Administrative Law — The Operational Realities*

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In civil litigation and criminal proceedings, the effects of court procedures are usually familiar to lawyers acting for the parties. But administrative law is different. Because of the diversity of quasi-judicial proceedings, the volume of cases in which lawyers are not usually involved, and for other reasons mentioned in this article, the operational realities are less well known in the profession. The article discusses the significance of the operational realities, and it explains, among other things, why it is important, when dealing with a system that has a pyramid structure, to understand the realities of primary adjudication, even for a lawyer who only acts on appeals or judicial review. A combination of equality and justice according to law can only be achieved if primary adjudication is designed to achieve those goals, and an appeal system is only needed to deal with a small minority of cases.

Dans les procès civils et les procédures criminelles, les avocats représentant les parties sont généralement bien au fait des effets des procédures judiciaires. Mais le droit administratif est différent. En raison de la diversité des procédures quasi-judicaires, du nombre généralement limité d'affaires auxquelles les avocats prennent part et de quatre autres raisons évoquées dans cet article, le contexte opérationnel est moins connu dans la profession. Dans cet article, l'auteur traite de l'importance du contexte opérationnel et explique, entre autres, pourquoi il est important, au moment de faire affaire avec un système ayant une structure pyramidale, de comprendre la réalité des premières instances, même pour un avocat agissant exclusivement en appel ou à l'occasion de contrôle judiciaire. Le droit ne peut être servi que si les premières instances sont conçues pour atteindre l'objectif visant à combiner l'égalité et la justice et un système d'appel n'est requis que pour traiter un petit nombre de causes.

INTRODUCTION

For a lawyer to function efficiently in administrative law, whether as an adviser, advocate, judge or other adjudicator, or when making statutory changes, he or she requires a knowledge of:

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A. the case law, and any relevant statutes; and
B. the operational realities of the system being considered.

Both university legal education and CLE usually cover A, but not B.[1] This article focuses on B. To maintain that focus, there is no citation of court decisions. Because of the differences in the many systems of adjudication, and the differences arising from time, place and the personalities involved, it is not possible to explain the operational realities to be found in every case. The article reflects the experience of the author,[2] and it would be no surprise if other lawyers with different experiences could provide different ideas.

Cases decided in a government department, or in another agency (perhaps called a board, commission or tribunal) are commonly decided without legal advocacy. Lawyers are often then retained after a case has been decided. This is probably one reason why "administrative law" is commonly seen as synonymous with judicial review (JR). But in this article, "administrative law" refers to adjudicative decisions made outside the courts, as well as to JR.

The large volume adjudicative systems (including social insurance and social security systems) commonly have a pyramid structure, with the bulk of cases being decided in primary adjudication, some being reconsidered at the next stage, and some of those then going to an appellate body, perhaps external. In some systems, cases may then go to a higher appellate body. Usually, the appellate bodies are not confined to the evidence considered in primary adjudication. When a lawyer is retained, it is sometimes after the final stage in that pyramid structure.

A knowledge of the operational realities of a system is not only relevant in deciding how to argue a case on JR. When a lawyer is retained at an earlier stage, a knowledge of the operational realities can be essential at most levels of decision-making to decide or understand, for example:

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[1] One reason for this in university legal education may be the changes made in recent decades that discourage empirical research.

[2] Academic research, including 15 empirical research projects (in Canada and overseas), and practical experience, including adjudication (mainly as Chairman of the WCB in B.C., but also part-time in Ontario on Employment Standards appeals), administration, providing expert evidence to courts and public enquiries, arbitrator, opinions for government agencies and other lawyers, and advocacy as counsel in court proceedings. Both the academic research and practical experience have included surveys, attendances at places of medical treatment and other fieldwork, reading case files, reading court and tribunal decisions, as well as other legal and medical literature, attending conferences, and discussions about legal system impact with medical and para-medical personnel, and with other practising lawyers.

- whether to act for a potential client or recommend another lawyer;
- whether to seek cross-examination of a witness, or other person who filed a report, and if so, at what stage;
- the inter-action of law with another discipline;
- if there is an "independent" expert witness, would it be productive to raise the point that "independent" usually means dependent. If so, is evidence available and admissible to show that the particular witness was dependent;[3]
- the relevance of tribunal volume;
- whether the tribunal members have secure appointments, being appointed until retirement age, or for a fixed period that is not renewable, or are they appointed for a fixed period that is renewable if they have political approval;
- whether to withhold acting as advocate for a client until a later stage. For example, if most claims are allowed in primary adjudication without advocacy, it might be a waste of resources, and a cause of unnecessary delay, to act as advocate for the client at that initial stage. Sometimes, a client can only afford to retain a lawyer for one stage. Whether for that or other reasons, it may be prudent to decide at the beginning what would be the best stage for a lawyer to be an advocate.

Sometimes there are choices of system, or of jurisdiction. This can happen, for example, on claiming for a disability or death that was caused by a combination of events or exposures that are compensable under different systems, or in different jurisdictions. It can then help to enquire into the operational realities of the alternative systems or jurisdictions.

