A REVIEW OF THE INTERNAL OMBUDSMAN OF THE WORKERS’ COMPENSATION BOARD OF BC

Report submitted to

THE ROYAL COMMISSION
ON WORKERS’ COMPENSATION IN BRITISH COLUMBIA

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July 23, 1998

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1. PURPOSES

The purposes of this research project were twofold:

1. to describe the Workers’ Compensation Board’s internal Ombudsman office (“WCBO”) and its relationship to the office of the Provincial Ombudsman (“PO”) and the Workers’ Compensation Board (“WCB”) generally;

2. to study the effectiveness of the WCBO office.

2. THE ORIGINS OF THE WCBO

In the PO’s 1991 annual report, the then Provincial Ombudsman, Stephen Owen, discussed the value and effectiveness of internal complaint handling systems, such as those which had by then been implemented within agencies like BC Hydro, the Insurance Corporation of BC, the Income Assistance Branch (Ministry of Social Services) and the Corrections Branch (Attorney General). While the WCB was not specifically identified in that report as an agency that should establish its own complaints office, Mr. Owen’s general observation became the impetus for the creation of the WCBO.

A year or so later, the current Ombudsman, Dulcie McCallum, approached the WCB’s President with the idea that the Board should establish an internal Ombudsman’s office to deal with the large number of complaints of unfairness in the Board’s decisions and activities that the PO’s staff were receiving. The issue was then addressed in the Board’s strategic plan and Peter Hopkins, who was then the Director of the Policy and Research Department, was asked to undertake a comparison of internal Ombudsman offices in other jurisdictions and develop a model that would work in BC for the WCB.

The WCBO was formally established by the Board in the late fall of 1995. There is no official transcript or minute to document the Senior Executive Committee’s decision. According to Mr. Hopkins:

It was a decision of the WCB President with input from SEC members. It is my understanding that the Office of the Chair and the Panel of Administrators were informed of the administrative decision to create the office of the WCB O. The original idea came from the Prov O and was first broached with then-President Kenneth Dye in 1992. It is my impression that the delegation may be regarded pursuant to the Workers Compensation Act Section 84(4) with the duties being those outlined in the job description for the WCB O which was signed by the President. The intent was and is to provide improved service to workers and employers through an impartial office. ...

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1 It is interesting to note that about this time the PO’s jurisdiction was about to be expanded (e.g. to include self-regulating professions and other new authorities) which would no doubt lead to an increase in the number of complaints the PO would be receiving.

The WCBO opened its doors on April 15, 1996. On that date, the PO stopped accepting new workers’ compensation complaints and, since that time, has referred most workers’ compensation complainants to the WCBO.\(^\text{3}\) (I will explain “most” later in this report.)

There is no provision under the Ombudsman Act (“OAct”) that expressly authorizes the PO to establish a branch Ombudsman office within an agencies and organizations that fall under her jurisdiction. On the other hand, there is no provision that prohibits agencies from establishing their own internal Ombudsman offices. If an agency or organization wants to establish an internal office that would relieve the complaints burden shouldered by the PO, it is common practice for those agencies to consult with the PO before establishing such an office.

There is also no expressed authority under the OAct that grants the PO control over the use of the title “Ombudsman” by persons outside her office.\(^\text{4}\) Nonetheless, the PO monitors the use of “Ombudsman” by agencies and organizations within BC who want to establish internal complaints offices and use that title. Even though there was no legislative foundation, the Provincial Ombudsman agreed to allow the WCB to use the title “WCB Ombudsman”\(^\text{5}\).

3. THE MANDATE OF THE WCBO

The mandate of the WCBO has been expressed in somewhat different ways in various forums. For example, the WCBO’s mission statement is very general: “To provide impartial and confidential assistance to workers and employers.”\(^\text{6}\)

In an article Mr. Hopkins wrote in the Provincial Ombudsman’s 1996 annual report he described the WCBO’s mandate in these terms:

The WCB Ombudsman employs an informal dispute resolution process. He is not part of the appellate system (Review Board, Appeal Division or Medical Review Panel). He is also not an advocate for individual workers or employers; he is an advocate for fair practices and fair procedures.

In one of the background papers the WCBO has provided to the Commission is this more detailed description:\(^\text{8}\)

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\(^4\) Apparently, New Zealand’s Ombudsman legislation prohibits those other than that country’s Ombudsman from using that title. No similar provision exists in BC or other Canadian Ombudsman legislation.

\(^5\) Letter from Dulcie McCallum, Provincial Ombudsman to Peter D. Hopkins, WCBO, August 8, 1997.


The WCB Ombudsman will deal with complaints of alleged unfairness concerning:
- a decision or recommendation made;
- an act done or omitted; or
- a procedure, practice or regulation used by the WCB.

The WCB Ombudsman deals with only the Workers' Compensation Act. The office does not deal with complaints relevant to the Criminal Injuries Compensation Act.

The WCB Ombudsman helps individuals navigate their way through the WCB system. Clients are advised how the system works and how they can best access it to resolve outstanding issues. Clients are assisted and encouraged to go to the person who can directly address their concerns. The WCB Ombudsman office also helps people to deal with their feelings of frustration so they become better equipped to deal with their problems.

The WCB Ombudsman is an impartial source of assistance. All contacts with the office are confidential. The WCB Ombudsman is not a decision maker but can make recommendations pertaining to issues. The WCB Ombudsman function can be an informal dispute resolution process.

The WCBO’s mandate has also been summarized in a recent WCB information pamphlet, titled *The WCB Ombudsman*:

What the WCB ombudsman can do
- Advise how the WCB system works and how outstanding issues might be resolved
- Assist in reaching the individual authorized to deal directly with a particular concern
- Offer confidential, impartial recommendations on issues within the jurisdiction of the office

What the WCB ombudsman cannot do
- Deal with complaints relating to the Criminal Injury Compensation Act
- Accept referrals from WCB staff
- Handle issues pertaining to the law
- Advise on an issue under appeal or involving a right to appeal
- Handle issues being considered by the provincial ombudsman

In my view, the WCBO’s mandate can best be summarized as: To ensure the WCB administers the WCAct and applies its compensation, rehabilitation and prevention policies, practices and procedures in a fair and impartial fashion.

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8 *WCB Ombudsman*, a background briefing document prepared by the WCBO, undated, 3 pages, mimeograph, at page 1.
4. STAFFING OF THE WCBO

Peter Hopkins, a WCB employee with seventeen years of experience at the Board, was appointed as the first WCB Ombudsman. Mr. Hopkins had worked in the areas of compensation services, training and policy development. As noted above, immediately prior to his appointment he was the Director of the Policy and Research Department, which later became the Policy and Regulation Development Bureau.

Attachment #1 is the approved job description for the WCBO. This position is excluded from the bargaining unit that represents other Board employees. This was done because it was perceived that, if the internal Ombudsman was outside the bargaining unit, such a separation would facilitate an independent review and assessment of complaints against other Board staff who might otherwise be within the same bargaining unit. This would be particularly the case if the complainant was a fellow union member but was approaching the WCBO as a claimant and not as an employee.

In January 1997, a new staff position was added to the WCBO office - the Assistant WCB Ombudsman. This new position was created to help the Mr. Hopkins field the larger-than-anticipated number of complaints. It was also determined that technical expertise in the field of compensation services was required to assist Mr. Hopkins, expertise that the secretarial staff person at the time did not possess. To ensure that no conflicts would arise, the Assistant WCB Ombudsman position was also excluded from the bargaining unit. This allows the Assistant to deal with the full range of complaints and fill-in for the WCBO Ombudsman on as needed basis.

In addition to the two Ombuds positions, the WCBO is now staffed by a full-time secretary. This position reduced the number of calls to the WCBO that used to be automatically forwarded to the Legal Department, due to a lack of secretarial assistance.

The current staffing level of the WCBO is 3.0 FTEs. Apparently, this level is close to the 3.25 FTEs that the PO used to dedicate to dealing with workers compensation complaints prior to April 1996.

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13 Interview with Peter Hopkins, WCBO, June 24, 1998.
The WCBO has a separate budget code. Attachment #2 is a copy of the current organizational chart, showing the administrative relationship of the WCBO to the Board’s senior officers.

5. THE WCBO’s RELATIONSHIP WITH THE PO

The PO has no direct management authority over the operations of the WCBO, and the WCBO does not report to the PO. However, as explained by Mr. Hopkins, the two offices do communicate and meet with each other on a regular basis.

The Prov O and the WCB O meet every quarter as a matter of courtesy and general information sharing on complaint trends and new initiatives at the WCB. The WCB O also meets with the Prov O oWCB teamô to discuss new developments at the WCB and any new initiatives which may affect complaint trends and patterns affecting the office of the Prov O. ...

We also meet to discuss new trends and initiatives in the area of "ombudsmanship".

While there is no formal relationship between the two offices, the PO maintains its authority under the OAct to deal with any workers’ compensation complaint that is first received by its office, rather than refer that complaint to the WCBO. However, as noted above, the PO now directs most complaints concerning the WCB to the WCBO.

The following information is provided to persons who access the PO’s website (my emphasis):

Workers may appeal any decision of the Workers Compensation Board about their compensation claims. For information about the appeal process, refer to the Claims Appeal Guide. You can get the guide at your local WCB office. If you need help to file an appeal, contact a union representative or the Compensation Advisory Services at 1-800-663-4261.

If your complaint is about delay or service quality, please contact the WCB’s Ombudsman in Richmond at 276-3053 or 1-800-335-9330.

The same information is provided to persons who phone the PO’s general information line (1-800-567-3247, press #1, then #3). However, that telephone message advises callers that they can also file complaints with the PO regarding the WCB by pressing another set of numbers. It is interesting to note that during 1997 - the first full year of the WCBO’s

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15 Available Remedy, the office of Ombudsman of BC’s website, 1998.
While most persons who have a complaint about workers’ compensation matters are
directed by the PO to the WCBO, there are some that the PO does not pass along,
because the WCB did not grant the WCBO authority over the Workers’ Compensation
Review Board, the Workplace Act or the Criminal Injuries Compensation Act (“CICAct”).
As a consequence, any complaints relating to the Review Board or these two statutes fall
outside the mandate given to the WCBO and are thus handled by the PO. (Unfortunately, I
was unable to obtain information from the PO regarding the number or nature of such
complaints.)

The PO will also deal with complaints that were first addressed by the WCBO, but which
for various reasons come back to the PO. As Mr. Hopkins explains:

       The office of the Prov O may contact the WCB O office regarding
complaints which may have been dealt with by the WCB O but which
have not be brought forward to the Prov O. All WCB O [docket]
information pertinent to the complaint may be shared with the office of
the Prov O in the fulfillment of its statutory obligations.

Finally, the PO will accept complaints against the WCBO itself. (Again, I was unable to
obtain information from the PO about how many or what sort of issues are raised in
complaints against the WCBO.)

While there are no formal administrative or operational ties between the WCBO and the
PO, the PO has an obvious interest in the success of the WCBO. If the WCBO fails, the
PO would no doubt have to deal with the thousand additional workers’ compensation
complaints each year that are now addressed by the WCBO.

In the news release the WCB issued shortly after the WCBO was established, Ms.
McCallum is quoted as saying: “My office will monitor the effectiveness of the WCB
Ombudsman.”

In her August 1997 letter to Mr. Hopkins, Ms. McCallum provided further details about
the nature of her interest in his office.

       [I]t is important that over time the WCB Ombudsman office evolve to be
more of a classical Ombuds office including more attention given to:

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18 Letter from Dulcie McCallum, Provincial Ombudsman, to Peter D. Hopkins, WCBO, August 8, 1997.
19 Dulcie McCallum, quoted in “WCB Creates Ombudsman Office”, WCB news release, Richmond, BC,
20 Letter from Dulcie McCallum, Provincial Ombudsman, to Peter D. Hopkins, WCBO, August 8, 1997.
a) how the Ombudsman is appointed and for how long;  
b) to whom the Ombudsman reports; and  
c) that the Ombudsman and her or his staff are excluded from the human resources arrangements that apply to those they are responsible to investigate.

The significance of the PO’s interest in the WCBO becoming more like a classical Ombudsman office is an issue that I will explore in this report.

