substantial degree of autonomy from the rest of our legal system. It is quite common to find that, in order to correct errors or to deal with problems of inconsistency, these administrative agencies are given a statutory power to reconsider their decisions, either at the instance of a party or on their own motion.

The principal check on the abuse of power lies in the tripartite composition of many of the agencies: the presence on an arbitration or labour relations board of representatives of labour and management, and an independent chair, lends to the process a measure of internal democracy and accountability. Given also that time is often of the utmost importance in labour disputes, and that the employee or union is generally in the financially weaker position, rights of appeal would seriously jeopardize some of the essential statutory aims: facilitating the right of workers to be represented by a union of their choice, keeping to a minimum industrial disruption, and redressing some of the more glaring consequences of the market power imbalance between labour and capital.

#### *(e) Human rights*

Over the last ten years in Canada there has been great interest in legal protection against discrimination, particularly on grounds of race, ethnic origin, religion, gender and sexual orientation. The areas of discrimination that have proved of most importance include employment, housing and the provision of services. The statutory regimes aimed at the elimination of discrimination have been strengthened since 1985 by the Canadian Charter of Rights and Freedoms, which states in s 15 that

<sup>21</sup> At the federal level, the relevant tribunal is the Public Service Staff Relations Board.

<sup>22</sup> See the Employment Standards Act RSO 1990 c E.14.

<sup>23</sup> See the Canada Labour Code RSC 1985 c L-2 s 242.

<sup>24</sup> For example, Ontario's Labour Relations Act RSO 1990 c L.2 confers exclusive jurisdiction on the Labour Relations Board to 'exercise the powers conferred on it by or under this Act and to determine all questions of law and fact that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes' (s 108). It also provides that no decision of the Board shall be questioned or reviewed in any court, and no proceedings shall be taken in any court, whether by way of a prerogative order or declaration or injunction, to review the decision of the Board (s 110).

everyone has the right to equality before and under the law, and has the right not to be discriminated on grounds of race, ethnic origin, sex, religion or political opinion. The Charter has enabled the courts to scrutinize the validity of legislation on the ground that it is discriminatory (including human rights legislation that is arbitrarily underinclusive in its coverage),<sup>25</sup> and has forced governments to identify and correct discriminatory provisions in existing legislation. More generally, the constitutional guarantee of freedom from discrimination has given an enhanced public prominence to issues of equality.

Anti-discrimination legislation is typically administered by an agency (normally called a commission) which is empowered to investigate complaints of unlawful discrimination and to decide whether to refer the complaint for adjudication. The commission is independent of the government departments that have general responsibility in the areas of equality and discrimination, and community relations. If warranted by the evidence, the commission refers the complaint to a board of inquiry, which holds a hearing to determine whether there has been a breach of the statute. The proceeding is adversarial in form, with the commission having carriage of the prosecution of the matter. Members of boards of inquiry are selected from a panel of approved persons and appointed ad hoc to hear cases; they serve in a part-time capacity and are often lawyers.<sup>26</sup>

Appeals from decisions of the boards typically lie to a court of general jurisdiction and are often wide in scope, including questions of fact, discretion and law. However, courts may be reluctant to reverse a finding of fact by a board of inquiry which the board was better placed to make.<sup>27</sup> This may be because the decision turned on the credibility of a witness, who had been seen and heard by the board but not by the appellate court, or because it was one that was essentially a matter of human rights policy, on which the view of the specialist agency was entitled to a measure of curial deference. The complainant has no right of appeal against a decision by the commission not to refer the complaint to a board of inquiry.

The administration of human rights statutes in Canada has become increasingly problematic: many commissions have accumulated substantial backlogs in their case load; delays seem endemic at all stages of the process; and commissions are now increasingly asked to investigate complaints of systemic discrimination, which raise issues of investigative methodology, fact and law that are much more complex than those raised by the kind of discriminatory conduct contemplated when the

<sup>25</sup> See, for example, *Re Blainey and Ontario Hockey Association* (1986) 26 DLR (4th) 728 (exemption of single gender sports teams), *Haig v Canada* (1992) 94 DLR (4th) 1 (omission of sexual orientation from the statutorily prohibited grounds of discrimination).

<sup>26</sup> This description fits, for example, Ontario's Human Rights Code RSO 1990 c H.19, and the Canadian Human Rights Act RSC 1985 c H-6.

<sup>27</sup> This principle has been the subject of two recent decisions by the Supreme Court of Canada: *Zurich Insurance Co v Ontario (Human Rights Commission)* [1992] 2 SCR 321; *Dickason v University of Alberta* (1992) 95 DLR (4th) 439. However, no such deference is extended to human rights tribunals' interpretations of their enabling statutes: *Canada (Att-Gen) v Mossop* [1993] 1 SCR 554.

legislation was first enacted.<sup>28</sup> The reduction in the scope of the appellate jurisdiction of the courts would help to a limited extent to reduce costs and delays.

The Ontario legislation designed to eliminate gender-based inequalities in pay has its own administrative structure.<sup>29</sup> The Equal Pay Commission is the educational, investigative and prosecutorial branch, while the adjudication of complaints is entrusted to the Pay Equity Hearings Tribunal, which sits in panels of three. Members of the Tribunal are drawn from management and labour, with an independent chair. The Tribunal's decisions are protected from judicial review by a privative clause.<sup>30</sup>

(f) *Immigration and refugee determination*

The Immigration and Refugee Board is Canada's largest administrative agency by far.<sup>31</sup> On the immigration side of its jurisdiction, it hears appeals on the merits from decisions made by officials within the Immigration Department: the deportation of permanent residents, the refusal of a visa to a sponsored applicant, and the refusal to admit a person who either has a valid visa or has been recognized in Canada as a Convention refugee.

These represent only a small proportion of the decisions made by immigration officials; other decisions (such as the removal of illegal entrants and overstaying visitors, the refusal of a visa to a person other than a sponsored immigrant, or a refusal to vary a person's immigration status while in Canada) are, with leave of the Court subject to judicial review on limited grounds in the Federal Court of Canada. Decisions of the Board are similarly subject to judicial review in the Federal Court, but again only with leave of the Court. There is no appeal against a refusal of leave and an appeal against a dismissal of the application itself lies only if, when rendering a judgment, the judge certifies that a serious question of general importance is involved! Considerations of cost, and the substantial backlog of cases that has built up in the Federal Court, have no doubt led to the strict limitation of access both to the courts and to the administrative appellate tribunal.