Even on JR, a knowledge of the operational realities of the system being considered is still critical in several ways. For understandable reasons, the case law on JR reflects, and always will reflect, such a diversity of judicial thought that in most cases, precedents can be found to support a conclusion either way. So any judge with a sense of purpose and a dedication to the public interest should be pleased to receive argument, and with some subtlety, also evidence, on the likely operational conse-

[3] At least in B.C., such evidence has often been adduced in civil litigation.

quences of a decision either way. For example, a knowledge of the operational realities of a system might enable a judge to appreciate:

a) the rationales for rough justice; and why insisting on precise justice in a particular case might create a precedent that lowers the level of justice overall; or
b) that in some situations, finding a breach of procedural fairness at any level can be a cause of injustice (such as by coercing or promoting procedural consistency when procedural diversity would achieve a higher level of justice).

INQUISITORIAL SYSTEMS

It is usually good to know whether the system being considered was established to be adversarial or inquisitorial. Without an understanding of operational realities, a court on JR, or even an appeal tribunal, may be imposing the adversary system on a subject that was established in the first place by statute to avoid the adversary system, and to use some type of inquisitorial system.

The traditional hostility in the Canadian legal profession to inquisitorial systems was probably imported in the 19th century by immigrants from the English Bar. In more recent years, that hostility seems to have diminished in England as a result of Britain's entry into the European Common Market, and the consequential experience of English lawyers with inquisitorial systems in Continental Europe. In Canada, the negative view of "inquisitorial proceedings" may also be declining. The pressures for reform of civil procedure have produced a growing recognition, at least in B.C., that a rational decision on reform options cannot be achieved by any process that begins with a commitment to the adversary system.

Within the profession, however, it is still common to assume that a tribunal should proceed according to the rules of procedural fairness that are part of the adversary system. That assumption seems to be generated by a combination of:

- legal education;
- cases on JR;
- in Ontario, the *Statutory Powers Procedure Act*; and
- the historical reasons why any reference to an "inquisitorial system" can generate a negative reaction in a country with a legal system that began with the common law.

Yet many, and perhaps most, adjudicative bodies in Canada were established in the first place to avoid the problems of the adversary system, and operate on some version of an inquisitorial system. But because of the historic hostility, the use of that phrase has usually been avoided.

Probably the bulk of adjudicative decisions on claims for disability or death are made in inquisitorial systems. This is partly because the bulk of actions for damages are either settled or abandoned. It was a goal of workers' compensation, for example, to save disabled workers and dependants from having to bargain from a position of disadvantage, and provide them instead with prompt and economical adjudication.

Also, many adjudicative systems decide cases that have only one party, or only one who is interested in participating in the decision-making process. The adversary system is not then a workable option. As well as relating to systems in which all applicants are individuals, this point relates to some systems with business applicants, such as some applications relating to property development. There may be a hearing at which the public are allowed to speak, but there may be no opposing party, and therefore no possibility of an adversarial proceeding.

Even when a system was created to use an inquisitorial procedure, some tribunals, particularly appeals tribunals chaired by a lawyer, often seem to prefer the adversary system. This may result from:

- the appointment as tribunal members of lawyers whose legal education and subsequent experience focused on the adversary system;
- a lack of budgeting and staff needed for an inquisitorial system, even when it is clear that the appeal tribunal was intended to be inquisitorial;
- the professional prestige, and perhaps career ambition, that may seem to be promoted by behaving like a court;
- the Respondent being represented by a lawyer from the department of an attorney-general, or by a lawyer in a civil litigation practice, rather than by a lawyer or administrative official from the agency whose decision is being appealed;
- the layout of hearing rooms.

Related to these points, when the external Appeals Tribunal was established for workers' compensation in Ontario, it was better than its internal predecessor in giving reasons for decision. But its reasons were written in legal language, in the style of the courts, and of an adversary

system. They were not written in the language used in the Board, or by those outside the Board who were usually dealing with claims. Nor were they always written with an understanding of what their significance could be as precedents. These are probably some of the reasons why the law of workers' compensation in Ontario became divided between the law as applied by the Board (commonly the Board doctors), and the law as applied by the Appeals Tribunal.

The inquisitorial system is the same as the adversary system with regard to the *standard* of proof, subject to one exception,[4] but it differs with regard to the *burden* of proof. If the evidence for and against a claim is judged to be evenly balanced, the adversary system applies a legal presumption of the negative, because the burden of proof lies on the plaintiff. In an inquisitorial system, the parties are usually required to provide all relevant information available to them, often by completing standard forms. But for resolving any remaining uncertainties, the burden lies on the adjudicating body to initiate and conduct further enquiries. Advocacy, including the provision of further evidence and argument, is a supplementary option. So if, when acting for a client in a pending tribunal hearing, it appears that further evidence is required, it can help to consider whether to seek that evidence yourself, have it sought by your client, or ask the tribunal to obtain it.

An inquisitorial system can also allow procedural flexibility in other ways. For example, because most claims are allowed under many inquisitorial systems, any lawyer consulted by a claimant before the claim is decided may feel that the only help the client needs relates to the detail of the decision. The most efficient way to provide that help might be to request a draft of the contemplated decision, so that any comments on the draft can be provided before the decision is made.