6. THE WCBO’s RELATIONSHIP WITH THE WAO/EAO

The Ministry of Labour has established an independent service to advise and assist workers with their claims appeals before the Review Board and the Appeal Division (i.e. the Workers’ Advisers Office - “WAO”) and to advise and assist employers in their OHS or assessment matters or any claims filed by a worker (i.e. the Employers’ Advisers Office - “EAO”). Unlike the WCBO, these offices have been granted a defined legislative mandate under the WCA Act:

Workers’ advisers and employers’ advisers

94 (1) The Lieutenant Governor in Council may appoint workers’ advisers and employers’ advisers.  
(1.1) The workers’ advisers and the employers’ advisers must be paid remuneration fixed by the Lieutenant Governor in Council, and actual and reasonable expenses incurred by them in the discharge of their duties.  
(1.2) All money required to be paid under subsection (1.1) must be paid by the government, but the Workers’ Compensation Board must reimburse the government for all amounts so paid when requested by the minister.  
(1.3) On receiving a request under subsection (1.2), the Workers’ Compensation Board must, out of the accident fund, pay the amount requested to the Minister of Finance and Corporate Relations.  
(1.4) Notwithstanding the Public Service Act, the minister may enter into contracts and agreements to provide for the facilities, equipment and staff necessary for the efficient performance of the duties of the workers’ advisers and the employers’ advisers.  
(1.5) The workers’ advisers and the employers’ advisers and the staff referred to in subsection (1.4) are, notwithstanding the Financial Administration Act, not part of the staff of a ministry for the purpose of applying section 23 (6) of the Financial Administration Act.  
(2) A workers’ adviser must  
(a) give assistance to a worker or to a dependant having a claim under this Act, except where the workers’ adviser thinks the claim has no merit,
(b) on claims matters, communicate with or appear before the board, review board or any other tribunal established by or under this Act on behalf of a worker or dependant where the adviser considers assistance is required, and
(c) advise workers and dependants with regard to the interpretation and administration of this Act or any regulations or decisions made under it.

(3) An employers’ adviser must
(a) give assistance to an employer respecting any claim under this Act of
   (i) a worker, or
   (ii) a dependant of a worker
   of that employer, except where the employer's adviser thinks the claim has no merit,
(b) on claims matters, communicate with or appear before the board, review board or any other tribunal established by or under this Act on behalf of an employer where the adviser considers assistance is required, and
(c) advise employers with regard to the interpretation and administration of this Act or any regulations or decisions made under it.

(4) The workers’ advisers or employers' advisers need not be members of the Law Society of British Columbia, and if one of them is not, section 26 of the Legal Profession Act does not apply to him or her.

(5) An employers’ adviser must not report or disclose to an employer information obtained from or at the board of a type that would not be disclosed to the employer by the board.

According to Mr. Hopkins, his office enjoys a healthy working relationship with the WAO/EAO. They have two separate and distinct mandates.

For example, the WCBO does not accept a complaint if the complainant has not yet exercised a right of appeal (within time). In such a situation, the WCBO would refer the complainant to the WAO/EAO, which can then help advise the worker/employer about their possible appeal.

On the other hand, the WAO/EAO refers workers/employers to the WCBO if the issue is one that cannot be resolved by an available appeal under the WCAct, or if the right of appeal has expired.

That said, the WCBO does not accept complaints regarding the services someone receives from the WAO/EAO. Such complaints are forwarded to the PO.²¹

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²¹ Telephone interview with P. Hopkins, July 20, 1998.
7. SOURCE OF COMPLAINTS TO THE WCBO

So long as the subject matter of the complaint falls within the jurisdiction of the WCBO, as has been prescribed by the Board, the office will accept complaints from anyone, including WCB staff who may have sought compensation as a result of their own workplace injuries or illnesses. However, a complainant must generally have a personal or direct interest in the issue that forms the foundation of the complaint.

The WCBO identifies the sources of the complaints it receives as falling into one of the following seven categories. (The proportion of complainants within each complainant category is set out in Attachment #3.)

- Workers
- Employers
- the Provincial Ombudsman
- Members of the Legislative Assembly of the Province of British Columbia
- the Workers or Employers Advisers
- Agents
- Others

On page 4 of his 1998 Business Plan and at page 2 of the handout, The WCB Ombudsman, Mr. Hopkins states: “WCB staff do not refer cases to the WCB Ombudsman office.” By this, Mr. Hopkins means that if a member of the public tells a Board staff person that he/she wants to file a complaint with the WCBO, the staff person must direct that person to the office and cannot file a complaint on that person’s behalf. Also, Board staff may not commence complaints on behalf of the public. The only exception to this general rule arises if the Board staff person is him/herself a claimant and wants to file a complaint. In such cases, they may complain to the WCBO as claimants, but not in their capacity as Board employees.22

8. THE WCBO’s COMPLAINT REVIEW PROCESS

The WCBO employs a two phased complaint review process. This process was described at tab 4 of the WCBO’s February 1998 submission to the Commission.

Under the first phase, the WCBO staff determine the type of inquiry; i.e. whether it is a simple or general inquiry, or a formal complaint. If it is a complaint, so called “tombstone data” is recorded in a file known as a complaint docket. Once the general nature of the complaint is ascertained, a decision is made as to how urgent the issue is and the complainant’s expectation of the WCBO is noted.

If the WCBO has jurisdiction, further details regarding the complaint are ascertained and recorded in the complaint data base using the defined keywords. The complaint is then

forwarded to either a WCB manager or assigned to one of the two internal Ombudsmen. Depending on the urgency, a bring-forward date is set to track the complaint.

If the WCB manager resolves the complaint by the bring-forward date, the file is closed. If the matter is not resolved by the manager, the file is usually re-assigned to one of the two internal Ombudsmen.

The second phase is the Ombudsman’s investigation. Usually, the Ombudsman contacts the complainant to clarify the WCBO’s role and confirm the issue of concern. Various sources of information are then accessed, including a review of the claims file. Discussions may be held with Board management staff. Conversations may be held with third parties, if applicable and permissible.

At the close of an investigation, the complainant is contacted either by phone or by letter. If the matter is not resolved to the complainant’s satisfaction, the WCBO advises that a further complaint can be filed with the PO.

9. WCBO COMPLAINTS DATA

Attachment #3 is a table of data about the WCBO complaints that I have extracted from the quarterly and annual reports prepared by the WCBO which were provided to the Commission. I have described this table as “provisional” because the data in those reports was not easy to extract, nor was it organized in the same way from report to report, and most importantly, the data was incomplete.

With those qualifications, I can offer only a few very general observations:

• the average length of time that it takes from the day that a complaint docket is opened to the day that it is closed has dropped apparently quite dramatically since the WCBO opened its office in 1996 (from about 20 calendar days to about 4);
• workers constitute the largest proportion of all persons who file complaints with the WCBO (i.e. on average, at least half of all complainants);
• complaints concerning compensation services (e.g. benefit entitlement, medical, appliances, allowances, rehabilitation, field investigations, disclosure, etc.) make up at least 80 percent of all formal complaints.

Mr. Hopkins advises me that his office has recently completed a new report, 1997 Report of the Office of the WCB Ombudsman, that will be published in the near future. Apparently, this report will contain complaints data that will be compiled and organized in a more useful fashion than what I have been able to extract from his reports.

For example, it would be interesting to see if the compiled data in this new report could be used to answer the following sorts of questions:
• Has there been a gradual drop since April 1996 in the number or proportion of complaints that are sent to the WCBO from the PO? In other words, are more people accessing the WCBO directly, rather than through the PO?
• Since April 1996, has increasingly more employers filed complaints with the WCBO?
• Are fewer (in number and proportion) complaints being resolved by WCB managers and more by the WCBO? If so, are the same type of complaints being resolved by both routes? Or is the WCBO addressing more substantial or systemic problems than the WCB managers?

I would be pleased to review and comment on that data when this new report is made available to the Commission.

10. A COMPARISON OF THE PO AND THE WCBO

In the following seven tables, I have compared the mandate and activities of the PO to those of the WCBO.

I have used the OAct as a template for these comparisons. I have used the OAct because, as noted previously, the PO is interested in ascertaining whether the WCBO should become more like a classical Ombudsman office. I have assumed that the essential features of a classical Ombudsman are to be found in the governing statute.

**TABLE ONE: APPOINTMENT AND ACCOUNTABILITY MECHANISMS**

<table>
<thead>
<tr>
<th>CRITERIA</th>
<th>PROVINCIAL OMBUDSMAN</th>
<th>WCB OMBUDSMAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the legal authority that created the office and established the Ombudsman's mandate?</td>
<td>Statute, approved by the Legislative Assembly.</td>
<td>A policy decision of the President of the WCB, with input from the Senior Executive Committee.</td>
</tr>
<tr>
<td>Who appoints the Ombudsman?</td>
<td>The Cabinet, on the unanimous recommendation of a special committee of the Legislative Assembly (s.2 OAct)</td>
<td>The President of the WCB, on behalf of the Senior Executive Committee.</td>
</tr>
<tr>
<td>What is the Ombudsman's term of office</td>
<td>Six years, plus an additional six years (s.3(1) OAct)</td>
<td>No applicable provision in WCAct or Board policy.</td>
</tr>
<tr>
<td>Who can remove the Ombudsman?</td>
<td>The Cabinet, but only on the recommendation of the Legislative Assembly (s.6(2) OAct)</td>
<td>The President, but only with the prior approval of the Panel of Administrators.</td>
</tr>
<tr>
<td>Status</td>
<td>An officer of the provincial legislature, but is not a civil servant or an elected politician (Pamphlet)</td>
<td>An employee of the WCB.</td>
</tr>
</tbody>
</table>
**Reports to** | The Legislative Assembly (see also filing of annual reports next) | The President and Chief Executive Officer of the WCB.
---|---|---
**Is the Ombudsman required to file an annual report** | 1) Yes, to the Speaker of the Legislative Assembly, who must then lay the report before the full Assembly asap (s. 31(1) & (2) OAct).  
2) May make a special report to the Assembly or comment publicly about PO’s duties or a particular case (s. 31(3) OAct). | Yes; is not required under the WCAct to file an annual report, but does so as a matter of Board policy.

It is obvious that the primary difference between the two Ombuds offices is that the PO was established by statute approved by the Provincial Legislature, while the WCBO was established by a policy (authorized under statute) approved by an creature of the Legislature. As we will see in the remaining comparison tables, this is a critically important difference.