Unlike the Appeal Division, the Convention Refugee Determination Division of the Board has original jurisdiction to determine claims to refugee status made at a port of entry, or by persons already in Canada. Its decisions are subject to judicial review on the traditional grounds in the Federal Court, but only with leave. On its refugee side, the Board has no general jurisdiction to reconsider its decisions.

<sup>28</sup> See the recent report of the Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (1992).

<sup>29</sup> Pay Equity Act RSO 1990 P.7.

<sup>30</sup> Section 30(1) (the Tribunal's decision is 'final and conclusive for all purposes'). On the limited effect of finality clauses on the standard of review see: *Dayco (Canada) Ltd v CAW* [1993] 2 SCR 230.

<sup>31</sup> The provisions described in this paragraph are found in the Immigration Act 1976-77 c 52 (as amended by Bill C-86, 1992) ss 82(1)-82(2), 83.

*(g) Police, parole and prisons*

Arrangements exist at both the provincial and federal levels of government in Canada for the independent investigation and adjudication of public complaints against the conduct of police officers.<sup>32</sup> A guiding principle is that primary responsibility for dealing with complaints rests within the force. Even when a complaint is referred to the independent body, the initial response will normally be to attempt to have the matter dealt with by senior officers. If this does not prove satisfactory, the public complaints body may conduct its own investigation, although its substantive powers are frequently limited. There are typically no rights of appeal from bodies of this kind, and applications for judicial review are extremely rare.

Decisions over the grant and revocation of parole are made by an independent agency, the National Parole Board.<sup>33</sup> The Board's proceedings are conducted in accordance with the principles of procedural fairness, including an oral hearing in many situations. However, the need to protect the identity of those who supply valuable information often means that applicants for parole, or those whose parole has been revoked, can expect significant limitations to be imposed on the disclosure of information in the possession of the Board when this might prejudice sources of confidential information.<sup>34</sup> Again, there is no right to an administrative appeal, and those dissatisfied with the Board's decisions must resort to judicial review.

The administration of prisons has become increasingly subject to judicialized procedures. Hearings are held to review inmates' confinement in 'solitary', or other unusually oppressive conditions, and their transfer to higher security institutions.<sup>35</sup> Prison discipline is also administered by tribunals that conduct hearings. In substance, many of these hearings are appeals from decisions taken by prison officials.

Because of the personal liberty interests involved, the Charter has had an important influence on exposing the decision-making processes of those administering parole and prisons.<sup>36</sup>

<sup>32</sup> At the federal level, for example, see the Royal Canadian Mounted Police Act RSC 1985 c R-10 (as amended by SC 1990 c 8). s 45(25) et seq.

<sup>33</sup> Parole Act RSC 1985 c P-2.

<sup>34</sup> Parole: Regulations s 17(5) permits the Board to rely on information without disclosing it to the person concerned where the Board is of the opinion that disclosure could reasonably be expected to 'threaten the safety of individuals' or to impede investigations by inter alia revealing the source of information received in confidence. However, courts have resorted to s 7 of the Canadian Charter of Rights and Freedoms (no deprivation of liberty except in accordance with the principles of fundamental justice) to justify their scrutinizing more closely claims made under s 17(5), when non-disclosure would jeopardize the fairness of the hearing: see, for example, *Gough v National Parole Board* [1991] 2 FC 117.

<sup>35</sup> See, for example, *Cardinal v Director of Kent Institution* [1985] 2 SCR 643; *Demaria v Regional Classification Board* [1987] 1 FC 74. And see A Manson 'The role of statutory duties in prison transfer cases' (1992) 2 *Admin L Rep* (2d) 33.

<sup>36</sup> See, for example, n 34, and *Howard v Inmate Disciplinary Court, Stony Mountain Institution* [1984] 2 FC 642.

*(h) Income security*

This is the area of public administration in Canada where administrative appeals are most prevalent. Typically, of course, the initial decision on a person's entitlement to a benefit, or its amount, will have been taken by an official in the relevant government department, or other bureaucracy, on the basis of the file that has been compiled. The following examples illustrate the variety of review mechanisms available under Canadian programmes.

All Provinces have schemes for the compensation of workers injured at work, which are typically administered by an agency that is independent of the Executive. Until relatively recently, there were no external appeals against these agencies' decisions, although most boards developed a system of internal appeals. Indeed, board decisions are often shielded by statutory preclusive clauses, which the courts have tended to take more seriously than similar clauses in other labour-related legislation. Workers' compensation is an insurance based scheme; premiums have typically been set by reference to the level of successful claims made against an industry as a whole, rather than to the record of individual employers.

At one time, the Ombudsman investigated complaints by dissatisfied claimants; however, this was never a very satisfactory alternative to an independent adjudication by a specialist tribunal. As a result, Ontario instituted a right of appeal to an independent tribunal, the Workers' Compensation Appeals Tribunal, which hears appeals on the merits after the board's internal appeal remedies have been exhausted.<sup>37</sup> Like other agencies in the labour law area, the Tribunal is tripartite in composition, and there is no appeal from its decisions to a court. Applications for judicial review have met with little success.

Because an award in favour of a worker has no immediate effect on the premium payable by the claimant's employer, the claim is generally not opposed at the hearing by the employer.<sup>38</sup> As a result, it has been necessary to develop procedures suitable for a more inquisitorial type of proceeding. For instance, the Tribunal has assumed a positive responsibility for ensuring that the cases that come before it are decided correctly; the Tribunal does not necessarily limit its consideration to those issues raised by the claimant and, when represented, the employer. The statute has created the Office of Workers' Adviser to assist claimants.<sup>39</sup>

Unemployment insurance is a federal programme, and is administered at first instance by Ministry officials. There is a first level of external de novo appeal to a tripartite tribunal, which is assembled ad hoc. A further appeal on questions of law lies to an Umpire, often a judge of the Federal

<sup>37</sup> Workers' Compensation Act RSO 1990 c W.11.

<sup>38</sup> However, this is likely to change if the government implements a proposal that insurance premiums should be set by reference to the claims successfully made against individual employers, rather than by the claim record of the relevant industry as a whole.