Another example of procedural flexibility that I recall is a case requiring a decision on rehabilitation to prevent further injury. Because of the psychological tension generated by a hearing with several people present, the hearing was getting nowhere. The matter was resolved by adjourning the hearing and the chairman having a one-to-one informal discussion with the claimant while sitting in comfortable chairs and having some tea.

Another rationale for an inquisitorial system may be that in court actions, the adversary system is designed to resolve issues between parties.

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[4] If, after making such enquiries as the adjudicating body deems appropriate, the evidence for and against a claim is judged to be about evenly balanced, some systems provide that the claimant be given the benefit of the doubt.

It is not well designed to protect a public interest. But that may be a role of another type of adjudicating body, such as a professional discipline tribunal. For a lawyer acting for a party, this point can sometimes be relevant in deciding what to include in any submission of evidence or argument, and in estimating what the probabilities are of a conclusion favourable to the client.

Another aspect of inquisitorial systems is that in a controversial case, it can be useful to inspect the file of the adjudicating body, or receive a copy of the file. If it is possible and convenient to inspect the file in the office of the adjudicating body, informal discussion with the staff might be a way of learning more about the available options and the operational realities.

Although most of the points mentioned above are irrelevant to the conduct of a tort claim, they can be useful in a collateral way to a lawyer acting for a plaintiff. The problems of delay in civil litigation can sometimes be mitigated if the client promptly receives income from a social insurance or social security system. To receive that income, all that is commonly needed is to complete a form, often a single page, and send it in.[5]

PRIMARY ADJUDICATION

Unfortunately, political and bureaucratic pressures often militate against efficiency in primary adjudication. In some cases, a decision in primary adjudication is made according to an illegal practice that is routine at that level. In such a case, a lawyer retained at that stage could find it worth considering whether to apply for JR straight away. For a court to dismiss such an application because another remedy is available could perpetuate the illegality of decision-making in primary adjudication. Also, in cases in which procedural fairness is important, it is probably more important in primary adjudication than on an appeal to another tribunal. Even when a lawyer is retained only at a subsequent stage, understanding the operational realities of primary adjudication can help in developing an argument on appeal, or on JR, and sometimes in other ways.

It is common to find decisions of public bodies, departments, and tribunals in social insurance and social security systems based only on "medical" reports that reach negative conclusions for no reason but the

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[5] I am familiar with a personal injury case in which the lawyer for the plaintiff was sued by his client years later for negligence in failing to advise the client to file a workers' compensation claim. Both cases were settled.

lack of "objective medical evidence", or "scientific proof", of the affirmative. This illegality is most common when the physician is on the staff of the adjudicating body, and is not instructed by a good lawyer.[6] The physician is then commonly the *de facto* decision-maker on questions of law, as well as medicine and non-medical facts.

For example, when our workers' compensation systems became established in Canada, the only professionals usually appointed to work in the claims departments of the boards were the board doctors. So adjudicators (usually promoted from clerical staff) would refer to them any question of difficulty or uncertainty, even if no medical question was involved. A board doctor, who was supposed to be a medical adviser, became the *de facto* decision-maker on all points, including non-medical facts and questions of law, as well as medicine. In particular, board doctors decided, if only subconsciously, what was the legally relevant medical question, without recognizing that this was a question of law. Assumptions of law made in that way are commonly wrong.

When reading a decision, it is not usually obvious what the phrase "*objective* medical evidence" was intended to mean. In court proceedings, "*objective*" sometimes means unbiased. There is no problem when it means that. But in other systems, and sometimes in the courts, this phrase has two common meanings.One is that the conclusion in the medical opinion depends on symptoms or other facts described by the patient to the physician, and which the physician cannot corroborate. With that meaning, any adjudicator who rejects a medical opinion because it is not "objective" has made three erroneous assumptions of law:

(1) At least with regard to the facts necessary for a medical opinion, evidence of the claimant should be disbelieved automatically unless it is corroborated;
(2) Any medical opinion that partly depends on such evidence of the claimant should be discarded; and
(3) If any question relating to the existence, diagnosis or etiology of a disability cannot be answered in the affirmative without evidence from the claimant, that question should be answered in the negative.

Those assumptions of law are clearly wrong. They deny the duty of the adjudicator to weigh the evidence in the balance, and reach a conclusion by estimating the balance of probabilities. Any report based

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[6] More detailed discussion of this can be found in Terence G. Ison, "Statistical Significance and the Distraction of 'Scientific Proof'" (2008) 87 Can. Bar Rev. 119, 140-159.

on the lack of "objective" medical evidence is not a medical opinion. It is an erroneous opinion on law.

As well as making these erroneous assumptions of law, staff physicians (and sometimes "independent medical experts") sometimes assume or assert that the eligible cause must be the exclusive cause of the disability or death, not recognizing that the law requires only that the eligible cause be a significant contributing cause (*i.e.*, more than *de minimis*) of the disability or death for which entitlement is claimed.

The problem was aggravated when, as commonly happened, the opinion of a board doctor, who had never examined the patient, became entrenched as the position of the board. This problem has been mitigated for workers' compensation in some jurisdictions by the creation of an external appeals tribunal. But even in those jurisdictions, some claims are still denied at the boards because there was no "scientific proof", or "objective medical evidence" to support the claim, or because there were multiple causes.