**TABLE TWO : JURISDICTION**

<table>
<thead>
<tr>
<th>CRITERIA</th>
<th>PROVINCIAL OMBUDSMAN</th>
<th>WCB OMBUDSMAN</th>
</tr>
</thead>
</table>
| Workers’ compensation legislation that is within the Ombudsman’s jurisdiction | Workers’ Compensation Act  
Workplace Act  
Criminal Injuries Compensation Act | Workers’ Compensation Act |
| Agencies that are within the jurisdiction of the Ombudsman (i.e. who may be investigated?) | Various authorities with a relationship to government (s.10(1) and Schedule to the OAct). Includes all branches of the WCB, including the Appeal Division, the Workers’ Compensation Review Board, and the workers/employers advisors. | All branches of the WCB, including the Appeal Division, but not the Workers’ Compensation Review Board or the workers/employers advisors. |
| Subject jurisdiction (i.e. what subject matters can be investigated?) | All matters of administration re: a decision or recommendation made, an act done or omitted, or a procedure used (s.10(1) OAct)  
A complaint that a decision is unjust or oppressive, discriminates against a person or group, is unreasonable or arbitrary, is based on wrong or irrelevant facts, is based on the wrong interpretation of the law or is unreasonably delayed. (Pamphlet)  
A complaint that an act is done for an improper purpose, is done negligently, is done without adequate reasons or is unreasonably delayed. (Pamphlet) | Complaints of alleged unfairness concerning a decision or recommendation made, an act done or omitted, or a procedure, practice or regulation used by the WCB. (Pamphlet) |
<table>
<thead>
<tr>
<th><strong>Timing of matters that can be investigated (i.e. is there a limitation period?)</strong></th>
<th>If the matter has occurred or may occur (s.10(1) OAct), but <em>may</em> refuse to investigate or stop an investigation if the complainant or person aggrieved knew or ought to have known of the decision, recommendation, act or omission to which the complaint refers more than one year before the complaint was received by the PO (s.13(a) OAct).</th>
<th>If the complaint relates to a decision, etc. that the complaint knew about for more than one year without taking action. (Pamphlet) However, according to Mr. Hopkins:23 “We have never applied time conditions or constraints to any complaint.”</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>May the Ombudsman investigate conduct that occurred before the commencement of the legislation?</strong></td>
<td>Yes (s.11(2) OAct)</td>
<td>May investigate events that occurred before the office was established in April 1996.</td>
</tr>
<tr>
<td><strong>Effect of other privative clause on authority to investigate</strong></td>
<td>PO may investigate notwithstanding various privative clauses (s.10(2) OAct)</td>
<td>Not applicable.</td>
</tr>
<tr>
<td><strong>Limits on the Ombudsman’s jurisdiction (i.e. what are the mandatory limits on jurisdiction)</strong></td>
<td>If there is a statutory right of appeal, review, etc. and the right to appeal has not been exercised or if limitation period has passed (s.11(1)(a) OAct)</td>
<td>If it is an issue that is currently under appeal or an issue that could be appealed. (If the appeal period has expired, the WCBO may provide guidance re: an request for an extension of time.)</td>
</tr>
<tr>
<td></td>
<td>If the person is an authority’s lawyer (s.11(1)(b) OAct)</td>
<td>If it involves a change to law or statute (as opposed to policy).</td>
</tr>
<tr>
<td></td>
<td>PO cannot make a decision for an authority or reverse a decision that has been made. (Pamphlet)</td>
<td>If it relates only to the facts of a case.</td>
</tr>
<tr>
<td></td>
<td>PO cannot be an advocate for people or a defender of the actions of government. (Pamphlet)</td>
<td>If the matter is being dealt with by the PO.</td>
</tr>
<tr>
<td></td>
<td>If the matter is a concern regarding the office of the PO. (Pamphlet)</td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>What are the other discretionary criteria which allow the Ombudsman to refuse to investigate or stop an investigation?</strong></td>
<td>If the law or existing administrative procedure provides a remedy adequate in the circumstances for the person aggrieved, and, if the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for the failure to do so. (s.13(c) OAct) If the complaint is frivolous, vexatious, not made in good faith or concerns a trivial matter. (s.13(d) OAct) If, having regard to all the circumstances, further investigation is not necessary in order to consider the complaint. (s.13(e) OAct) If, in the circumstances, investigation would not benefit the complainant or person aggrieved. (s.13(f) OAct)</td>
</tr>
<tr>
<td><strong>Any statutory limits on the Ombudsman’s powers of investigation?</strong></td>
<td>Yes, if the Attorney General certifies that entering a premise, giving information, answering questions or producing a document or thing may interfere with or impede a criminal investigation, etc. (s.18 OAct)</td>
</tr>
<tr>
<td><strong>How can questions about jurisdiction be resolved?</strong></td>
<td>PO may apply to Supreme Court for a declaratory order determining the questions (s.11(3) OAct)</td>
</tr>
</tbody>
</table>

**Legislative jurisdiction:** The WCBO does not have the same legislative jurisdiction as the PO. This means that the PO must continue to deal with complaints which are based upon decisions or actions of the Board made pursuant to the **Workplace Act** and the **CICAct**.

**Agency jurisdiction:** The WCBO cannot take complaints regarding the Workers’ Compensation Review Board or the special workers/employers advisors established under s.94 of the **WCAct**. However, the WCBO can investigate any other branch of the WCB.

**Subject jurisdiction:** The subjects that the PO and the WCBO may investigate are described in different words in the **OAct** and the Board’s information pamphlets.

**Timing:** Both the PO and the WCBO have the discretion to refuse to investigate a matter that took place a year before, or if the complainant ought to have knowledge about the matter one year before the complaint was filed. Both may also investigate complaints that occurred before their offices were established.

**Limits on jurisdiction:** The WCBO appears to have adopted the limits on the PO’s jurisdiction that are set out under the **OAct**. To those limits, the WCBO has added...
necessary limits, such as when the PO is dealing with an issue or if the complaint is directed against the PO itself.

The WCBO suggests that his office will not investigate a complaint if it relates to the facts of a case. By this, Mr. Hopkins has explained that he will not proceed further if the complaint is directed at the weight an adjudicator or the Appeal Division assigned to a particular fact when making a decision. He would, however, accept a complaint if the adjudicator or appeal commissioner ignored a particular fact or if some evidence is brought forward by the complainant after-the-fact. In those cases, Mr. Hopkins asks the adjudicator of Appeal Division to ascertain whether it needs to reconsider its decision based on that new information.

TABLE THREE: CONFIDENTIALITY, INDEPENDENCE AND RELATED SUBJECTS

<table>
<thead>
<tr>
<th>CRITERIA</th>
<th>PROVINCIAL OMBUDSMAN</th>
<th>WCB OMBUDSMAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Must the Ombudsman keep information confidential?</td>
<td>Yes; PO must not divulge any information except if permitted by the Act (s.9 OAct).</td>
<td>No applicable provision in the WCACT or Board policy (s.96 WCACT re: “secrecy” does not apply to WCBO), but WCBO attempts to maintain “confidentiality by anonymity”. The office also maintains its own computer system that is separate from the rest of the Board, and has dedicated telephone and fax lines.</td>
</tr>
<tr>
<td>Is the Ombudsman exempt from the Freedom of Information and Protection of Privacy Act?</td>
<td>Yes; any document created by, in the custody of the PO, or sent from the office of the PO to another party is exempt from the Freedom of Information and Protection of Privacy Act (s.3(1)(c) FOIPPAct).</td>
<td>No.</td>
</tr>
<tr>
<td>Must investigations be kept confidential?</td>
<td>Yes; investigations must be conducted in private unless public knowledge is essential to further the investigation (s.9(5) OAct)</td>
<td>See above.</td>
</tr>
<tr>
<td>Is the Ombudsman compellable?</td>
<td>No; the PO is non-compellable, with certain exceptions (s.9(5) OAct)</td>
<td>Yes; there is no applicable provision in WCACT or Board policy.</td>
</tr>
<tr>
<td>When can there be disclosure?</td>
<td>Permitted if necessary to further investigation, prosecute an office or establish grounds for a recommendation (s. 9(7) OAct)</td>
<td>While there is no applicable provision in WCACT or Board policy, WCBO may disclose as a matter of discretion.</td>
</tr>
<tr>
<td>What sort of protection does a complainant or witness enjoy?</td>
<td>A person must not discharge, suspend, expel, intimidate, coerce, evict, impose any pecuniary or other penalty on or otherwise discriminate against a person because that person complains, gives evidence or otherwise assists in the investigation, inquiry or reporting of a complaint or other proceeding under this Act (s.16 OAct). It is an office to breach this section (s.32(e) OAct)</td>
<td>No applicable provision in WCAct or Board policy.</td>
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</tr>
<tr>
<td>What statutory provisions or rules of law apply re: withholding of information or refusing to disclose to the Ombudsman?</td>
<td>Generally speaking, a rule of law or an confidentiality oath does not apply (s.19(1) &amp; (3) OAct), but a statutory provision does apply (s.19(2)). If a complainant consents, someone who has taken an oath must disclose (s.19(4)).</td>
<td>No applicable provision in WCAct or Board policy.</td>
</tr>
<tr>
<td>What privileges does someone have if they give information, answer questions or produce documents or things to Ombudsman?</td>
<td>Same privileges as they would have with respect to proceedings in a court of law. (s.20(1) OAct)</td>
<td>No applicable provision in WCAct or Board policy.</td>
</tr>
<tr>
<td>Is evidence given in a proceeding before the Ombudsman inadmissible against that person in a court of law or any other judicial proceeding?</td>
<td>Yes, except in a trial for perjury or an offence under the Act. (s. 20(2) OAct)</td>
<td>No applicable provision in WCAct or Board policy.</td>
</tr>
<tr>
<td>Is the Ombudsman impartial and neutral</td>
<td>Yes; not an advocate for people or a defender of government actions; is independent of the agencies that it investigates. (Pamphlet)</td>
<td>WCBO is “designated as neutral” by the Board; has a “moral duty of impartiality”.</td>
</tr>
<tr>
<td>Can the Ombudsman be challenged, reviewed, etc. by the courts</td>
<td>Privative clause creates barrier: Proceedings of the PO cannot be challenged, reviewed or called into question by a court, except on the ground of lack or excess of jurisdiction. (s.28 OAct)</td>
<td>Privative clause may create a barrier: Board has exclusive jurisdiction to make inquires, etc. and decision is final and conclusive, and not open to review by courts (s.96(1) WCAct).</td>
</tr>
<tr>
<td>Are the Ombudsman’s proceedings privileged?</td>
<td>Yes. No action may be taken against the PO (or under PO’s authority) for things done in good faith, etc. Also, all information provided to PO is privileged and not subject to law re: libel or slander (s.29 OAct).</td>
<td>No applicable provision in WCAct or Board policy.</td>
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</tr>
<tr>
<td>Can the Ombudsman delegate powers</td>
<td>Yes, with certain limits and conditions (s.30 OAct).</td>
<td>Not applicable; no statutory powers to delegate. However, powers granted by Board policy can be delegated to the Assistant Ombudsman.</td>
</tr>
<tr>
<td>Can the Ombudsman determine its own procedures?</td>
<td>Yes, subject to any rules that the Legislative Assembly may make (s.34 OAct).</td>
<td>Yes. While there is no applicable provision in WCAct or Board policy, the WCBO had determined its own procedures in accordance with the Code of Ethics and the Standards of Practice of The Ombudsman Association.</td>
</tr>
</tbody>
</table>

**Confidentiality:** This is the subject area where there is the greatest difference between the PO and the WCBO, and where that difference can be explained because the PO is governed by statute, while the WCBO is governed by Board policy.

**Compellability:** Another difference between the PO and the WCBO is in relation to compellability. S.9(5) of the OAct, provides further support to an Ombudsman’s duty of confidentiality in that it prevents someone from compelling the PO to give evidence in court or at some other similar proceeding. There is no similar provision under the WCAct that applies to the WCBO.

**Protection of complainants:** Unlike under the OAct, persons who file complaints with the WCBO under the WCAct enjoy no protection if they are mistreated by their employer or anyone else as a result of their complaint. They also do not enjoy the same privileges they would otherwise be entitled to in a court of law. In particular, information given to the WCBO could be admissible against that person in a court of law or another legal proceeding.

**Impartial / neutral:** Both the PO and the WCBO proclaim their respective impartiality and neutrality in their promotional material, but only the PO can rest its claim on a legislative foundation.

**Privative clause:** It appears that both the PO and the WCBO enjoy the same, relatively high threshold for judicial review that has been created by the privative clauses under the OAct and WCAct, respectively.

**Limitation of liability:** While the PO enjoys an expressed limitation under the OAct on being sued, etc., the WCBO could conceivably be sued, or any libelous or slanderous information in the WCBO’s files could be used as the basis to sue third parties.
Delegation of powers and Determining own proceedings: While they rest on different legal foundations, the PO and the WCB appear to have similar powers under these two subject headings.