<sup>39</sup> Workers' Compensation Act (n 37) s 96.

Court of Canada, whose decisions are subject to judicial review in the Federal Court of Appeal.

Welfare programmes are a provincial responsibility, although, because partially funded by Ottawa, they must comply with federal statutory standards. Eligibility and quantum are assessed by departmental officials, whose decisions are reviewable on the merits by an independent administrative tribunal. A further appeal lies from the tribunal to the courts on questions that are not purely factual.<sup>40</sup>

### (3) *Some conclusions*

It would be futile to attempt to extract from the patchwork of provisions for administrative appeals that I have described above any underlying body of principles from which it could be said to have been designed. However, a few generalizations may be made.

First, the growth of the administrative state has eroded on a massive scale the traditional Westminster model of democracy based on parliamentary accountability for public policy. In most areas of public administration in Canada, main line government departments have shed much of their former responsibility for the formulation and implementation of policy. These are functions that to a large extent administrative agencies perform, either at first instance or on appeal, in the course of delivering the programmes entrusted to them.

Of course, agencies enjoy differing degrees of autonomy, and the Executive can limit their independence in a variety of ways. For example, through its control of the legislative process the government can set the parameters of the regulatory agenda, and establish the legal framework within which the agency must operate. The government's powers over the purse and the appointment of members can also be decisive in influencing the performance of administrative agencies. Ministerial directives and guidelines on questions of policy, and Cabinet appeals against agency decisions, can also serve to link agencies more closely to the traditional political processes. None the less, there have been debates from time to time, and in particular contexts, about the constitutional propriety in a parliamentary system of leaving the responsibility for making policy in areas of great public interest to agencies which are not directly accountable to parliament. For the most part, though, the openness of agency decision-making (in the contexts of both general policy-making and its particular application) and the opportunities for direct public participation are regarded as more than adequate democratic alternatives to the doctrine of ministerial responsibility.<sup>41</sup>

<sup>40</sup> For a typical scheme, see Family Benefits Act RSO 1990 c F.2 ss 14, 15.

<sup>41</sup> See further H N Janisch 'Independence of administrative tribunals: in praise of structural heretics' (1987) 1 *Canadian J Admin L & Practice* 1; D J Mullan in R Creyke (ed) *Administrative Tribunals: Taking Stock* (1993). But for a traditional rule-of-law hostility to the issue by an agency of an elaborate and detailed 'policy statement', see: *Ainsley Financial Corp v Ontario Security Commission* Ont Ct (Gen Div) 13 August 1993.

Second, administrative appeals are generally not provided from decisions of independent tribunals that exercise original or merits review jurisdiction. However, appeals to the courts on the merits are common from the decisions of tribunals charged with deciding a person's fitness to practise a profession. Appeals are provided in these circumstances because of the seriousness for the individual of an erroneous decision that may prevent her from earning her livelihood, the essentially adjudicative nature of the issues and, perhaps, a lack of confidence in the first level decision-maker. The similarly broad right of appeal that is granted to those found guilty of unlawful discrimination may be subject to the same kind of explanations. Despite the width of these appeal rights, courts have shown some deference to the findings of fact made by the agencies in question. None the less, I suspect that the legislature is not about to reduce the scope of appeal to errors of law, even though this would still enable the appellate court to correct egregious errors of fact and unreasonable exercises of discretionary powers.

Third, appeals to an independent administrative agency are commonly provided from benefit-entitlement decisions that are made at first instance within the bureaucracy of a government department: income security and immigration, for example. Two factors seem to make administrative appeals to independent tribunals appropriate in these situations. First, the initial decision will often have been taken without the procedural protections of a hearing: for example, the individual may not have had full disclosure of the material on which the decision was based, and an opportunity to respond. Second, the initial decision is made within an institution that has, or is seen to have, an interest in the outcome: fairness requires that such decisions should be open to independent scrutiny on broad grounds.

The fourth general observation to be made is that the roles assigned to the courts under the various statutory schemes described in this paper vary widely. Some statutes confer the broadest possible right of appeal on the merits, while others confine the courts to the narrowest scope permitted by the constitution, review for jurisdictional error. However, in practice, the scope and intensity of judicial review are not perhaps as different as the diversity in their statutory terms of reference would suggest.

Whatever the statutorily prescribed scope of judicial review, the courts are particularly interested in issues of procedural propriety, the interpretation of legislation, and unreasonableness in both fact-finding and the exercise of discretion. Conversely, even when there is a broad right of appeal, courts may be reluctant to substitute their view of the facts for that of the agency.<sup>42</sup> Variations in the scope and intensity of judicial review tend to be differences of degree, rather than of kind.

<sup>42</sup> See n 27; see also *Union Gas Co of Canada v Sydenham Gas and Petroleum Co* [1957] SCR 185 (whether 'public convenience and necessity' justifies the construction of a gas pipeline was not a question of fact, and therefore was not subject to appeal).



Naturally, this is not to deny that cases can be won and lost by virtue of the particular statutory definition of the role of the court in reviewing the decisions of the agency in question. Indeed, the Supreme Court of Canada has recently stated that reviewing courts should normally show deference to an administrative tribunal's interpretation of its own legislation only if its decisions are protected by an ouster clause.<sup>43</sup> None the less, it is important to bear in mind that other considerations may also shape a court's response: its view of the competence of the agency to decide the issue in dispute, the precision of the language of the enabling statute, the nature of the individual rights at stake, the reputation of the agency and the thoughtfulness of its reasons for decision, and the degree of administrative disruption and delay likely to be occasioned by judicial intervention, for instance.

(4) *Does it work?*

It would be a nigh impossible task to provide within the confines of this paper an answer to the question: has Canada developed a system of appeals and review that works? To start, one would need to define the objectives that administrative appeals and judicial review should serve. My definition of these would include: improving the quality of the decisions made in terms of accuracy of fact-finding, consistency, fidelity to statutory mandate, thoughtfulness in the exercise of discretion, and respect for fundamental rights; and ensuring that appropriate procedures are observed that enhance the reliability of the agency's decisions, its democratic legitimacy, and its legal and political accountability. At the same time, any successful system of review must also provide value for money, that is, the benefits that it brings must more than offset the inherent costs of a second look. I include in the category of 'costs' items such as delay, diversion of resources, strengthening the position of already powerful interests at the expense of the less well placed, and the risk that, because external reviewers may not appreciate the problem in all its ramifications, the second decision may be worse than the first.