In federal systems, the same problems still exist, at least with regard to military pensions for a disability claimed to result from some event or exposure when in military service. Instead of deciding the case by trying to weigh the balance of probabilities, claims are still being denied by applying a presumption of the negative in the absence of scientific proof of the affirmative.[7]

The other meaning of "objective medical evidence" is synonymous with "scientific proof". Again, there is a duty to reach a conclusion by weighing the balance of probabilities. It is clearly a breach of that duty to presume the negative because there is no "scientific proof" of the affirmative. The bulk of claims in which the negative is presumed because there is no "scientific proof" of the affirmative are cases in which "scientific proof" is unavailable.

The problems of primary adjudication are not limited to medicolegal interaction, or to claims for disability or death. In systems that have several levels of adjudication, the bulk of unjust decisions can be expected in primary adjudication. In some agencies, and for several reasons, statute law seems to be perceived in primary adjudication as if it were a form of decorative literature, or a statement of aspiration, not as a body of law that an adjudicator has a duty to implement.[8] One reason for the conse-

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7 This appears in a series of judgments of the Federal Court over recent years (as well as in news reports).

8 This problem was resolved in Australia, though in a costly way. *The Administrative Appeals Tribunal of Australia* (Report of Terence G. Ison to the Law Reform

quential injustice is that many people see government officials as the voice of authority, whose decisions cannot be questioned successfully.

A related reason for the common inadequacy of primary adjudication is that when a complaint is received about a decision, several systems provide that the decision be reconsidered, rather than being moved to an appellate body. Having a system of reconsideration before an appeal can proceed is usually demanded or supported by political and bureaucratic pressures. A routine practice of reconsideration tends to perpetuate inadequate processing in primary adjudication, partly because the appeal statistics will not show the volume of errors made in primary adjudication. The goals of justice according to law, and of equality, are replaced by the principle that the squeaky wheel gets the grease.[9]

Related to this, only a small minority of claims in a system might need an oral hearing, or another form of sophisticated processing. But for that small minority, neither of these needs usually arises for the first time on an appeal. They were there in the first place. To avoid all the problems of delay, as well as to reduce overall costs, meeting those needs should be a part of primary adjudication.[10] The relevance of these points in advocacy is that they are an example of when to consider whether to apply for JR after primary adjudication, showing the court why the application should not be dismissed because another remedy is available. This might be a good course for a lawyer acting for an organization that represents multiple claimants.

For a lawyer acting for a claimant, the general practice of the adjudicating body is usually less important than whether any of these problems were part of primary or subsequent adjudication in the particular case. That is one of the points that can be checked when reading the case file of the adjudicating body.

Commission of Canada, 1989) at 26.

[9] When an automatic reconsideration process is used on receiving a complaint, and a claim that was denied in primary adjudication is allowed on reconsideration, it is usual to justify this on the ground that new evidence was received. But in a system in which reconsideration follows shortly after decisions are made in primary adjudication, it is rarely true that any evidence was received that was not previously available. Almost always, the "new evidence" would have been obtained in the first place if the adjudicator had been selected, trained, and allowed the time to use the initiative that should have been used in seeking evidence.

[10] A reason commonly given for not having hearings in primary adjudication is that the adjudicators are not capable of holding a hearing. But if a case is of a type for which a hearing is needed, anyone who is incapable of holding a hearing will not have the capacity to decide the case correctly without one.

Related to this, it can be important also to check the "policies" being applied. An adjudicating body usually needs rules to be followed by its adjudicators. Because those rules are for internal use, promulgating them as regulations can be, and usually is, avoided. The rules are produced under the misnomer "policies". They may be written by an administrator or physician, and may or may not have been checked by a lawyer. If a client is adversely affected by a "policy", it can be worth considering whether the "policy" is compatible with the relevant legislation and case law. In an exceptional case, it can also be relevant to consider whether there is any constitutional objection to the "policy". Also, in a serious case, it can sometimes help to check the training program of adjudicators, and to question the relevant adjudicator about any instructions that are not published in the "policies", but which adjudicators may be following nevertheless in deciding claims.

TRIBUNAL MEMBERS

For lawyers appointed to be members of a tribunal, and particularly those appointed to be in charge of a tribunal, it can be difficult if their prior experience has been with civil litigation, or with criminal cases, rather than with the system(s) covered by the tribunal.

Functioning like a court can accord with past experience, and sometimes with future ambitions, but it can have damaging consequences. One is that functioning like a court can seem to create an expectation that a party be represented by a lawyer. If it has that effect, it may defeat one of the reasons why the system was created in the first place. Trying to function like a court may also involve treating a hearing as if it should be a one-shot trial, preceded by following rules of preparation and the gathering of all evidence that *might* be required. Related to this can be the significance of delay, mentioned below. Paradoxically, both a tribunal and any lawyer engaged by a party can probably function most efficiently if any hearing is begun promptly, with very little preparation. In many, and probably the bulk of cases, it may be found that everything that is needed is already on file, or can be provided by oral evidence that is obviously appropriate and available. If it appears that further evidence is required, it can then be decided exactly what further evidence, how it should be sought, and by whom. Then, or later, it can be decided whether the oral hearing should be resumed or the matter completed by written communications.