**TABLE FOUR: INVESTIGATION OF COMPLAINTS**

<table>
<thead>
<tr>
<th>CRITERIA</th>
<th>PROVINCIAL OMBUDSMAN</th>
<th>WCB OMBUDSMAN</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initiation of an investigation</strong></td>
<td>By complaint or on the PO’s own initiative (s.10(1) OAct), or by reference from the Legislative Assembly (s.10(3) OAct)</td>
<td>By complaint or on the WCBO’s own initiative (e.g. if complaints data suggests a systemic problem).</td>
</tr>
<tr>
<td><strong>When must the Ombudsman undertake an investigation and file a report?</strong></td>
<td>A reference from the Legislative Assembly (s.10(3) &amp; (4) OAct)</td>
<td>While there is no applicable provision in WCAct or Board policy, the Board may request the WCBO to consider commencing an investigation.</td>
</tr>
<tr>
<td><strong>Who can make a complaint?</strong></td>
<td>Any person or group of persons [affected by a decision of the Board under the applicable legislation, or their agent] (s.12(1) OAct), unless the subject matter of the complaint primarily affects a person other than the complainant and the complainant does not have sufficient personal interest in it (s.13(b) OAct).</td>
<td>Anyone who is affected by a decision of the Board under the WCAct or their agent</td>
</tr>
<tr>
<td><strong>What form can the complaint take?</strong></td>
<td>Must be in writing (s.12(2) OAct)</td>
<td>The WCBO accepts complaints over the phone, by fax or in writing.</td>
</tr>
<tr>
<td><strong>Must the Ombudsman notify an authority being investigated?</strong></td>
<td>Yes; must notify authority affected and any other persons considered appropriate (s.14(1) OAct)</td>
<td>Not applicable; the authority being investigated is the Board itself.</td>
</tr>
<tr>
<td><strong>In what form may the Ombudsman receive or obtain information?</strong></td>
<td>In the manner the Ombudsman considers appropriate (s.15(1) OAct)</td>
<td>The WCBO receives or obtains information over the phone, by fax or in writing.</td>
</tr>
<tr>
<td><strong>May the Ombudsman conduct hearings?</strong></td>
<td>Yes, at the PO’s discretion (s.15(1) OAct); a person is not entitled to a hearing (s.27 OAct).</td>
<td>No applicable provision in WCAct or Board policy.</td>
</tr>
<tr>
<td><strong>Does the Ombudsman have the power to enter and inspect premises?</strong></td>
<td>Yes, at any reasonable time (s.15(2)(a) OAct)</td>
<td>The WCBO is empowered as an officer of the WCB and, as such, may exercise any inspection or related powers that have been appropriately delegated under the WCAct.</td>
</tr>
<tr>
<td><strong>Can the Ombudsman talk in private with any person?</strong></td>
<td>Yes (s.15(2)(a) OAct)</td>
<td>As a practical matter, yes; but authority to do so is not granted under the WCAct.</td>
</tr>
<tr>
<td><strong>Can the Ombudsman require someone to furnish information, documents or things?</strong></td>
<td>Yes, at a time and place the PO may specify, whether or not that person is still employed by the authority, or information is still in control of an authority (s.15(2)(b) OAct)</td>
<td>No, but works in cooperation with Board staff; has been granted “unfettered access” to Board files and all Board staff.</td>
</tr>
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</tr>
<tr>
<td><strong>Must the Ombudsman return a document or thing obtained?</strong></td>
<td>Yes, if authority requests; PO must return within 48 hours of request (s.15(3) OAct)</td>
<td>Not applicable</td>
</tr>
<tr>
<td><strong>Can the Ombudsman make copies of information or documents produced?</strong></td>
<td>Yes (s.15(2)(c) OAct)</td>
<td>No statutory power, but works in cooperation with Board staff.</td>
</tr>
<tr>
<td><strong>Can the Ombudsman order anyone with relevant information to appear by summons and examine them under oath?</strong></td>
<td>Yes (s.15(2)(d) OAct); also an offence to violate an oath (s.32(d) OAct).</td>
<td>No statutory power, but works in cooperation with Board staff.</td>
</tr>
<tr>
<td><strong>Can the Ombudsman receive evidence whether or not it would be admissible in a court of law?</strong></td>
<td>Yes (s.15(2)(c) OAct)</td>
<td>No statutory power, but works in cooperation with Board staff.</td>
</tr>
<tr>
<td><strong>Is a person examined by the Ombudsman under summons entitled to fees, allowances and expenses?</strong></td>
<td>Yes, as if they were a witness in the Supreme Court of BC (s.21(1) OAct)</td>
<td>No; Board staff would be paid their normal salaries when speaking to the WCBO.</td>
</tr>
<tr>
<td><strong>Can a person who has incurred expenses in complying with an Ombudsman’s request be reimbursed?</strong></td>
<td>Yes, for reasonable expenses incurred not covered under s.21(1), (s.21(2) OAct)</td>
<td>Generally, the WCBO does not make requests of non-WCB persons. If the office did request someone to travel to Richmond for an interview, the WCBO would reimburse them according to the Board’s established policy and practice.</td>
</tr>
</tbody>
</table>
**Initiation of a complaint:** The mechanism for initiating a complaint to the PO is essentially the same as the one for initiating a complaint to the WCBO. There are some differences in the wording of the OAct compared to the WCBO’s operating policy, but those are minor in nature.

**Investigation of a complaint:** While the PO enjoys various statutory powers which support that office’s ability to investigate a complaint, the WCBO can exercise similar powers although they have been granted by way of Board policy instead of under the WCAct. If WCB staff do not cooperate with the WCBO, the internal Ombudsman would be free to report that non-cooperation to the President.

The limits on the WCBO’s power to investigate a complaint become apparent when the focus falls outside the Board. For example, the WCBO does not appear to have any authority to summon someone from outside the Board to attend a hearing.

**TABLE FIVE: INFORMAL RESOLUTION OF COMPLAINTS**

<table>
<thead>
<tr>
<th>CRITERIA</th>
<th>PROVINCIAL OMBUDSMAN</th>
<th>WCB OMBUDSMAN</th>
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</thead>
<tbody>
<tr>
<td><strong>Does the Ombudsman have the authority to attempt to settle a complaint?</strong></td>
<td>Yes; negotiate a settlement (Pamphlet and s.14(2) OAct)</td>
<td>Yes, granted by Board policy.</td>
</tr>
<tr>
<td><strong>Does the Ombudsman have the authority to consult with the authority?</strong></td>
<td>Yes (s.14(2) OAct)</td>
<td>Yes, granted by Board policy.</td>
</tr>
<tr>
<td><strong>When must the Ombudsman consult with an authority?</strong></td>
<td>If the authority requests consultation before the PO has made a decision (s.14(3) OAct)</td>
<td>Not applicable.</td>
</tr>
</tbody>
</table>
When must the Ombudsman inform an authority? And give the authority an opportunity to make representations?

PO must inform, etc. before it makes a report or recommendation that may adversely affect an authority (or person). (s.17 OAct)

Yet to be determined. (Note: One issue in Weldwood v. WCB was whether WCBO had a duty to advise Weldwood of its investigation and allow the company to make submissions before issuing a recommendation.)

What must the Ombudsman do if a complaint is not substantiated?

PO must notify complainant in writing of reasons why and may suggest alternative courses of action (s. 22 OAct)

The WCBO writes to the complainant and explains the reasons why, and may suggest alternative courses of action.

What must the Ombudsman do if a complaint is substantiated?

PO must report to authority in writing with reasons and may recommend various actions to resolve matter (s. 23 OAct), and may request authority to notify PO of acts taken to respond to recommendation or reasons if no action taken (s.24(1) OAct).

May make recommendations to the division manager, followed by recommendations to the President/CEO or Panel of Administrators.

What must the Ombudsman do if it is necessary to modify original recommendations?

PO must notify authority of modified recommendations and may request authority to notify PO of acts taken to respond to modified recommendation or reasons if no action taken (s.24(2) OAct)

The WCBO writes to the complainant and the Board, outlining the changes.

Informal resolution of a complaint: This is another area where the authority of the PO and WCBO are similar, even though one has been granted by statute and the other by policy. The net effect, however, appears to be the same.

Notifying those affected: The OAct requires the PO to inform and advise an authority that may be affected by a report or recommendation. This is a safety-check that provides the authority being investigated with an opportunity to change its ways (or provide an explanation of its conduct) before the PO proceeds further with its investigation. The authority being investigated by the PO will probably always be the party that is also most likely to be affected by the results of the PO’s investigation.

For the most part, the party that is most likely to be affected by the WCBO’s investigations will be the WCB itself. However, the Court in the Weldwood case may provide guidance to the WCBO as to whether that internal Ombudsman office has a duty of fairness to notify and provide third parties who may be affected by the results of a recommendation with an opportunity to be heard. (This issue will be discussed in more detail in the later section of this paper titled Discussion of the Issues.)
Table Six: Formal Resolution of Complaints

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<tr>
<th>CRITERIA</th>
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<th>WCB OMBUDSMAN</th>
</tr>
</thead>
</table>
| What can the Ombudsman do if no action is taken on its recommendation that is adequate or appropriate | 1) PO may submit a report of the matter to the Cabinet and, after that, may make a report to the Legislative Assembly respecting the matter as the PO considers appropriate (s.25(1) OAct)  
2) PO must inform the complainant of the recommendation and may make additional and appropriate comments (s.26(1) OAct) | No authority under WCAct to issue independent public reports if Board does not follow a recommendation, however, as a matter of Board policy, the if there is no action, the WCBO will inform complainant of its recommendation and may offer additional comments. |
| Must the Ombudsman inform the complainant of the results of an investigation? | Yes; must be done in every case within a reasonable period of time (s.26(2) OAct). | The WCBO informs the complainant of the results of an investigation either by phone or in writing. |

*Power of persuasion:* Neither the PO or the WCBO have the authority to direct that an authority or the WCB must do or not do something, nor do they have any power to issue remedial or corrective orders, issue fines or award costs. They are both limited to a power of persuasion in the form of a recommendation.

The power of those recommendations is based on the authority or power of the receiving party. In the case of the PO, if the authority does not take the recommended corrective action, the Provincial Legislature will be the ultimate recipient of a special or public report. If the Legislature believes the Ombudsman was correct, it can take the necessary corrective action.

The WCBO’s power appears to be more limited, in that the Board’s internal Ombudsman can only notify the complainant if the recommendation is ultimately not followed by the WCB.
### TABLE SEVEN: OFFENCES

<table>
<thead>
<tr>
<th>CRITERIA</th>
<th>PROVINCIAL OMBUDSMAN</th>
<th>WCB OMBUDSMAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is it an offence to obstruct, hinder or resist the Ombudsman?</td>
<td>Yes (s.32(a) OAct)</td>
<td>No applicable provisions under the WCAct, but could be a disciplinary matter for Board employees (i.e. covered by Board policy).</td>
</tr>
<tr>
<td>Is it an offence to refuse or fail to comply with a lawful requirement of the Ombudsman?</td>
<td>Yes (s.32(b) OAct)</td>
<td>No applicable provisions under the WCAct, but could be a disciplinary matter for Board employees (i.e. covered by Board policy).</td>
</tr>
<tr>
<td>Is it an offence to make a false statement or mislead the Ombudsman?</td>
<td>Yes (s.32(c) OAct)</td>
<td>No applicable provisions under the WCAct, but could be a disciplinary matter for Board employees (i.e. covered by Board policy).</td>
</tr>
<tr>
<td>Is it an offence for the Ombudsman to violate an oath?</td>
<td>Yes (s.32(d) OAct); see also s.15(2)(d) re: examination of parties under oath.</td>
<td>No applicable provisions under the WCAct, but could be a disciplinary matter for the WCBO as a Board employee (i.e. covered by Board policy).</td>
</tr>
</tbody>
</table>

Acts such as obstructing the PO or the WCBO, making a false statement, etc. are based on different legal foundations (e.g. statute versus policy). As a result, different legal mechanisms are employed to address those problems and, in turn, those mechanisms result in different consequences to the affected party.

Someone breaching the OAct could be prosecuted in a court of law and, if convicted, would have to pay a fine or face a term of imprisonment. A staff person breaching the Board’s policy with respect to cooperating with the WCBO, could face discipline in accordance with the applicable collective agreement.

### 11. THE EFFECTIVENESS OF THE WCBO

In her 1997 Annual Report, the Provincial Ombudsman noted:\(^{24}\)

> For a number of years my Office had urged the WCB to establish an internal review mechanism, so that complainants would have someone to go to within the WCB itself, as a first recourse to address their concerns. At the beginning of 1998, as the office of the WCB Ombudsman approached its two-year anniversary, I initiated an audit of its operation. The purpose of this audit is to assess the effectiveness of this internal complaint and review mechanism within the WCB. I also

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expect the audit to provide useful information about the possible application of this type of model to other agencies, and general information about internal complaint handling. I expect that my 1998 Annual Report will report on the results of this audit.

As I have described in separate correspondence to the Commission, the PO has started its evaluation of the effectiveness of the WCBO. On May 14, 1998, the PO set out in very general terms the objectives of her staff’s audit of the WCBO:

> We are auditing the WCB Ombudsman ... with the purpose to determine the following:

1. Whether referrals from my Office constitute adequate remedies to complainants who approach my Office pursuant to s.13(c) of the Ombudsman Act RCBC 1996:

   > 13. The Ombudsman may refuse to investigate or cease an investigating a complaint if, in the opinion of the Ombudsman, any of the following apply:...
   >   (c) the law or existing administrative procedure provides a remedy adequate in the circumstances for the person aggrieved, and, if the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for the failure to do so; ...