The absence of any sustained empirical research makes it impossible to assess to what extent Canada's arrangements for review and appeal are achieving any of these objectives. Indeed, it is in my view a grave deficiency that we have no kind of mechanism for monitoring the operation of the administrative system with an eye to quality control and value for money. A study commissioned by the government of Ontario, *Directions: A Review of Ontario's Regulatory Agencies* (the Macaulay Report), recommended in 1989 the creation of a body with co-ordinating and overseeing functions with respect to the Province's tribunals. In particular, Macaulay lamented the lack of attention paid to the recruitment and continuing education of tribunal members and to the development of a satisfactory career structure, the needless proliferation of tribunals and procedural rules, and the failure to develop principles of tribunal accountability.

<sup>43</sup> *Canada (Att Gen) v Mossop* (n 27).

Otherwise, one is left with anecdotal and impressionistic evidence about the efficacy of Canada's appeal and review provisions. For the most part, there is no clamour to add new layers of appeal where none now exist; even the demands at one time made by refugee activists for an appeal on the merits from the rejection of claims by the Immigration and Refugee Board are seldom heard today. I suspect there is a broad consensus to the effect that what ails administrative decision-making in Canada is unlikely to be cured by restructuring the existing provisions for appeal and review. It will be more profitable to improve the performance of the tribunals that we have by focusing attention on the sorts of issue identified by Macaulay and others.

As for the role of judicial review, there is, in my view, only a weak case for maintaining rights of appeal from independent administrative tribunals on questions of fact, and on the merits of the exercise of discretion; the costs are apt to outweigh the benefits. Under the Judicature provisions of our constitution, judicial review for jurisdictional error is guaranteed, at least in respect of tribunals created by provincial legislation. In addition, because it is part of the constitution and as such is the supreme law of the land, the Canadian Charter of Rights and Freedoms effectively ensures that judicial redress is available in the event that an administrative agency violates a constitutionally protected individual right.

Thus, the only legislative choices to be made are from among the provision of a right of appeal on questions of law, statutory silence on access to the courts from the tribunal in question, and the insertion of a privative clause restricting judicial review to procedural unfairness and other species of jurisdictional error. Increasing the specialization of the courts that exercise appellate and supervisory jurisdiction over the administration would, I believe, be a step in the right direction towards ensuring that judicial review makes its proper contribution to achieving the objectives of the administrative system.<sup>44</sup>

### III LESSONS FOR SOUTH AFRICA?

Before considering what lessons for the design of provisions for appeal and review of administrative decision-making in the new South Africa may be suggested by Canadian experience, it is worth noting two points made in a recent article by Terry Ison.<sup>45</sup>

First, he argues, arrangements for appeals and review should be regarded primarily as part of the decision-making process and substan-

<sup>44</sup> The Federal Court of Canada has virtually exclusive jurisdiction to review administrative action taken by federal agencies, and since these cases comprise the largest part of its docket, the Court can be considered to be a specialist in administrative law. Moreover, an unusually high percentage of its judges have been appointed from the public sector: the federal civil service, administrative agencies and the Cabinet, for example. Ontario's Divisional Court is no more than 'semi-specialized' (see n 16); the Ontario Court of Appeal, and the courts in other provinces, remain truly generalist. For a comparative perspective, see S H Legomsky *Specialized Justice* (1990).

<sup>45</sup> T G Ison 'Appeals on the merits' (1992) 30 *Osgoode Hall LJ* 139.

tive content of the particular programme, and assessed in terms of their 'fit' within that scheme. An approach to institutional design based on 'general principles' may hold powerful attractions for lawyers, but is liable to be overly concerned with issues of individual 'fairness' and insufficiently attentive to the needs and diversity of programmes.

Second, Ison reminds administrative reformers that the best option for any given programme may be that there should be no external review of a decision. He points out that appellate provisions carry inevitable costs, of the kind outlined earlier in this paper, and suggests that the existence of an appeal to an outside body may divert attention from ensuring that the primary decision-making processes are as open, accountable, reliable and effective as possible. He would confine the courts to the smallest role that is consistent with the constitution, because of their limited institutional competence to improve the ability of agency performance, the strong ideological commitment of the common-law mind and methodology to the preservation of private-law rights and the adversarial model of procedure, and the delays and expense associated with litigation in the courts.

In my view, these arguments provide a useful antidote to the ingrained habits of thought of many lawyers and administrative law reformers. Moreover, I am sympathetic to Ison's 'particularist' approach to the creation of rights of appeal and review. However, the arguments seem to me to be overstated, and out of step with the importance attached by those shaping the future South Africa to the independent review of government decision-making.

I would suggest that both appeal on the merits and judicial review have useful contributions to make in any system of public administration with objectives that include openness of process, accountability, consistency, fidelity to the expressed will of the legislature, and a respect for rights and values that transcend those that are of most immediate concern to the agency. The challenge is to ensure that these objectives are pursued at the least cost to agency effectiveness and egalitarian aspirations, and with appropriate regard to the public resources available.

### (1) *Appeals on the merits*

By 'on the merits', I mean an appeal that requires the appellate body to determine whether the first instance decision-maker found the facts and law correctly,<sup>46</sup> and to substitute its view of the proper exercise of any discretion.

#### (a) *No role for the courts*

It is difficult to think of a situation in which it would be appropriate to provide an appeal on the merits from an administrative decision to a

<sup>46</sup> I am not concerned here to distinguish among the different kinds of appeal on the facts. Suffice it to say that they range from factual redeterminations *de novo*, to appeals in the strict sense that are limited to the identification of errors made by the tribunal in the facts found, perhaps aided by fresh evidence that was not available at first instance, but without regard to events occurring after the decision was made.

court of general jurisdiction. Courts are too costly to be used to correct isolated errors, and are inaccessible to most citizens. Nor is there any reason to believe that courts possess institutional characteristics that make them appropriate for this expansive role in a decision-making process that the legislature has thought fit to entrust primarily to a specialist administrative body.

*(b) Few appeals from independent administrative agencies*

When responsibility for initial decision-making has been entrusted to an independent administrative agency it will rarely be justifiable to provide for an appeal on the merits,<sup>47</sup> provided that the agency has full fact-finding powers, allows for a proper degree of participation by those affected by its decisions, and provides reasons on request.