For an advocate, the value of communicating with a tribunal prior to a hearing largely depends on who, within the tribunal, deals with such

communications. If it is the chair of the panel that will decide the case, prior communication can be an effective way of settling an efficient procedure for that case. But if it is someone on the staff of a tribunal, that person may only be authorized to inform the advocate of a standard routine, not to settle a procedure that is specifically appropriate for the particular case.

If a system was established to be inquisitorial, it can be appropriate for a tribunal member to play an initiating, as well as responsive, role, perhaps in seeking evidence, raising a new issue,[11] or considering an alternative remedy.

TRIBUNAL HEARINGS

If a lawyer is appearing as an advocate, but the hearing is being conducted by someone who is not a lawyer, or a panel that includes non-lawyers, an argument may be more persuasive if legal terms are avoided as much as possible. Conversely, when a tribunal has a lawyer as chairman, and an individual party is not represented, it can be most efficient for the tribunal to communicate with the party by using ordinary language as far as possible. It can be much easier for many people to think and speak if they are not confronted by legal language or mystifying formalities. For example, at a hearing, rather than inviting a party to "present your case", it might be more productive to ask "what would you like to tell us?" Similarly, it can be more distracting than productive to ask a party to separate evidence from argument. It would be understandable if someone finds that distracting and bewildering, perhaps thinking "isn't that something you are trained to do?"

An example that I remember is a tribunal appeal hearing in New Zealand under the Accident Compensation system. The claimant sat down, with no notes in front of him, and he was obviously ready to say what he wanted to say. But the tribunal chair spoke first, taking up nearly 15 minutes explaining the procedures of the tribunal to the claimant, including telling him how and why he must separate evidence from argument. The claimant was then speechless, and seemed bewildered, as if convinced that he had come to the wrong place. It was then difficult to get the claimant to say anything.

When a lawyer is retained for civil litigation, or other court proceedings, the normal routine is for the lawyer to be the client's advocate.

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[11] In some systems, there are unfortunate statutory limitations on an appeal tribunal raising a new issue.

Similarly in tribunal hearings, it is usually most efficient for the client to provide evidence while the lawyer presents the argument. But in a particular case, it can sometimes be worth considering whether to act as a legal advisor, and let the client do all the talking. An example might be a human rights case in which the applicant alleges that she was denied employment by a marketing company because of her sex and ethnic origin. The employer responded that the applicant was not offered employment because the job involves marketing advocacy, requiring an employee to communicate fluently in English, and in a congenial manner. The employer decided that the applicant would have difficulty in doing so. To let your client do all the talking *might* be the most convincing way of showing that the respondent had no reason at all to believe that.

The balance of lobbying pressures is commonly different in subsequent administration from what it was in the legislative process. So when a statute is passed to regulate an industry, or to make other requirements of an industry, or group of industries, the administering agency usually falls under the control of the affected industries, either immediately or within a few years. This is known in U.S. literature as "regulatory capture". Another point relates to legislation that does not focus on disabilities or deaths. If the statute seems intended to protect the public from improprieties in a type of business, the statute was probably prepared by an organization of the businesses covered; and any investigators or adjudicators under that statute may have been nominated by that organization, rather than by anyone representing the public interest. These are not problems that can be solved by a lawyer in a particular case, but they are background problems that can be useful to have in mind when deciding how to deal with a particular case.

THE SIGNIFICANCE OF DELAY

Delay is usually very relevant in selecting among the options available to a client. For lawyers, delay in completing a case is often necessary to allow each step in each case to be handled according to its comparative urgency. Sometimes delay can help a client, particularly a business client. In tort claims, a lawyer for an injured plaintiff may think it necessary to delay settlement or trial until enough time has passed to be most confident of the nature and degree of the permanent disability. But delay can be devastating. In most cases involving individuals, delay is a likely cause of stress for the client, and often for the client's family. Delay in deciding a claim can also create planning problems for the claimant's family members.

In claims for compensation for disability, delay can also mean that medical examinations become out-of-date. Further medical examinations that are only required for adjudication can then increase the stress. Delay can also increase the number of adjudicating personnel dealing with a claim, creating a risk of inconsistency in successive decisions. Having more adjudicators involved in primary adjudication can also be a cause of confusion in a subsequent appeal, or application for JR.

At least in workers' compensation, the health damage of delay has sometimes been recognized. Several boards have paid a claim for psychological disabilities caused by the decision-making processes of the Board, and at least three boards have paid fatal claims for suicides resulting from those processes.

For systems that were established in the first place to provide for income continuity, delay in deciding claims tends to defeat the very purpose for which the system was created. The stress of delay can be compounded in social insurance and social security systems by exhausting the applicant's savings, the costs of borrowing, or the psychological harm of having to apply for welfare. As well as increasing procedural costs, the lack of any adequate income can compound the impact of delay by damaging health in other ways; for example, by preventing the purchase of healthy food or attendance at events that would facilitate relaxation. In these and other ways, delay can increase the costs for taxpayers

Where it appears that the decision in one case will become a precedent, delay can have a multiple damaging impact if other cases are delayed pending the precedent. It also seems likely, though not provable, that the impact of delay on the minds of decision-makers increases the probabilities of the conclusion being negative. Delay can also result in a key witness becoming unavailable.