2. Whether the WCB Ombudsman is an effective means to promote fairness within the administration of the whole of WCB; and

3. Whether the Office of the WCB Ombudsman complies with the principles of natural justice and administrative fairness.

I have been unable to obtain details from the PO concerning the procedures that office will carry out during its audit of the WCBO and, in particular, the specific questions that it will attempt to answer. I understand that the PO will be conducting interviews with a random sample of persons who have filed complaints with the WCBO in the past few years, but I have no details regarding the types of questions the PO staff will be asking those respondents.

Apparently, the PO intends to provide the Commission with more details concerning its audit of the WCBO. If that information indicates that the PO audit will not meet the Commission’s objectives, the Commission could continue its own evaluation of the internal effectiveness of the WCBO. I am hopeful, however, that the PO’s audit process and evaluation criteria will satisfy the Commission.

If the Commission was to undertake its own evaluation, it is very likely that the Commission would be asking the same types of questions to many of the same people who

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26 Interview with Dulcie McCallum (PO), Brent Parfitt and others, July 8, 1998.
the PO has already contacted. I doubt that those respondents would appreciate being contacted twice and asked essentially the same questions.

If it becomes necessary for the Commission to undertake its own evaluation of the WCBO, rather than rely on the PO’s audit, the following would be the type of questions that could form the basis of that study. These represent issues that I have not considered in this report.

*Timeliness:*
1a. *How does the WCBO ensure complaints are investigated (receipt of complaint to resolution of problem) in a timely way?*
1b. *By category, how long does it take for the WCBO to investigate complaints?*
1c. *By month, what is the backlog of complaints (breakdown by stage of resolution)?*
1d. *Is there sufficient resources for the office to deal with the current volume of complaints?*

*Communication:*
2a. *What are the manner, form, and content of communication from the Office to the Board (e.g., reports, letters, and memoranda)?*
2b. *What is the manner, form, and content of communication from the Office to the complainants and other affected parties?*
2c. *What is the nature of communications to, within, and beyond the office (e.g., voice mail, staffing)*

*Public Perception:*
3a. *Do the documents and public communications prepared and sent out by the Office meet the standards that the PO would apply to similar documents or communication?*
3b. *Are the documents and public communications prepared and sent out by the Office truthful? Accurate? Do they represent the true functions (and limitations) of the WCBO?*
3c. *How do people find out about the WCBO?*

One key question for this research would be to ask: Does the WCBO currently deal with complaints in the same way that the PO used to deal with similar sorts of complaints? Unfortunately, the PO was not forthcoming with details that would allow me to make such comparisons. Hopefully, such information would be disclosed in its report of its audit of the WCBO.

If the PO’s audit is not satisfactory to the Commission, I would be pleased to help the Commission undertake a formal evaluation of the effectiveness of the WCBO to supplement the findings I have drawn from other sources. If the Commission proceeding with its own evaluation, it would have to obtain certain background information from the PO to provide a meaningful basis of comparison.
While the WCBO does not deal with all possible workers’ compensation complaints (e.g. those concerning the Review Board, the Workplace Act or the Criminal Injuries Compensation Act are outside its jurisdiction), Mr. Hopkins is of the view that his office is able to deal with issues in a more in-depth fashion than the PO was able to in the past.\(^{27}\)

The WCBO is able to deal with issues at a more detailed level using a broader base level of knowledge of the WCB and its complexity as an organization. For example, the Compensation Services division is considering the introduction of a new method for assessing PFI (permanent functional impairment) ratings which involves the use of computer hardware and software. I have a background in pension assessment, adjudication and vocational rehabilitation. I am able to review the hardware and software applications with an understanding of the PFI impacts as well as any other intended or potentially unintended impacts on such areas as vocational rehabilitation. This helps the office of the WCBO to anticipate any complaints that may stem from the introduction of the new method for assessing PFI as well as providing initial feedback to the WCB if it requests it.

It would be useful to be able to evaluate the veracity of this claim.

Mr. Hopkins provided me with case summaries of over fifty major files that his office has handled from April 16, 1996 through to June 30, 1980. These case summaries are of cases that took many days to resolve or involved complex or sensitive issues, or both. I have taken Mr. Hopkins summaries, done some minor editing and organized them into four groups. These summaries are set out in Attachment #4.

I have not undertaken an in-depth content or program analysis of these case summaries to ascertain what they can say about the effectiveness of the WCBO. If the Commission would like me to undertake such an review, I would be pleased to do so in a supplementary report. However, from a general review of these case summaries, I believe it is fair to draw the following general conclusions.

- These case summaries demonstrate that the WCBO deals with more than complaints of employee rudeness or inappropriate delay. While those are legitimate grounds for filing a complaint, the actions the WCBO has recommended in about half of these cases have resulted in changes to Board policies or procedures, and some of those are fairly significant changes.
- It appears that most of the systemic problems that the WCBO has addressed have arisen as a result of a single complaint that was focused on that problem. In some cases, however, a systemic problem was identified by the WCBO while investigating a complaint that was not entirely about that problem. (e.g. “Staff knowledge of evidentiary issues” under 1) Systemic Problems - Compensation Services; and “Complainant part of investigation by Board staff”, “Use of personal option protection”, and “Accreditation of alternative health service providers” under 2)
Systemic Problems - Other Board Functions). Another example can be found in a case that did not involve a systemic problem (e.g. “Immaterial internet information” under 3) Unique Cases - Compensation Services). These may be good examples of the type of more in-depth problem solving that an experienced Board employee can offer a complainant (which can also benefit others) than a PO staff person may be able to provide.

• In a few cases, the changes recommended by the WCBO have apparently not been acted on (e.g. “Conflicting policies” under 1) Systemic Problems - Compensation Services). Aside from reporting on this apparent lack of action to the President, it does not appear that the WCBO has any other mechanism to encourage the Board to bring about the changes that are necessary.

• In one or two cases (e.g. “Internal harassment policy does not apply to third parties” under 2) Systemic Problems - Other Board Functions), the WCBO has apparently investigated a matter on its own initiative; without a complaint to initiate the process. From what I understand, the PO did (does) not initiate an investigation of workers’ compensation matters without a complaint.

• It appears that the WCBO is able to deal with more than complaints of unfairness. Because of the office staff’s experience, they appear to be able to go further and comment on the merits of a complaint regarding compensation, rather than limiting their review to considering whether the process that led to that decision was fair, followed the WCAct or Board policy, etc. In effect, the WCBO has become another level of appeal on the substantive issues within certain claims files. Again, from what I understand, the PO did (does) not offer this level of service to complainants that approached (approach) its office.

Reviewing the cases summarized in Attachment #4, one is left with the impression that the WCBO is able to effectively address specific problems in individual cases, as well as being able to deal with more systemic problems that can or have affected more than one individual. This alone is a good indicator of the capabilities of the office.

However, other measures of effectiveness need to be applied. In particular, for the PO to be able to conclude that the WCBO should become more like a classical Ombudsman, she will have to ascertain if the WCBO provides services that are as effective or more effective than her staff used to (currently) provide. (Again, I was unable to obtain information from the PO about this issue. Hopefully, such a comparison will be attempted within the PO’s audit of the WCBO.)

12. THE WCBO’s SELF-EVALUATION

On page 2 of it 1998 Business Plan and Budget, the WCBO has set out three specific objectives for the office:

1) Provide timely service to clients.
2) Educate and communicate with the stakeholder communities on the role and function of the office.
3) Provide usable information to the WCB administration
In response to my inquiries, Mr. Hopkins has explained how his office has work toward achieving those objectives.28

**Objective 1: Provide timely service to clients.**
The office tracks on a weekly basis, the average duration time elapsed from the opening to closing of dockets. At the end of Q1 97, the office established the practice of FIFO (first in, first out) to see if that would improve duration. For the period Jan 01/97-Jun 30/97, average duration was 30.26 days. For the period Jan 01/98-Jun 30/98, average duration was 12.92 days. FIFO accounts for some of that gain. Also, the decision to permanently staff the office with 3 FTEs (full time equivalents) has had a direct bearing on duration.

**Objective 2: Educate and communicate with the stakeholder communities on the role and function of the office.**
Generally, the WCB O updates stakeholders on a regular basis through personal visits. In 1998, during the sitting of the Royal Commission, those activities were put in abeyance. Once the Royal Commission completes its work, those visits will resume. A communication strategy has been developed for 1998 and into the future to provide more information pertaining to the office appearing in various WCB publications which will target the most number of workers and employers in the province. A 1997 Report outlining the activities of the office is presently being finalized for publication and mail out to worker and employer groups. In the future, that report will be contained in the WCB Annual Report. The communication strategy also includes an internal communications component to provide more information pertaining to the office appearing in various internal WCB electronic and paper publications.

**Objective 3: Provide usable information to the WCB administration.**
During 1997, all divisions were asked to review the complaint key words and suggest additions/deletions. During Q4 98, all divisions will again be asked to review the complaint key words in light of the tracking data collected for the years 1996, 1997 and inclusive of Q3 98.

At the time of this report, the WCBO has been in operation for just over 27 months. In that time, the office has managed to reduce the average length of time that it addresses the various complaints it receives by almost 60%. That type of decrease is noteworthy, but it would be useful to ascertain if the office’s current average “complaint life” of about 13 days will remain constant. All things being equal (e.g. about the same number and type of complaints being investigated by about the same number of staff), it would also be useful to ascertain if the current open/closing time period is comparable to the length of time that it used to take the PO to deal with WCBO complaints.

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If the WCBO’s efforts to educate and communicate with the stakeholder communities about the role and function of the office were successful, then one would expect that the number of complaints the PO receives that fall within the WCBO’s current jurisdiction would have decreased. (Unfortunately, I was unable to ascertain how many and what type of complaints the PO currently receives that fall within the WCBO’s jurisdiction and are, therefore, passed on to the WCBO. Nor was I able to ascertain whether the number has decreased, increased or stayed about the same.)

In relation to the third objective, I have concerns regarding the WCBO’s use of complaint key words and how useful this type of information is to the Board’s administration. This is addressed in the following section.

13. THE WCBO’s CLASSIFICATION OF COMPLAINTS

The WCBO has constructed its own data base to categorize and track the complaints that it receives. Tab 5 of the WCBO’s submission to the Commission set out the complaint categories the WCBO uses, as well as the complaint key words and closure categories.

Mr. Hopkins has advised me that the WCBO’s categorization of complaints is different than the one used by the PO. Unfortunately, I was not able to ascertain the precise nature of this difference. Mr. Hopkins could not explain it to me, and the PO did not respond to my request for an explanation of its categories.

It would have been useful to have been able to compare the WCBO’s complaint categories to those used by the PO. That comparison may have provided some insights in terms of the types of complaints the WCBO currently deals with and those the PO used to deal with. Further, it would have provided a basis to comment on whether it would even be possible for the PO to undertake a meaningful comparison of the WCBO’s current activities to the PO’s past activities so as to then be able to make a decision as to whether or not to recommend that the WCBO should become more like a classical Ombudsman office.

That said, I have some general concerns for the way the WCBO had established its complaint categories and, as a consequence, the type of analysis that office can do of the complaints it receives.

It does not seem clear to me that the categories of complaints and the complaint key words create a sufficiently distinct set of descriptive categories that would then allow someone to meaningfully classify and analyze the complaints the WCBO deals with. For example, the six complaint categories do not appear to be mutually exclusive, and may even be missing some major categories (e.g. Rehabilitation). In the key words there are location or program identifiers that are mixed in with descriptions of complaints.

Rather than use the current categories and key words, it might be more useful to classify the complaints by the following:
• Program area (e.g. Compensation Services, Appeal Division, Medical Review Panel, Prevention Division, Employer Assessments, Panel of Administrators, Policy Bureau, etc.)
• Nature of complaint (e.g. delay, rudeness or inappropriate comment, missing fact, failure to consider a relevant fact, etc.)
• Subject matter (e.g. accident investigation, assessment, classification, benefit entitlements, vocational rehabilitation, physical rehabilitation, etc.)