A power to reconsider decisions may be a more cost effective means of correcting errors. Multi-member agencies that sit in panels may also develop other strategies for ensuring that inconsistencies are minimized and panel decisions are informed by other agency members' experience. Such strategies may include the issue of interpretative guidelines and policy statements; the review by agency staff of draft reasons for decision; and meetings of the full agency to consider cases that a panel has heard, but not yet decided.

Concerns about the 'acceptability' of an administrative decision that is not subject to an appeal may be met by ensuring that the members of the tribunal have the personal qualities, skills and knowledge necessary for their task. It is also important to ensure that agencies' membership is drawn from as broad a cross-section of society as possible, including, where appropriate, persons whose experience will enable them to form a sympathetic understanding of the position of those whose cases they must decide. A combination of full-time senior tribunal members, and part-time, or shorter term, appointments may provide the right blend of continuity and professional expertise on the one hand and the diverse perspectives of community representatives on the other.

*(c) Appeals from 'closed' bureaucracies*

Appeals on the merits are liable to be most appropriate when the initial decision concerns individual statutory entitlements or liabilities, and has been made within a government or municipal department or some other 'closed' bureaucratic structure. It seems to me doubtful whether any amount of internal quality control will ever satisfy the legitimate claims to 'fairness' by the recipients of an unwelcome decision, especially when the decision-maker is also in reality the claimant's opponent. However, because the effectiveness of a right of appeal as a remedy depends on the resources, both material and personal, of individuals, it is important that

<sup>47</sup> An appeal to an independent tribunal may be justified when, for example, the initial decision is taken at a local level, and the view of a regional or national body is regarded as valuable.

continuing efforts are made to minimize errors at first instance and to provide internal checking mechanisms.

(d) *A single appeal tribunal?*

An important issue is whether administrative appeals should be centralized within a single institution, along the lines of the Administrative Appeal Tribunals that have been pioneered in Australia at both the federal and state levels of government. Without a fuller understanding of the operation of these bodies, I simply do not know whether the Australian model is likely to suit South Africa better than the more traditional network of specialist tribunals. However, my inclination is for the latter.<sup>48</sup>

I suspect, for example, that it may be easier for smaller and more specialized bodies with lower public profiles to develop procedures that are appropriate for their functions. A criticism made of the AAT is that it has clung too closely to a formal and adversarial model.<sup>49</sup> It is also easier to ensure local access to smaller, specialized tribunals than to a large, centralized body. I wonder, too, whether a centralized appeals body is likely to be as sensitive as single focus appellate bodies to the nuances of all the programmes from which appeals arise.<sup>50</sup> Australian experience also indicates that the existence of a centralized administration review body, such as the AAT, does not altogether dispense with the need for an intermediate level of specialist appeal tribunals.<sup>51</sup> Another consideration is that of expense.<sup>52</sup> In the year 1990–91, the AAT alone had a budget of approximately \$12.5 million.<sup>53</sup> Lastly, South Africa already has a number of specialist appeal tribunals,<sup>54</sup> and unless there is reason to think that they cannot satisfactorily be adapted to the new

<sup>48</sup> A view that I subsequently discovered is shared by the South African Law Commission (Working Paper 34), and by fellow panelist Karthy Govender (see Govender's paper in this volume). But see L Baxter *Administrative Law* (1984) 267–72 who, after noting some of the difficulties, favours the adoption of a centralized appeal tribunal with incremental additions to its jurisdiction. And for a balanced, but favourable account, see Cheryl Saunders' paper in this volume.

<sup>49</sup> See, for example, M Allars 'The Australian Administrative Appeals Tribunal: procedure and review' 1990 *Public Law* 172; L Curtis 'Crossing the frontier between law and administration' (1989) 58 *Canberra Bulletin of Public Administration* 57–8; J M Sharpe *The Administrative Appeals Tribunal and Policy Review* (1986) 16–18.

<sup>50</sup> On the other hand, excessive specialization and fragmentation within a centralized tribunal may erode some of the advantages of such a body, that is, the ability to bring to particular issues a perspective informed by a broad experience with issues of public administration.

<sup>51</sup> Specialized tribunals exist to hear appeals from departmental decisions in respect of social security, veterans' benefits, student assistance, and migration.

<sup>52</sup> This is likely to be of particular concern in South Africa, both generally because of the high demands that programmes of social reconstruction will place on limited resources, and, more particularly, because of the size of a centralized tribunal that would be needed to review decisions of public administration at the national and sub-national levels of government.

<sup>53</sup> *Administrative Appeals Tribunal Annual Report for 1990–91* 58–9.

<sup>54</sup> Baxter (n 48) 180–3, 262–7.

constitutional and administrative regimes, there is something to be said for working from a familiar, functioning model.

(e) *Other structural and procedural issues*

Of course, answering the question of whether to adopt a single institution or a multiplicity of administrative review tribunals only starts to address the issues. How best can we reconcile the desire for informality and accessibility with the fair resolution of those complex issues of fact, law and policy which the administration of modern regulatory and benefit-conferral programmes inevitably produces? What should be the terms of appointment and qualifications of tribunal members, and who should appoint them? What should be the relationship between the tribunal and the legislature: are accountability and independence necessarily irreconcilable objectives? Should the appeal be *de novo*, or restricted to the material that was before the body a quo? To what extent should the tribunal defer to any government policy relevant to the making of a discretionary decision?<sup>55</sup> Without a context, thinking about these and similar questions cannot be pursued very far beyond rather mundane generalities.

(2) *Judicial review*

(a) *Scope*

Other papers in this volume deal fully with the grounds of judicial review and so my remarks about the role of the courts can be brief. The principal purpose served by judicial scrutiny is to ensure that constitutional values are observed by agencies of the government in their administration of statutory programmes. By 'constitutional values' I mean to include respect for the duly expressed will of the legislature, for the established relationships among the organs of the state, for the democratic foundations of the state, and for basic human rights.

The legitimacy of the judiciary's assumption of this role rests first and foremost on its institutional independence from the other branches of government, and on the confidence of the public. In addition, the breadth of experience that generalist judges bring to a problem can be a valuable counterbalance to a 'tunnel vision' tendency amongst administrators. The openness of the judicial process also gives to the courts a claim to play at least a residual role in overseeing the exercise of public power.