The impact on rehabilitation of delay in deciding a claim can be particularly damaging. Success in vocational rehabilitation often depends on momentum. So delay may not mean simply a delay in the commencement of rehabilitation. Delay can cause permanent damage to rehabilitation prospects. This is sometimes recognized by insurance companies. In a case familiar to me, the potential plaintiff had been made a paraplegic, and partly quadriplegic. As soon as he could function in a wheelchair, his lawyer persuaded the insurer of the potential defendant to purchase for his client a high-cost vehicle designed specifically for his client to board and drive in his wheelchair. It was agreed that the amount spent by the insurer would be considered an advance of damages and that if the case went to trial, the assistance of the insurer would be acknowledged in court, and the insurer would not claim reimbursement in the event of the action

being dismissed. The vehicle turned out to be a substantial help to the plaintiff, and in subsequent negotiations for a settlement. This was a good example of how a lawyer might be able to think of some way to mitigate the negative impact of delay on rehabilitation.

Also with regard to rehabilitation and the psychological needs of a client, it can sometimes help for a lawyer to arrange an amicable discussion with the appropriate person in the adjudicating body, if possible, rather than a formal hearing. Even if the informal discussion does not solve the problem, it might still help in deciding how to present the case at a hearing.

The psychological harm and financial costs of delay in deciding a claim, and the damaging impact on rehabilitation, can be the same regardless of whether the claim eventually succeeds or is denied.

As well as delay commonly being critical in cases of disability and death, it can also be a cause of psychological harm and financial losses in some types of licensing proceedings,[12] and in professional discipline proceedings, at least in relation to lawyers and physicians.

JUDICIAL REVIEW – PRELIMINARY CONSIDERATIONS

(a) The Options

Before commencing an application for JR, it is usually prudent to consider any alternative remedies that might be pursued concurrently with JR, or as alternatives. The possibilities might include:

- seeking reconsideration by the adjudicating body whose decision is thought to be wrong;
- a complaint to the CEO of the relevant adjudicative body;
- a complaint to the Ombudsman;
- pursuing the claim in another system under which the client might be entitled to similar benefits;
- pursuing a tort claim against the adjudicating body for acting in bad faith; *e.g.*, if it seized automatically on an item of negative evidence to reach a negative conclusion, brushing aside the positive evidence without attempting to weigh it in the balance;

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[12] An example that I observed of delay being clearly a problem was a case relating to the suspension of a pilot's licence.

- success in JR is usually only the first stage of success. To decide whether JR is worthwhile, it can be important to consider what is likely to happen next if the application for JR succeeds. For example, in claims for pensions for disabilities resulting from military service, there has been a series of cases in which the Board denied a claim on the ground that there was no scientific proof of causation, and those decisions were set aside by the Federal Court. To decide whether it would be prudent to apply for JR in a similar case, it could be crucial to discover what happened when those claims were considered again. Following JR, were at least some of those claims allowed, or were they all denied again for different reasons? If the latter, JR could be a waste of time and money. Alternatively, the operational realities could be considered in the context of checking the case law supporting the proposition that in an exceptional case, the court can make the decision that it considers the tribunal should have made, even though the remedy sought in the application was in the nature of *certiorari*, and even though the decision is of a type that only the tribunal is authorized by statute to make;
- seeking legitimate political action; *e.g.*, some statutes confer discretionary powers on the Minister to accommodate some unusual cases.

(b) Possible Support Groups

In some cases, a client might find support from a business, professional or labour organization, or from a political party. If the client is a current or former employee, it might be worth considering whether help might be available from the employer. Many claims by employees have succeeded when such help has been provided.

(c) Proceeding with JR

If, after considering the relevant statutory and case law, and other points, it is decided to proceed with an application for JR, some further preliminary points may need to be considered, including:

- unless you specialize in both the subject area of the particular case and in administrative law, whether a case can best be argued on JR by a lawyer who specializes in administrative law, or one who

specializes in the subject area of the particular case, or by two lawyers, one specializing in each;

- is the case an exceptional one in which raising a *Charter* issue could succeed? If so, does the client have the resources, would raising the *Charter* issue appear to be worth the cost, and should expert evidence, or some other evidence, be adduced?
- whether there are any ways of mitigating the damaging effects on the client of delay.

(d) Preliminary Considerations of a Respondent

Some points mentioned above can also be relevant to a lawyer acting for a Respondent. Some other operational realities of the system can also be relevant. For example:

- whether the practice of the adjudicating body followed in all or many cases might be adversely affected by a decision in favour of the applicant. If so, whether it would be prudent, and whether it would be ethical, to concede the particular case and continue the existing practice in other cases;
- whether the matter can best be resolved by amending the legislation or regulations;
- whether the applicant should be offered an alternative remedy;
- whether some change seems to be needed in the practice of the adjudicating body, and if so, whose attention should be drawn to that.

ARGUMENTS ON JUDICIAL REVIEW

It can sometimes help to consider the fundamental principles on which a system was based. For example, to achieve efficiency in social insurance and social security systems, the golden rule in system design is "keep it simple". Usually, that would be relevant in the context of proposals for legislative change, but the golden rule can sometimes be relevant in an argument on JR, as well as at a tribunal.