These classifications could be further subdivided, as suggested in the key words themselves. For example, delay could be divided into various subsets: “failure to return a call”, “delay in implementing an appeal finding”, “delay in initial adjudication”, “delay in payment”, etc.

The closure categories appear reasonably descriptive and mutually exclusive, but I would have to study the cases in more detail to confirm this observation.

The WCBO’s current categories and key words appear to be insufficient and would not permit a meaningful analysis of the complaints, particularly to study trends over time. The key words may give senior Board management some hints regarding the problems in their particular areas, but I would suggest that that is about as far as the key word approach can go.

The Commission may want to consider this issue further to ascertain if the WCBO’s current scheme for classifying complaints is as deficient as it appears. Without a properly constructed classification system that meets the needs of all parties, I would suggest that it would be difficult if not impossible for the WCBO or anyone else to offer any meaningful conclusions about the work of this office. I would be pleased to assist in this further project.

14. SUMMARY OF ISSUES RAISED IN THE SUBMISSIONS

To ascertain what issues regarding the WCB Ombudsman have been raised in the written and oral submissions received by the Commission, I asked Gerry Schive to undertake Sonar searches of about 2,500 documents in the Commission’s data base. The first search looked for submissions where the word “Ombuds*” was used; the second search was for “Hopkins” (the sir name of the current WCBO).

The results of those searches yielded 345 hits for the word “Ombuds*” and 20 hits with “Hopkins” within the written submission data base. The searches also identified a number of presentations when the issues of the WCBO was discussed. Not surprisingly, the search with “Hopkins” identified most of the same submissions that had been generated by the “Ombuds*” search, but it did identify a few new submissions.

Most of the submissions identified by searching for “Ombuds*” and “Hopkins” contained simple references to or contacts with either the Provincial Ombudsman or the WCBO.
Examples are references in the submissions to letters sent to or received from the PO or WCBO, or that a complaint had been filed with either office. Unfortunately, no other information was provided in these submissions that would allow someone to ascertain if the submitter had a specific concern regarding the mandate or operations of the WCBO.

Search results
Some substantial comments regarding the WCBO (as distinct from the PO) were identified by the sonar searches. Those comments can be placed into nine general categories.

1) Questioning the need for the WCBO
   • Why doesn’t the Provincial Ombudsman deal with workers’ compensation complaints any more? Why is this function “farmed-out” to an in-house person at the WCB? (D-ADV-010v.doc)
   • The WCBO position should be eliminated and workers should be allowed to use the court system (U-INJ-617.doc).
   • The WCB does not need a full-time, co-dependent Ombudsman (Y-INJ-145.doc).
   • “[G]et rid of the Ombudsman’s office.” (U-INJ-617v.doc)

2) General support for the WCBO
   • “There should be an internal Ombudsman available to expedite corrections in a timely manner.” (D-INJ-323.1.doc)

3) The WCBO is not (cannot be) effective
   • The WCBO is understaffed and over worked; he can’t effectively carry out the functions of an Ombudsman within the WCB (B-INJ-314v.doc).
   • “Adjudicator said to me that she knew more than John Hopkins.” (H-INJ-117v.doc)
   • The internal WCBO is not effective. (B-INJ-314.doc)

4) The WCBO is (can be) effective
   • “We feel the WCB Ombudsman is doing a good job.” (S-UNI-042.doc)

5) The submitter has had an apparently satisfactory contact with the WCBO
   • The WCBO explained [to the submitter] what a Medical Review Panel certificate had found and the information that the Panel did not have before it (L-INJ-216.3.doc).
   • Submitter contacted the WCBO, which resulted in a follow-up phone call to the submitter from a WCB supervisor (I-INJ-726.doc).
   • The WCB reversed its position on many outstanding issues in the submitter’s claim, due to the work of the WCBO and others (B-INJ-314.1.doc).
   • The WCBO found that documents were missing or have disappeared from submitter’s claims file (V-INJ-682.doc).
   • After meeting with the WCBO, “it was agreed that only the work and job histories and a letter from [submitter’s] doctor would be enough; prior to that any emotional problems would remain with the doctor of the time.” (D-INJ-305.txt)
   • Submitter’s “appeal” to the WCBO found no malfeasance on the part of the Board (H-INJ-437.doc).
6) The submitter has had an apparently unsatisfactory contact with the WCBO
   • Submitter complains that there was no resolution of the complaint that he had taken
to the WCBO (P-GEN-094v.doc). (The complaint was about apparent “false” or
“irrelevant” comments concerning the submitter in his claims file.)
   • Submitter complains that the WCBO did not help resolve her complaint re: threats
and lack of communications from the Board (P-GEN-094.doc).
   • “The Ombudsman was a very rude man ... he said ‘I can’t do nothing.’” (J-GEN-
077v.doc)
   • “We took it to the WCB Ombudsman and after about a year and a half he said there
was nothing that could be done.” (R-INJ-806v.doc)
   • “I got a letter from the WCB Ombudsman who again insists that since I asked for a
[medical review] panel, it is up to me to provide additional information...” (D-INJ-
217v.doc)
   • In 1997, the worker contacted the WCBO and was told that they would not handle
his complaint (J-INJ-721.doc).

7) Concerns re: the administrative procedures of the WCBO
   • Submitter says she sent a letter to the WCBO, but the office never acknowledged
they had received it (R-INJ-526.doc).
   • “WCB Ombudsman is a joke - never got back to me when I tried to contact him.”
(H-INJ-117v.doc)
   • The WCBO did not return at least six phone calls that he said he would faithfully
return. (K-INJ-428v.doc)

8) Concerns regarding the independence, impartiality or fairness of the WCBO
   • Submitter is concerned that his case was reviewed by someone (i.e. the WCBO) who
is on the payroll of the WCB (Y-INJ-141.1.doc).
   • Submitter says the WCBO promised to help with the case and allegedly stated to the
complainant that the WCB staff “hates my guts around here”. Submitter believes
that the WCBO is a Board lawyer who working against injured workers (A-INJ-
092.txt).
   • “If WCB needed an Ombudsman, then it should be an unbiased person... especially
not a lawyer with a history of over 20 years working for WCB! Why does WCB
need a full-time dependent Ombudsman?” (U-INJ-014.txt)
   • Board is corrupt and in a conflict of interest; WCBO is a former employee of the
Board (Y-INJ-159.1.doc).
   • An independent Ombudsman should be appointed who is outside the WCB system
(G-IJA-010.doc).
   • Need to establish an unbiased Ombudsman’s office (B-INJ-093.txt).
   • “The Ombudsman must not be a branch of the [WCB].” (D-INJ-289.txt)
   • “I thought [adjudicator’s] comments [re: claim] were sexist and the WCB
Ombudsman was not happy with him either. However, it’s an in-house program
and they might get their pinky smacked, that’s all.” (V-INJ-027v.doc)
   • “They gave the complaint to [the WCBO] and of course the report came back very
favourable [to the Board].” (K-INJ-428v.doc)
• Responding to a question from the Commission re: the submitter’s experience with the WCBO upholding the decisions of the WCB to date: “If you were bought and paid for by the WCB, you would uphold their decisions too. It’s your paycheque.” (G-IJA-010.1v.doc)

9) Concerns regarding the remedial powers of the WCBO
   • Ombudsman can only make recommendations; cannot compel the WCB to do anything (E-GEN-137v.doc).

Attachment #5 contains the extracts from the public hearings where specific issues regarding the mandate and activities of the WCBO was discussed in some meaningful or substantive fashion.

Discussion of the results
It is not possible to draw any firm conclusions about the WCBO’s mandate or the effectiveness of the WCBO’s operations, based upon these extracted comments. However, they do provide us with a general understanding of the nature of the concerns that have been expressed regarding Mr. Hopkins’ office. They also can help to illustrate some of the issues that the Commission should considered.

15. ISSUES FOR CONSIDERATION

This section lists the issues regarding the WCBO that the Commission may want to address in its final report. A discussion of those issues is then provided which could form the basis for possible recommendations to the government.

Issues
The following issues are not set out in their order of importance. Each is discussed in more detail below.

   a) Governance of the WCBO (appointment, reporting and budget)
   b) Legislative jurisdiction of the WCBO
   c) Agency jurisdiction of the WCBO
   d) Other jurisdictional issues
   e) Confidentiality of the WCBO’s proceedings
   f) Compellability of the WCBO staff
   g) Protection of complainants
   h) Impartiality and neutrality of the WCBO
   i) Entrenching substantive powers of the WCBO
   j) Clarifying the WCBO’s duty of fairness
   k) Nature of the WCBO’s powers
   l) Scope of the WCBO’s powers
   m) Offences
As I have noted above, the PO is interested in ascertaining whether the WCBO can become more like a classical Ombudsman office. In the PO’s 1996 annual report, Sir Brian Elwood, the Chief Ombudsman for New Zealand, listed what he felt were the essential principles of a classical Ombudsman office:29
• independence
• used as a last resort
• personal access to the ombudsman, without cost
• use of non-adversarial complaint investigation techniques
• ombudsman recommendation to resolve grievances
• ombudsman recommendation to change practices
• public reporting

With the exception of “personal access without costs”, Sir Elwood’s factors are remarkably similar to the issues that I have identified during my research.

**Discussion of Issues**
The following discussion of the issues is presented in the absence of a complete assessment of the effectiveness of the WCBO. My research suggests that the WCBO is effective, but that conclusion is based on a limited review of the complaints data and a consideration of the WCBO’s case summaries. Hopefully, the PO’s audit of the WCBO will demonstrate that the Board’s internal Ombudsman office is effective and that it should become more like a classical Ombudsman.

If problems with the WCBO are identified by the PO, they may be the results or examples of the problems that I have identified during my research. I might suggest that any problems the PO will identify could be readily corrected by amendments to the WCAct, as I will discuss in more next.

**Governance (appointment, reporting and budget)**
The power to appoint, and the reporting relationship and control over an Ombudsman’s operating budget are important features of any Ombuds office. These factors are the foundation for promoting the independence and impartiality of the office. They can be used inappropriately to control or limit the effectiveness of the office.

At the present, the WCBO is appointed by the Board (e.g. the President on behalf of the Board’s Senior Executive Committee). This would be like having the PO appointed by the Premier, rather than the Cabinet on the recommendation of the Legislature. One way to increase the perceived independence and impartiality of the Board’s internal ombudsman would be if the WCBO and the Assistant were appointed by the Cabinet rather than by the Board. (At the least, the Minister responsible for over-seeing the Board could hold that appointment power.) It would follow, then, that the WCBO or the Assistant could only be

removed by an order-in-council (or ministerial order). This approach would require an amendment to the WCAct.

The WCBO currently reports to the President of the WCB. Again, this is analogous to having the PO report to the Premier, instead of the Legislature. To make the WCBO more like a classical Ombudsman, it may be appropriate if the WCBO was to report directly to the governing body of the WCB, which is currently the Panel of Administrators. At the present, the Panel holds the power to dismiss the WCBO. So, it would make sense if the WCBO was to report to the Panel, instead of the President. Alternatively, if the Cabinet or the Minister was to hold the power to appoint the WCBO, then it would follow that the WCBO should report to that level of government, rather than to within the Board.

In a similar vein, approval of the WCBO’s budget should not rest with senior Board management, but should become the decision of the governing body of the WCB (again, currently the Panel).

**Legislative jurisdiction**

As noted above, the WCBO does not have the same legislative jurisdiction as the PO. While the WCB administers both the Workplace Act and the CICAct, complainants cannot access the Board’s internal ombudsman if their complaints are based on either of those two statutes. This limit on the WCBO’s jurisdiction may be confusing to persons who approach the WCBO and want to file complaints under these two statutes.

With the introduction of the new occupational health and safety part of the WCAct and the consequential repeal of the Workplace Act, that legislative jurisdictional problem may become moot. However, it may be necessary for the Board to expressly declare that the WCBO has jurisdiction to deal with complaints arising from the new OHS part. The WCBO currently hears complaints regarding the Prevention Division, so I cannot see any reason why that office should not also have the authority to address complaints that flow from the administration of the new part.