As we are all aware, however, a surfeit of judicial review can be as damaging as its absence. I have already indicated that I do not favour

<sup>55</sup> This issue has proved particularly troublesome to the AAT: for a recent contribution to the debate, see I Thompson & M Patterson 'The Federal Administrative Appeals Tribunal and policy review: a re-assessment of the controversy' (1991) 2 *Public Law Review* 243. It has surfaced less frequently in Canada. When it has, the courts have said that tribunals may take relevant government policy into account, but, in the absence of a statutory direction to the contrary, may not regard it as binding: *Innisfil (Township) v Vespra (Township)* [1981] 2 SCR 145. See generally, J M Evans et al *Administrative Law: Cases, Text and Materials* 3 ed (1989) 680-5, and n 41.

using this expensive and unwieldy mechanism to remedy factual errors, or to provide a second opinion on the appropriate exercise of a discretion. Whether the courts' scrutiny of administrative decisions should be confined to issues of jurisdiction and rationality (however defined), procedural fairness and constitutionally protected rights, or expanded to an appeal on all questions of law is best resolved within particular decision-making contexts.

(b) *Constitutional status*

A further question for consideration is whether the courts' jurisdiction to review administrative action should be in some way constitutionally entrenched.

(i) *Canada*

The Canadian constitution provides two bases for judicial review. First, provincial legislatures cannot oust the supervisory jurisdiction of the superior courts to review for jurisdictional error the decisions of administrative tribunals that otherwise have been validly created by provincial statute. This constitutional limitation on legislative competence was enunciated by the Supreme Court of Canada comparatively recently in *Crevier v Attorney General of Quebec*.<sup>56</sup>

The textual origin of the constitutional right to judicial review on jurisdictional grounds is to be found in the judicature provisions of the constitution, and in particular in s 96 of the Constitution Acts 1867–1982, which vests in the federal executive the authority to appoint the judges of the superior, county and district courts. Over the years, this apparently simple appointing power has been given substantive content by the courts.<sup>57</sup> In order to prevent the provinces from undermining the efficacy of this head of federal authority by eroding the power of federally appointed judges, and transferring it to provincially appointed bodies, the Supreme Court has held that no provincially created body may exercise a judicial power that is identical or analogous to one that has historically been exclusively within the jurisdiction of a superior, county or district court, unless it can be said to be an essential part and parcel of an administrative scheme of regulation. This line of authority was extended by the Court in *Crevier* to include a clause in a provincial statute which, properly construed, completely removed an appellate administrative tribunal from review by the superior court in Quebec. For a statute to confer on a provincially appointed body immunity from judicial review, even for jurisdictional error, endowed the tribunal with an attribute associated only with a superior court, and was to that extent invalid.

Although this case may seem at first blush to be concerned with the division of powers between the federal and provincial levels of government, in the long run it is likely to be regarded as being more

<sup>56</sup> [1981] 2 SCR 220.

<sup>57</sup> See generally P W Hogg *Constitutional Law of Canada* 3 ed (1992) 184–200.

broadly based.<sup>58</sup> It is not difficult to see in the court's reasoning the idea that the rule of law in a democracy requires the judiciary, whose independence from the executive is guaranteed by the constitution, to ensure that administrative agencies with the power to determine individual rights do not exceed their statutory powers. In effect, the court elevated to the level of constitutional law what had previously been a presumption of statutory interpretation applied to privative clauses.

The second restriction on the ability of legislatures to oust judicial review of administrative action is derived from the paramouncy section of the constitution, which makes it explicit that the constitution, including the Canadian Charter of Rights and Freedoms, is the supreme law of the land, and that any law that is inconsistent with it is, to the extent of the inconsistency, of no force and effect.<sup>59</sup> The relevance of this provision for present purposes is that, since the Charter applies both to provincial and federal legislatures and governments, it entrenches the power of the courts to review the validity of statutes, delegated legislation, tribunal decisions, or any other form of administrative action by a governmental body, on the ground that they violate a right protected by the Charter.

The following examples illustrate the impact that the Charter has had on Canadian administrative law. A ban imposed by the manager of a major airport on the distribution of leaflets in the airport was held to be an invalid restriction of the right to freedom of speech guaranteed by the Charter.<sup>60</sup> Statutory limitations on public access to hearings held by administrative tribunals have also been found to violate freedom of speech, which includes freedom of the media.<sup>61</sup> The right to be free from discrimination has been used to attack the exclusion of agricultural workers from the jurisdiction of a labour relations board to certify a trade union chosen by workers to be their collective bargaining agent,<sup>62</sup> and the limitation to adoptive parents of a provision for parental leave.<sup>63</sup>

Section 7 of the Charter is of particular importance in the context of this discussion. It provides that everyone has the right to life, liberty and security of the person, and the right not to be denied those rights other than in accordance with the principles of fundamental justice. The scope of the phrase that triggers the application of s 7 review, 'life, liberty and security of the person', will inevitably be the subject of judicial elaboration over time. To date, however, it has been held to include: the right of a claimant to refugee status not to be removed to a country

<sup>58</sup> However, unlike the English courts (see *Page v University of Hull* [1993] 1 All ER 97 at 106-7), Canadian courts have purported to maintain a distinction between review for error of law, and review limited to jurisdictional error: see *Canada (Att Gen) v Mossop* (n 43); and for a critical examination of the Court's prior decisions, see J M Evans 'Jurisdictional review in the Supreme Court: realism, romance and recidivism' (1991) 48 *Admin LR* 255.

<sup>59</sup> Constitution Act 1981 s 52(1).

<sup>60</sup> *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139.

<sup>61</sup> *Pacific Press Ltd v Canada (Minister of Employment and Immigration)* [1991] 1 FC 327.

<sup>62</sup> See *Cuddy Chicks Ltd v Ontario (Labour Relations Board)* [1991] 2 SCR 5.