If a case rests on the interpretation of a statute, it may be more distracting than helpful to cite a case in which similar words were used in a different statute relating to a different subject. A judge with a sense

of purpose might be more readily persuaded by quotations from non-legal literature in the subject area of the case.

THE ROLES OF LAWYERS FOR AN ATTORNEY-GENERAL OR OTHERWISE ACTING FOR GOVERNMENT

While the points mentioned under this heading relate primarily to the roles of government lawyers, they can also be relevant to lawyers acting for organizations seeking changes in legislation or regulations. Sometimes, these points can also enhance an understanding of a system by lawyers acting for individual or business clients.

Systems are often changed by statute without an understanding of the operational realities, and therefore without recognizing whether contemplated amendments would produce reform or deform. To understand the likely consequences of a statutory change to any system of adjudication by a government agency requires a knowledge of the operational realities, as well as the case law. For example, damaging delays, waste and injustice can be caused by focusing on the upper levels of decision-making, and on JR, rather than on primary adjudication. Also in high volume systems, no appellate structure can operate efficiently unless the bulk of cases are properly decided in primary adjudication. That may not happen unless the requirements for efficiency in primary adjudication[13] are prescribed in the legislation.

Related to this, the advantages and disadvantages may not be understood of blending adjudication with administration, or separating them. For example, in workers' compensation in Ontario, the creation of the external Appeals Tribunal for the final level of appeal was not preceded by any study of the advantages and disadvantages of that change, compared with other structural options.[14]

In the event, a cogent advantage of the change was recognizing the distinction between questions of law, questions of medicine, and non-medical facts. A comparison with B.C., however, shows that this improvement in Ontario resulted from the change of appellate decision-makers, rather than the change in structure. One disadvantage of creating external appeals tribunals is that they are not given signing authority on the bank

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[13] Such as the qualifications of adjudicators, their roles, procedures and locations.

[14] Some of the advantages of the chairman of the final appeal body also being the chief executive of the system are discussed in *The Administrative Appeals Tribunal of Australia* (Report of Terence G. Ison to the Law Reform Commission of Canada, 1989) at 62-64. However, those advantages have been diminished by the political shifts of recent years.

account of the system. So when an appeals tribunal decides that a claim should be paid, or should be paid at a higher rate, and the organization responsible for primary adjudication refuses to implement the decision, the claimant then has the further delay and cost of having to apply on JR for an order in the nature of *mandamus*.[15]

Another disadvantage of establishing the external Appeals Tribunal in Ontario has affected a larger volume of cases. These are also cases in which a claim for compensation was denied at the Board, and then allowed by the Appeals Tribunal. Officials at the Board may recognize that the claim must be allowed, but if they remain convinced that the decision of the Appeals Tribunal was wrong, they may then seek to minimize the compensation. For example, they may pay temporary benefits, but deny that the claimant has any permanent disability resulting from employment. There may then be further months or years of delay while the case is taken again to the Appeals Tribunal on the issue of entitlement to benefits for a permanent disability. If, before the initial appeal, this problem appears to be a risk, an advocate for the worker can seek to minimize the risk by asking the Appeals Tribunal to be as precise as possible in wording its decision. But this can be difficult if the jurisdiction of the Appeals Tribunal is confined by statute to deciding only questions that have been decided at the Board. An alternative for an advocate to consider on the first appeal is whether, in addition to evidence of the accident being compensable, to adduce evidence of the consequences of the accident, including the etiology, gravity and likely duration of the residual disability. This could help if it is thought that the Appeals Tribunal might be persuaded to reach conclusions of fact on these points, even if it has no jurisdiction to decide what should be done in response to those conclusions.

Another matter that should be understood before making any legislative change is the conflicts of interest involved in a system. They are commonly different from what they are assumed to be. In workers' compensation, for example, it is commonly assumed that there is a conflict of interest between injured workers and employers. All organizations involved in the system have an interest in maintaining that assumption. But when workers' compensation systems use experience rating, as they do now in Canada, that feature generates an array of "employers' representatives". The most cogent conflict of interest is then between employ-

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[15] There have been a few such applications for JR in recent years (including one in which I was counsel).

ers and "employers' representatives".[16] It is that primary conflict of interest which creates a secondary conflict between injured workers and employers.[17]

A root cause of many problems is the changes that have been made in the methodology of system change. Systems have become increasingly complicated because governments no longer appoint a one-person royal commission to advise on system changes. Nowadays, it is common to have committees or other groups that negotiate compromises among interest groups. Any goal of keeping a system simple is then likely to be replaced by making the system increasingly complicated.

Legislative changes in recent years, or the actions of government departments or agencies, have produced some unfortunate results, such as:

- an expansion in the role of accountants beyond their expertise in accounting, and into the efficiency of administration *and adjudication*;
- a resurrection of MBO (Management by Objectives) and its use in the adjudicative departments and agencies of government, regardless of its negative impact on efficiency;
- reports by some government auditors demanding the use of bureaucratic normalcy in adjudicative bodies;[18] overlooking the incompatibility of that with adjudication according to law.