The WCB has been assigned responsibilities to administer the CICAct, however the costs associated with that responsibility are paid for by the Ministry of the Attorney General. For example, the salary and benefits of the staff who work in the WCB’s Criminal Injury Compensation Section are charged back to the Attorney General. A special Appeal Committee of the Workers Compensation Review Board hears appeals to CICS staff decisions, but the costs of that committee are also charged back to the Attorney General. Parties may seek leave to appeal the Appeal Committee’s decision to the Appeal Division, which must apply defined criteria in making that decision (e.g. error of law, gross misinterpretation of the evidence, etc.). The costs of the initial leave hearing and any subsequent hearing on the merits of those further appeals are also charged back to the Attorney General on an average case cost basis.

If the WCBO was to be assigned responsibility for dealing with complaints associated with the criminal injuries compensation scheme, I expect those costs would also have to be
shouldered by the Attorney General. Therefore, that Ministry would have to approve any such extension of the WCBO’s current legislative mandate.

I am of the view that it would not be appropriate for the WCBO to receive complaints regarding criminal injury compensation adjudication matters. A simple example can illustrate this point. If the Attorney General was to establish a new and separate agency to oversee this program and, as a consequence, the WCB was no longer involved, there would be no administrative foundation to support the claim that the WCBO should have the legislative authority to investigate subsequent complaints regarding that new agency or the CICA. In other words, simply because there has been an arrangement whereby the WCB has agreed (or been directed) to administer a non-workers’ compensation program, does not mean that the WCBO should automatically have jurisdiction over that program.

Agency jurisdiction
The WCBO does not accept complaints regarding the Workers’ Compensation Review Board, but would investigate complaints regarding any other branch of the WCB.

I expect the average person would have some difficulty in understanding why they can complain to the WCBO about a claims adjudication decision or the second level of appeal that is provided by the Appeal Division, but that they could not file a complaint regarding the first level of appeal provided by the Review Board. While it is true that the Review Board is an agency that is administratively separate from the Board, that distinction is questionable in terms of the Board’s overall mandate for workers’ claims adjudication, rehabilitation and prevention decisions. In my view, if the WCBO can hear complaints about the final level of appeal (e.g. the Appeal Division), it should also be able to hear complaints about the first level of appeal (e.g. the Review Board). Simply because the adjudicators of the Review Board are appointed by the Cabinet should not be a barrier to the WCBO’s agency jurisdiction. If it is, the WCAct should be amended accordingly.

It is also not entirely clear to me why the WCBO should refuse to accept complaints that are made against the workers/employers advisers who are appointed under s.94 of the WCAct. It may be that the WCBO believes that, like the Review Board, it cannot oversee the operations of a part of the workers’ compensation system that has been established by Cabinet orders-in-council and are not employees of the Board per se. (Note: While the WAO/EAO are O/C appointees, their salaries, etc. are paid for by the Board indirectly.)

Again, if it requires an amendment to the WCAct to give the WCBO a broader agency mandate, then such an amendment should be considered. If the change can be made by Board policy, they such a policy change should be acted on.

Other jurisdictional issues
As noted above, the words used to describe the subjects that the PO and the WCBO may investigate are different. However, I am of the view that the net effect of those two different descriptions is essentially the same. That said, I believe that it would be helpful if the WCBO’s mandate was phrased more like the PO’s mandate under the OAct and as
explained in its pamphlet. Further, the WCBO’s mandate should be entrenched within the WCA act itself.

Also, while both the PO and the WCBO can refuse a complaint that is one year old, the way that aspect of the PO’s mandate is described under the OAct is clearer than in the WCBO’s pamphlet.

I have no particular concerns regarding the way the WCBO has described the other limits on its jurisdiction in relation to available appeals, changes to law, etc.

It is not necessary that there be a mechanism that would allow someone to petition the Courts for a determination of the WCBO’s jurisdiction, as is available under s.11(3) of the OAct regarding the PO’s jurisdiction. As matters currently stand, someone can approach the PO if they believe that the WCBO incorrectly rejected their complaint on the basis of a lack of jurisdiction. The PO could then adjudicate that issue.

Confidentiality

As noted above, confidentiality is one subject where there is a marked difference between the PO and the WCBO. That difference can be explained on the basis that the PO is governed by statute, while the WCBO is governed by Board policy.

The Legislature can grant enforceable statutory provisions that protect complainant confidentiality, as has been done for PO complainants under s.9(4) of the OAct and s.3(1)(c) of the FOIPPA ct.

• S.9(4) of the OAct states: “The Ombudsman and every person on the staff of the Ombudsman must, subject to this Act, maintain confidentiality in respect of all matters that come to their knowledge in performing their duties under this Act.”
• S.3(1)(c) of the FOIPPA ct grants an exemption to the PO from that statute’s access to information provisions, thereby ensuring confidentiality cannot be breached by an FOI request.

In contrast, all the WCBO can do is proclaim or assert that the office protects confidentiality. Indeed, the WCBO has taken the position that, as an administrative or internal Ombudsman office, it has a moral duty of confidentiality.

In its February 1998 submission to the Commission, the WCBO states that it adheres to the Code of Ethics and the Standards of Practice of the Ombudsman Association. Those standards, in turn, state that Ombudsmen have a responsibility to maintain strict confidentiality concerning all matters brought to their attention, unless given permission to disclose. Unfortunately, such statements are not binding on others; they are simply moral assertions that would not stand-up in a court of law.

At tab 6 of its February 25, 1998 submission to the Commission, the WCBO states: “To further ensure privacy of its records, the Information and Privacy Commissioner for the Provincial [sic] of British Columbia has ruled that under S 56 of the Freedom of
Information and Protection of Privacy Act, the records of the WCB Ombudsman are exempt from disclosure.” (WCBO’s emphasis.) The WCBO provided a copy of Privacy Commissioner order #188-1997 which the WCBO believes supported this statement.

During a conversation we had on this subject, Mr. Hopkins admitted that this statement was not correct and agreed with my observation that Privacy Commissioner order #188-1997 applies to the PO and not to the WCBO. It says nothing about exempting the WCBO from the general disclosure requirements of the FOIPPAct. In fact, it appears that information held by the WCBO was not even considered during that hearing.

The issue of the WCBO claim of confidentiality was argued in the Weldwood v. WCB case,30 which I have reported to the Commission under separate cover. At this writing, the Court has not ruled on Weldwood’s application, so I cannot advise you whether Mr. Justice MaCauley has determined that the WCBO enjoys any form of confidentiality protection be this established by legislation or Board policy.

Based upon my research, I have concluded that being able to protect the confidentiality of complaints is critical to the successful operation of the WCBO, or any other Ombudsman office. Whether or not the Court addresses this issue and rules in support of the WCBO’s declared moral duty of confidentiality, it is open to the Commission to address this subject.

For example, the Commission could recommend that the same sort of provisions that apply to support PO confidentiality under the OAct and the FOIPPAct should exist under the WCAct and apply to the WCBO and those who file complaints with that office. If such an amendment were made, the WCBO would no longer have to rely on taking a moral position to protect the names of complainants or the confidentiality of the information complainant’s and others provide to that office.

Compellability
S.9(5) of the OAct states that, with certain exceptions, the PO “or a person holding an office or appointment under the Ombudsman must not give or be compelled to give evidence in a court or in proceedings of a judicial nature in respect of anything coming to his or her knowledge in the exercise of duties under this Act”. This non-compellability provision is the flip-side of the PO’s general duty of confidentiality.

As noted above, there is no provision like s.9(5) under the WCAct that applies to the WCBO. Further, the non-compellability provisions of the new OHS part (new s.156(4)) would not apply to the WCBO. That new provision applies to officers carrying out safety inspections under that Part.

As with confidentiality, the Commission could recommend that the WCAct be amended to provide non-compellability protection for the WCBO.

Protection of complainants

As noted in Comparison Table three (above), section 16 of the OAct states: “A person must not discharge, suspend, expel, intimidate, coerce, evict, impose any pecuniary or other penalty on or otherwise discriminate against a person because that person complains, gives evidence or otherwise assists in the investigation, inquiry or reporting of a complaint or other proceeding under this Act.”

No similar provision currently exists under the WCAct that would provide a similar level of protection to persons who file complaints with the WCBO. The proposed s.151 of the new OHS Part of the Act would not provide such protection, because it is focused on anti-discrimination in the context of occupational health and safety, and enforcement of that Part.

The Commission could recommend that the WCAct be amended to provide protection to all persons who file complaints with the WCBO, or otherwise participate in an investigation, etc. of a complaint or related proceeding. Such a provision could go a long way to increase the perceived usefulness and independence of the Board’s internal Ombudsman office.

Impartiality and neutrality

While there is no provision under the OAct that declares the PO must be impartial and neutral, the cumulative effect of that legislation and the way the PO office works to achieve its mandate have resulted in a widely held public perception that the PO is an impartial and neutral party in all disputes. Indeed, it is this public perception that is critical to the success of the PO.

The issue of the impartiality and neutrality of the WCBO has been raised in the submissions sent to the Commission. As noted above, some submitters have questioned the need for the creation of the WCBO. A number have expressed reservations regarding the perceived independence of the Board’s internal Ombudsman.

In some respects, it is always going to be difficult for an internal Ombudsman to be seen by all parties as independent of the agency within which it operates. Independence does not necessarily mean that the Ombudsman must be physically or administratively isolated from the agency.

The WCBO has stated that: “The office of the WCB Ombudsman must be independent but not isolated from the mainstream of the WCB system.”

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31 1998 Business Plan and Budget at page 2.
During his April 8, 1998 presentation to the Commission, Jim Sayre spoke at some lengths regarding this issue. To quote Mr. Sayre from page 2 of Attachment #5:

[T]he problem is that when people go to the Ombudsman it is very often that the stage that they are at is that they have exhausted their appeal rights. They have firmly viewed the Board as their adversary and their enemy and to be directed from an external Ombudsman's office to an internal part of the Board to process your complaint is not going to be satisfactory to a lot of those workers. They are not going to feel that that is really providing the objective advisory view that the Ombudsman is supposed to provide...

And from page 4:

[T]he concern I have about an internal Ombudsman is that the person that is unsuccessful at the end of the day is going to walk away and say well the Board just turned me down again. And they are not going to have any more confidence in the fact that the Ombudsman who works for the Board says that the Board's conduct was okay then they had in the first place. As I said Mr. Hopkins is a very courteous and pleasant person and I think that they may walk away with the sense that they've been treated with more respect than they were perhaps by the other officers that they dealt with that isn't usually the crux of what they were there for. They are there because they think the decision itself was unfair and the benefits they received were unfair and if they are not going to get that remedied then it would be helpful to have in a sense that at least an outside body had done they could for them.

Independence is a relative term and can be significantly affected by the applicable legislative and institutional arrangements.

If there was some statutory foundation for the WCBO within the WCAct, and if certain key features of a classical Ombudsman office were address in that statute (as opposed to policy), those legislative arrangements could go a long way to improve the WCBO’s image. While it is unlikely the WCBO staff could ever be anything but Board employees, if there were confidentiality and non-compellability provisions within the WCAct in support of that office, and if other legislative changes were made as suggested elsewhere in this report, those could significantly enhance the public’s view of the impartiality and neutrality of the WCBO.

An alternative legislative model would be to make the WCBO an branch of the PO, thereby granting to the WCBO all the powers and authority of the PO under the OAct. If that sort of administrative arrangement was undertaken, there would probably be no need to amend the WCAct, because the WCBO would be operating under the mandate of the OAct, instead. The WCB could agree to pay the salary, etc. of the WCBO and maintain the office at it current location within the Richmond office. However, it might be necessary to amend the OAct to permit this alternative legislative model.
While this alternative legislative model may help to improve the perceived impartiality and neutrality of the WCBO, it may have negative effects on the daily operations of the office. As I have noted above, one of the benefits of having experienced Board employees within the WCBO is that they may be able to address complaints in a more expeditious or in-depth fashion that the PO staff were able to do “from a distance”. If the WCBO became a branch office of the PO, there is the possibility that such experience and services could be lost.

**Entrenching other substantive powers**

Certain substantive powers could be entrenched in the WCAct in support of the move to improve the perceived impartiality and neutrality of the WCBO. For example, there is no provision under the WCAct or the Board’s policy which speaks to the WCBO’s authority to delegate its powers to others. Nor is there a provision which states that the WCBO can determine its own proceedings. The WCBO does not appear to have any authority to require that persons outside the WCB participate in one of its investigations.