<sup>63</sup> *Schachter v Canada* [1992] 2 SCR 679.



where she fears persecution,<sup>64</sup> a woman's decision not to continue her pregnancy to term,<sup>65</sup> and the grant and revocation of parole from prison.<sup>66</sup> 'Property' was deliberately omitted from the list of protected interests on the ground that it might unduly restrict public programmes in such areas as land-use planning, environmental protection, the regulation of industry, and employment and labour relations. However, there is obviously no bright line to be drawn between liberty and security of the person, on the one hand, and interests that have an economic aspect on the other: examples include the practice of a profession, a tenancy in public housing, and the receipt of social security benefits, for example.<sup>67</sup>

Once an individual has established that the interest adversely affected qualifies as 'life, liberty or security of the person', it must be shown that the governmental action in question was not in accordance with 'the principles of fundamental justice'. This phrase includes the duty of procedural fairness as it is understood in administrative law.<sup>68</sup> Thus, in one of its most important early Charter decisions, the Supreme Court of Canada struck down the provisions of the Immigration Act dealing with the determination of claims to refugee status made by persons at a port of entry, on the ground that the Act implicitly excluded an oral hearing, and did not provide for proper disclosure by the Minister, before the claimant was removed to the country of alleged persecution.<sup>69</sup> The courts have also used the Charter to exact higher procedural standards from bodies with the power over liberty and security of the person (the administration of prisons, inmate discipline, and parole come particularly to mind) than they might otherwise have done through the common-law duty of fairness.<sup>70</sup>

It is also clear that 'the principles of fundamental justice' are not confined to matters of procedural fairness in the traditional sense. Rather, they have been held to connote 'the basic tenets and principles . . . of our legal system',<sup>71</sup> and, in the context of administrative proceedings, have included undue delay and unnecessarily vague statutory decision-making standards.<sup>72</sup>

<sup>64</sup> *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177.

<sup>65</sup> *R v Morgentaler* [1988] 2 SCR 30.

<sup>66</sup> See, for example, *Gough v National Parole Board* [1991] 2 FC 117.

<sup>67</sup> See further, I Johnstone 'Section 7 of the Charter and constitutionally protected welfare' (1988) 46 *University of Toronto Faculty of Law Review* 1; M Jackman 'The protection of welfare rights under the Charter' (1988) 20 *Ottawa L Review* 257.

<sup>68</sup> On the relationship between the constitutional and common-law standards of fairness, see J M Evans 'The principles of fundamental justice: the constitution and the common law' (1991) 29 *Osgoode Hall LJ* 51.

<sup>69</sup> *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177.

<sup>70</sup> *Howard v Inmate Disciplinary Court, Stony Mountain Institution* [1984] 2 FC 642.

<sup>71</sup> *Reference re Section 94(2) of the BC Motor Vehicle Act* [1985] 2 SCR 486 at 512 (per Lamer J).

<sup>72</sup> *R v Morgentaler* [1988] 2 SCR 30; *Saskatchewan Human Rights Commission v Kodellas* (1989) 60 DLR (4th) 143.

(ii) *South Africa*

The implications of entrenching in the constitution the courts' power over public administration need to be carefully thought through. There would seem to be three principal devices that could be used to secure different degrees of constitutional entrenchment.

First, the paramountcy of the constitutional guarantees of whatever fundamental rights are included in a bill of rights would in itself ensure that the courts were not precluded from reviewing legislation and administrative action on the ground that it violated a constitutionally protected right. How much constitutional protection such a provision gives would depend, of course, on the definition of the rights included in the bill of rights. A concern to protect basic rights from arbitrary or otherwise unfair infringement might be met by a clause similar in its essential thrust to s 7 of the Canadian Charter of Rights and Freedoms. Guarantees of freedom of speech, freedom from discrimination, and freedom from arbitrary arrest or search and seizure, are also apt to be important protections against the abuse of administrative power. The crucial point to note is that it would not be open to parliament to override by legislation the courts' determination that the design or administration of a public programme violates a constitutionally protected right.

Second, a new constitution could also provide that parliament may not remove the supervisory jurisdiction of the courts over the administration. The Australian constitution does this by conferring on the High Court the power to issue the prerogative writs of certiorari, prohibition and mandamus against federal officers.<sup>73</sup> A somewhat analogous result has been reached in Canada by a more circuitous route. However, the Supreme Court of Canada has as yet entrenched only review for jurisdictional error by administrative tribunals of an adjudicative nature created by provincial legislation. It is unclear to what extent, outside the Charter, the constitution also guarantees the review for ultra vires of other governmental action such as decisions of federal tribunals, or the exercise of discretionary powers by Ministers.

The point to note here is that a constitutional ban on ouster clauses does not prevent parliament from reversing a judicial ruling that an administrative agency lacked the jurisdiction that it claimed when it made the impugned decision. Amending legislation may expressly expand the jurisdiction of the agency, or authorize it to perform its statutory functions without complying with whatever procedural requirement a reviewing court has held to be mandated by the duty of fairness. Of course, parliament would be able to reverse a judicial decision in this way only if the administrative action in question had not infringed an interest that was independently protected by the bill of rights.

The third, and by far the most expansive, form of entrenchment would be to include in the constitution a provision to the effect that any

<sup>73</sup> Commonwealth of Australia Constitution Act 1900 s 75(v).

person aggrieved by some administrative decision or action may seek review in the courts on the grounds of procedural unfairness, illegality and irrationality, or some combination or variation thereof. This would in effect make the grounds of judicial review of all administrative action part of the constitution. I know of no jurisdiction in which such an extravagant grant of power over the entire administrative process has been made to the judiciary. Of course, the uniqueness of such a provision does not necessarily prove its undesirability in the context of the new South Africa. However, the implications of transforming every issue of administrative law into a constitutional question are potentially so far reaching that some at least should be spelled out.<sup>74</sup>

First, since the content of the procedural duties owed by an administrative agency would be determined by the court as a question of constitutional law, parliament would be unable to amend the agency's enabling statute in order to relieve it from a procedural requirement imposed by a court as a matter of procedural fairness. Now, what procedures it is appropriate to impose on an administrative agency in the performance of its statutory duties ultimately involves a judgment regarding where to strike the balance in any given context among potentially competing objectives and values: the ability of the agency to discharge its mandate effectively and efficiently, the public interest in accurate and thoughtful decision-making, the interest of those who may be affected by the agency's decisions in attempting to influence the decision-maker, and the democratic claims of the wider public to participate in the processes of government. Needless to say, the question whether the right balance has been struck is one on which views may legitimately differ. In my opinion it is not a question that the courts should be handed the ultimate power to decide regardless of the nature of the individual interests that the agency's decision may affect.