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[16] An example from my own experience was a case in which a claim had been denied, the worker was appealing the decision, and the "employer's representative" was opposing the appeal. But then the employer's accountant calculated that if the worker's appeal failed, the cost to the employer in sick pay would be about double the increase in workers' compensation assessment if the appeal succeeded. The employer's opposition to the appeal was then withdrawn. But that opposition would have continued if the employer's position had remained in the hands of the "employers' representative".

[17] To explain why this is so, and why it is not generally recognized to be so, would involve more detail than is relevant in the context of this article.

[18] One aspect of bureaucratic normalcy that government auditors or senior administrators commonly require is that adjudicators be supervised. These requirements do not distinguish between constructive types of supervision (such as spot checks for quality control and the prevention of fraud), and the types of supervision that are incompatible with quasi-judicial adjudication (such as some decisions being made by a supervisor who has not read the file, and who is not the person who engaged in oral communication with the parties, witnesses, and representatives, and received their evidence and arguments).

Legislative changes that could be more constructive include requiring all rules ("policies") used in adjudication, whether mandatory or discretionary, to be available to the public, and making it an offence to apply any secret rules. It could be included as part of the role of a government auditor to check that this requirement is complied with.

To an outsider, it seems that preceding legislative change by a study of the alternatives is often precluded by a combination of lobbying, and the volume of work that government lawyers have to produce.

When a statute provides rights to payment out of public funds, it logically follows that the relevant system requires a pre-emptive allocation of revenues. It is the nature of rights to payment that the paying system should have priority in the budget over discretionary uses of public funds. But the political pressures of the time in the finance departments of government commonly relate to discretionary expenditures. Justice according to law is more likely to be achieved if the statute creating the system includes a provision for a pre-emptive allocation of revenue. This point relates primarily to the preparation of statutes, but it can also be worth considering by a lawyer arguing a particular case when deciding whether to focus on points that are unique to the client, points that apply to the bulk of claims, or both.

Proposed legislative changes relating to procedural fairness can also be most constructive if their likely impact is considered on the operational realities of the systems that would be affected by the changes. There can be serious objections to procedural fairness in some situations, but not in others. For example, delay can be disastrous with regard to regulatory or quasi-regulatory decisions on the prevention of accidents or diseases. In one case familiar to me, where people were being killed almost daily, it was crucial for the prevention of further deaths that a regulatory decision be made and enforced immediately, with procedural fairness being considered only on a question of whether the regulatory requirements should be withdrawn or modified. Similarly, when remedial orders are made on the spot by an inspecting safety officer, or hygienist, it usually makes sense that the orders be issued primarily in response to what is observed by the decision-maker, and while that observation is fresh in the mind of the decision-maker, with procedural fairness being considered only if a question arises of whether the order should be withdrawn or modified.

Some other types of adjudicative/administrative decisions can affect a large number of businesses of varying size, varying influence, and varying capacities to engage in advocacy. These decisions may require balances to be struck among those groups. The decisions may also

affect a public interest. To attempt to make such decisions by procedural fairness may be more likely to produce injustice, as well as overwhelming cost, than if the decisions are made, perhaps using a formula, without inviting or allowing any type of advocacy.

Another example of when procedural fairness can be more damaging than beneficial may be human rights proceedings. When the first human rights legislation began to be implemented in Ontario, informal communications were used. For example, on receiving a complaint about sex or racial discrimination, a staff person in the human rights office might phone the employer or landlord to ask about the hiring or leasing practice of the firm. The complaint might then be resolved even the same day. Such an informal process made sense, bearing in mind that the legislation was passed to protect the immediate needs of people (including immigrants who had just arrived) for employment and accommodation. But objections were received from some lawyers, demanding that human rights complaints be sent to employers and landlords in writing, so that they can consult a lawyer before responding. For employers and landlords to receive legal advice might well have had a beneficial effect by increasing their familiarity and compliance with the human rights legislation. The damaging effect was the replacement of informal proceedings by procedural fairness. The predictable results were high procedural costs, long delays, and other problems. It is unknown to what extent these procedural problems have the effect of discouraging people from making a human rights complaint at all.

CLOSING COMMENT

If there is any question of the legality of any suggestion made above, that can best be considered by a lawyer dealing with a particular context. This is one reason why I refer to ideas to consider, rather than ideas to adopt. Most of the thoughts mentioned above have not been previously documented, but I have explained some more fully in previous publications.[19]

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[19] *Accident Compensation: A Commentary on the New Zealand Scheme* (London: Croom Helm, 1980); "The Therapeutic Significance of Compensation Structures" (1986) 64 Can. Bar Rev. 605; *Workers' Compensation in Canada*, 2nd edition (Markham, ON: Butterworths, 1989); Law Reform Commission of Canada, *The Administrative Appeals Tribunal of Australia* (Ottawa, 1989); "Workers' Compensation Appeals: The Significance of the Structural Options" [1989] *Assurances* 335; "Appeals on the Merits" (1992) 30 Osgoode Hall L.J. 139; *Compensation Systems for Injury and Disease: The Policy Choices* (Markham, ON: Butterworths, 1994); "Administrative Justice: Is it Such a Good Idea?" in *Administrative Justice in the 21st Century* (Oxford: Hart, 1999); "Statistical Significance and the Distraction of 'Scientific Proof'" (2008) 87 Can. Bar Rev. 119.