Let me give some examples. A multi-member administrative agency that sits in panels (to decide disputes about land-use planning, labour relations or social security benefits, for instance) may be concerned to ensure that the decisions of its panels are consistent and well-informed. Assume that in order to achieve this, the chair of the tribunal has required those members who have heard, but not yet decided, cases that raise important issues of agency law or policy to submit a draft decision for discussion at a meeting of all the members of the agency, from which the parties and their representatives are excluded. It is certainly conceivable that a reviewing court might hold that this procedure was unfair.<sup>75</sup> The effect of grounding in the constitution the procedural fairness of all administrative decisions to which the common-law duty currently applies, would be to remove from parliament the power to amend

<sup>74</sup> The implications for the jurisdiction of a South African Constitutional Court may also require consideration. If every administrative law case were also a case in constitutional law, the Constitutional Court might find itself deciding run of the mill applications for the judicial review of administrative action.

<sup>75</sup> Cf *IWA v Consolidated-Bathurst Packaging Ltd* [1990] 1 SCR 282; *Tremblay v Quebec (Commission des Affaires Sociales)* [1992] 1 SCR 952.

enabling legislation that would expressly permit an agency to adopt a procedure which a court had held to be unfair, but which would greatly enhance the quality of administrative justice in other respects.

Or, suppose that legislation were to provide that a local public inquiry must be held to approve the route to be taken by a proposed new road. The statute might be expected to stipulate that those objecting to the scheme had a right to be heard before the scheme was approved. It is not unknown for proceedings of this nature to attract considerable interest, both from the owners of land that might be adversely affected, and from public interest groups. Designing an appropriate procedure for conducting the inquiry requires a balance to be struck between the need to ensure that the decision-making process is not unduly delayed by a proliferation of lawyers and other 'experts' retained by those of financial means, and the desirability of facilitating public participation in the processes of government. Parliament should surely be able to overrule a court's determination of how much cross-examination or disclosure of information, for example, is required in this context to meet the demands of procedural fairness.

As for judicial review on non-procedural issues, it might seem desirable to limit the intensity or scope of the courts' scrutiny of the decisions of certain tribunals. For instance, the standard of review of an agency's findings of fact might be regarded as unduly intrusive in the case of an agency which was required as part of its decision-making to assemble a mass of complex technical information. Alternatively, it might seem appropriate to limit the courts' opportunities to review the decisions of a particular agency because of the disparate financial means of the parties who typically appear before it, or because the virtues of final decision-making by the tribunal are regarded as outweighing the costs. A single, constitutionally entrenched standard of judicial review applicable to all administrative action is likely to be incompatible with a more functional, contextual and differential approach to the appropriate degree of control exercised by the courts over the administration of public programmes.

#### IV CONCLUSIONS

At the risk of compromising my philosophical inclination to the principle of particularity in matters of public law and administration, I firmly believe that an independent body, equipped to monitor and co-ordinate the operation of whatever appeal and review provisions are put in place, is crucial to the success of any administrative system. In a sense, however, this idea may be regarded as a necessary corollary of the former: if a thousand flowers are to be left to bloom, it is particularly important that someone prunes and weeds! In order to establish the significance of the functions to be performed by an administrative council, and to provide some protection for its funding, it might even be included in the constitution.

The precise powers and tasks of such a body, which would occupy a place analogous in some ways to the Australian Administrative Review

Council, obviously require more detailed and careful consideration than can be given here. However, its mandate could include the recruitment, terms of appointment and training of tribunal members; the co-ordination of the procedural rules of agencies; 'hands-on' research and the promotion of reform in the area of administrative law; a consultative role on new legislation; and responsibility for monitoring the overall performance and operation of the administrative appeal and review system.<sup>76</sup>

As for judicial review, the various proposals to entrench in the new South African constitution a right to judicial review of administrative action on grounds broadly corresponding to those developed at common law, and modified by statute, seem to pay insufficient attention to some important limitations on the efficacy of judicial review. First, there are considerations of institutional competence. It is often difficult for lawyers and judges who are looking at an administrative scheme from the outside—perhaps for the first time and in the context of a worst case scenario—to form an understanding of the scheme that will enable them to fashion procedures, and to interpret the enabling legislation, in a way most likely to further the effective and efficient implementation of the programme.

Second, it is an almost inescapable feature of the litigation process that it focuses attention on the interests that are represented in the proceeding, and on the fairness of the administrative action vis-à-vis the individuals most immediately concerned: the business person who has been deprived of a licence, the owner of land who has been refused permission to develop it, or the corporation that has been ordered to cease its operations pending its compliance with a pollution control order, for example. In contrast, the public interests promoted by regulatory schemes are often represented only obliquely, and tend to be down played or overlooked: consumer protection, effective land-use planning, and a healthy environment, for instance. One does not have to assume for the purpose of this argument that the judiciary will approach the adjudication of disputes between individuals and agencies of the state with a determination to thwart whenever possible the implementation of the government's commitment to policies of redistribution, and social and economic reconstruction.

Third, litigation is a particularly expensive and cumbersome way of resolving disputes. Since it is used most frequently by the economically powerful, it is not surprising that courts tend to see disputes involving administrative agencies from the perspective of the regulated interests. Inequality of access to the courts is certainly one important reason for restricting the scope of judicial review over some administrative agencies, especially those created in order to provide a relatively cheap and expeditious forum for persons of modest means. Moreover, the delays that inevitably attend applications for judicial review can seriously

<sup>76</sup> Cf, for example, the proposal in *Directions* (n 9) ch 8.15 et seq for the creation of an Ontario Council for Administrative Agencies.

prejudice the effectiveness of an administrative scheme, regardless of the success or failure of the particular application.

With the tentativeness appropriate to the partially informed outside observer, I suggest that there are serious costs involved in entrenching in the constitution a general right to judicial review on specified grounds of all administrative action. Judicial resources, and the judges' stock of political capital, should be concentrated on the protection of those rights identified in the bill of rights as being of fundamental importance. Other interests can be adequately protected through a reformed and modernized administrative law that is based in statute and the common law, and that remains subject to the ultimate control of parliament. A compromise would be to include in the constitution a provision prohibiting legislative attempts to entirely exclude judicial review of administrative action.