If the Commission believes that there is a need to entrench the mandate of the WCBO within the WCAct and that, in turn, certain key provisions be included in that amendment, it would be useful to ensure these and other substantive powers are included. This would help to ensure the WCBO becomes more like a classical Ombudsman.

**Clarifying the duty of fairness**

The OAct requires the PO to inform and advise an authority that may be affected by a report or recommendation. This is a safety-check that provides the authority being investigated with an opportunity to change its ways (or provide an explanation of its conduct) before the PO proceeds further with its investigation. The authority being investigated by the PO will probably always be the party that is most likely to be affected by the results of the PO’s investigation.

The same does not hold true for the WCBO. However, as the Board is normally the only authority the WCBO would be investigating, it may not be necessary to address this in legislation. The situation may be different if third parties may be affected by one of the WCBO’s recommendations.

In the Weldwood case, the company was not consulted during the WCBO’s investigation of the complaint, even though (if the Board acted on the WCBO’s recommendation, as the company argued) Weldwood could face the possibility of having to participate in a hearing to reconsider a past decision of the Board that had the net effect the Board not issuing a penalty assessment against the company.

If the Court in the Weldwood case finds that the WCBO had a duty of fairness that required the Board’s internal Ombudsman to notify third parties who may be affected by one of its decision, that would provide guidance to the Commission on this point. However, regardless of the results of the Court case, the Commission may want to address this issue in its report.
For example, the Commission may want to recommend that, where a WCBO decision has the potential to directly or indirectly affect someone other than the complainant or the Board, that office should ensure that the potentially affected person is aware of the nature of its investigation and should be invited to participate during the WCBO’s investigation, if one takes place.

**Nature of powers**

The PO and the WCBO share the same type of powers. Those powers are simply advisory in nature; the recommendations the PO and the WCBO can make are not legally binding on the intended recipient or on other parties. Neither the PO or the WCBO can, for example, charge someone with an offence if they fail to follow one of their recommendations. That said, however, their recommendations are unlikely to be ignored, as they carry significant political or administrative weight.

As noted above, some submitters believe the WCBO’s powers should be increased. Some have suggested the WCBO should be able to grant financial remedies, such as ordering retroactive payments. Others have suggested the WCBO should be able to order the Board to do things. For example, in his April 8, 1998 presentation to the Commission, Jim Sayer was proposing there be another appeal body and was skirting around the suggestion that the WCBO should become that body and be given powers to order the Board to make necessary changes.

I am of the view that changing the WCBO’s advisory role would not be a wise route to take. If the WCBO was given such power, it would in effect create a third level of appeal within the Board. That would result in the office having to develop more formalized mechanisms for resolving complaints which would, in turn, inevitably result in further delays and increased costs.

Further, the effect of the PO and the WCBO’s power of persuasion should not be underestimated. The PO seems to have had some remarkable success with its approach. I would suggest that, if the WCBO had greater legislative authority and clearer administrative independence, then its recommendations could potentially carry greater weight inside and outside the Board.

**Scope of powers**

Under its current mandate, granted by Board policy, the WCBO’s power of persuasion has a limited scope. If Board staff do not agree with a WCBO recommendation, that office can take the issue up with the President. If the President or Senior Executive Committee do not also agree with the WCBO, that office’s only resource is to advise the complainant of that outcome. Presumably, the complainant would then have the option of either going public or filing a new complaint with the PO, but that is not explain in any of the materials I reviewed.

To provide some backbone to the WCBO’s recommendations, the Commission may want to consider recommending that, like the PO, the WCBO should be given the legislative
authority to issue public reports or otherwise report to some external authority, like the Legislature, the Cabinet or the responsible minister. Giving the WCBO this option would go some distance in supporting that office’s claim that it is independent of the Board. If the WCBO is free (if not legislatively encouraged) and is seen to be free to be critical of the Board, that is a direct and important expression of its independence.

Offences
If substantive powers are granted to the WCBO under the WCA Act, it may also be useful to considering importing some of the offences under s.32 of the OAct in support of those powers. For example, if the WCBO is required to maintain confidentiality under a new WCA Act provision, it would be useful to support that duty with a corresponding provision that would make it an offence if the Board’s internal Ombudsman breached that duty.
16. REFERENCES
The following material was considered in preparing this report.

Legislation
• Workers’ Compensation Act, R.S.B.C. 1996, c.492.

Legal proceedings
• Weldwood of Canada Ltd. v. Workers’ Compensation Board of BC, Van. Reg. A980904; application for judicial review; heard before Mr. Justice MaCauley, Supreme Court of BC, Vancouver Courthouse, June 26 and July 3, 1998; decision pending.

Tribunal decisions
• Inquiry re: a decision of the Workers’ Compensation Board (WCB) to deny access to the Ombudsman records, the WCB’s solicitor-client records, and other records related to a worker’s claim, report of the Office of the Information and Privacy Commissioner, Province of BC, Order No. 188-1997, August 2, 1997.

Reports

Articles

News releases and newspaper reports
Correspondence (in chronological order)
• Letter from Dulcie McCallum, Provincial Ombudsman, to Peter D. Hopkins, WCBO, August 8, 1997, 1 page.
• Letter from Peter Hopkins, WCBO, to George K. Bryce, July 10, 1998, 4 pages.
• Letter from Peter Hopkins, WCBO, to George K. Bryce, July 14, 1998, 5 pages.
• Letter from Peter Hopkins, WCBO, to George K. Bryce, July 17, 1998, 7 pages.

Other documents
• Code of Ethics and Standards of Practice, The Ombudsman Association, undated; 2 pages, mimeograph.
• The WCB Ombudsman, an information pamphlet produced by the Workers’ Compensation Board of BC, 1997.
• WCB Ombudsman, a background briefing document prepared by the WCBO, undated, 3 pages, mimeograph.
• WCB Ombudsman organization chart, prepared by the WCBO, current to January 6, 1998.
• Ombudsman Investigation Protocol, prepared by the WCBO, February 23, 1998, 1 page, mimeograph.
• Complaint Categories, etc., prepared by the WCBO, October 28, 1997, 12 pages, mimeograph.
• Statistics for Q4 1997, prepared by the WCBO, undated, 1 page, mimeograph.
• Statistics for Q3 1997, prepared by the WCBO, undated, 1 page, mimeograph.
• Second Quarter Report Cost Centre 15.03, prepared by the WCBO, undated, 3 pages, mimeograph.
• First Quarter Reporting Requirements Cost Centre 15.03, prepared by the WCBO, undated, 2 pages, mimeograph.
• 1996 Year End Reporting, prepared by the WCBO, February 14, 1997, 5 pages, mimeograph.

Website information
Interviews
• Interviews with Peter Hopkins, WCBO, June 24, July 17 and July 20, 1998.
• Interview with Dulcie McCallum (PO), Brent Parfitt and others, July 8, 1998.
I. FUNCTION

The WCB Ombudsman is responsible for the management of the Office of the Ombudsman and develops, establishes and implements policy with respect to this office. This position is the prime contact to the community, which includes employers, workers, advocates, service providers, interested parties, MLAs and other government agencies and serves as a confidential, impartial advisor; receives complaints from the community concerning practices, procedures, policies and regulations with respect to the Workers' Compensation Board; works as a facilitator or advocate for administrative fairness with the intent of satisfying client complaints while having regard for the administrative integrity of the system; assists in solving individual problems and disputes; makes recommendations to improve systems as required.

II. RESPONSIBILITIES

1. Directs the activities of the Office of the Ombudsman and develops, establishes and implements policies regarding this Office.

2. Receives complaints of alleged unfairness with respect to a decision or recommendation made, an act done or omitted, or a procedure or policy used by the WCB; conducts investigations with respect to such complaints; makes recommendations to the relevant division management to consider implementing remedial or corrective action; may present details to the President/CEO and Panel of Administrators if a satisfactory resolution does not occur.

3. Acts as the prime liaison on behalf of the community in the mediation and resolution of disputes; may involve active intervention and mediation with the responsible individual or office; refers individuals to appropriate resources as required.

4. Provides assistance in cases of injustice, discrimination and/or harassment of any kind by using active listening skills and questioning techniques, investigates and provides information in order to develop a creative solution that is acceptable and fair to clients.

5. Publishes an annual report which includes statistics on the number and types of complaints received, services rendered and complaints resolved.

6. Provides feedback to the President/Chief Executive Officer and the Panel of Administrators with respect to problem areas.

7. Responds to inquiries from interested parties, providing information on interpretation of laws and rules.
8. Provides training and seminars with respect to the role of the Ombudsman as required.

9. Establishes and maintains close interaction with other provincial ombuds offices.

10. Manages departmental employee resources which includes hiring, appraising and terminating employees as required; monitors employee career and developmental progression and ensures that individual performance plans are in place and match departmental goals.

11. Responsible for the WCB Ombudsman program budget.

12. Performs other related duties as required.

III. RELATIONSHIPS

The incumbent reports to the President for operational and administrative purposes and provides supervision and work direction to administrative support staff.

Prepared By
Robin Smith

Date
December 1996

Approved By

Date
IV. QUALIFICATIONS

Graduate degree preferred but not required. Extensive experience in dispute resolution and mediation. Strong sensitivity to interpersonal issues. Must have excellent communication skills. Mature, articulate, empathetic individual with creative problem-solving abilities. In-depth knowledge of the WCB operations, from top to bottom. Other equivalent combinations of education and experience may be considered.
Attachment #3: WCBO COMPLAINTS DATA - Provisional (extracted from WCBO quarterly and annual reports)

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<td>Dockets opened this quarter</td>
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<td>combined -&gt;</td>
<td>approx. 1,000</td>
<td>combined -&gt;</td>
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<td>289</td>
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<td>combined -&gt;</td>
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<td>combined -&gt;</td>
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<td>combined -&gt; 5</td>
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<td>combined -&gt;</td>
<td>combined -&gt;</td>
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<td>21.8 days</td>
<td>9.2 days</td>
<td>6.4 days</td>
<td>3.8 days</td>
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<tr>
<td>Workers</td>
<td>combined -&gt;</td>
<td>combined -&gt;</td>
<td>(81%)</td>
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<td>138 (48%)</td>
<td>126 (55%)</td>
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<td>Employers</td>
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<td>combined -&gt;</td>
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<td>35 (15%)</td>
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<td>combined -&gt;</td>
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<td>32 (11%)</td>
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<td>Others</td>
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<td>(11%)</td>
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<td>31 (11%)</td>
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<td>(9%)</td>
<td></td>
<td>29 (10%)</td>
<td>25 (11%)</td>
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<td>combined -&gt;</td>
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<td>17 (6%)</td>
<td>12 (5%)</td>
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<td></td>
<td>6 (2%)</td>
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<td>combined -&gt;</td>
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<td></td>
<td>6 (2%)</td>
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<td>Executive</td>
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<td>combined -&gt;</td>
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<td></td>
<td>0 (0%)</td>
<td>2 (1%)</td>
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## HOW DOCKETS WERE CLOSED

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<th>Complaints referred to WCB staff</th>
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<th>combined -&gt;</th>
<th>(47%)</th>
<th>61 (26%)</th>
<th>36 (20%)</th>
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<tr>
<td>Complaints addressed by WCBO</td>
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<td>combined -&gt;</td>
<td>(53%)</td>
<td>175 (74%)</td>
<td>140 (80%)</td>
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Introduction

The following case summaries are based on information that was upon provided by the WCBO. They are examples of some of the major cases the WCBO has addressed from April 16, 1996 through to June 30, 1998.

For the purposes of this appendix, I have placed these examples into one of two different groups: (a) systemic problems, or (b) case specific or unique problems. A systemic problem is one that can most often be resolved by a change in Board policy or procedure so that a similar problem does not arise in the future.

Within both of these groups, two further divisions have been made: (i) complaints that relate to workers' compensation or rehabilitation services, or (ii) complaints that do not relate directly to compensation matters, but involve some other Board function or program.

Finally, I have created separate headings for each summary in an attempt to describe the key issue of that case. These headings do not relate to the complaint key words that are used by the WCBO to classify the complaints it receives.

1) Systemic Problems - Compensation Services

Withholding of claim file information
Complainant contacted WCBO with reference to disclosure. WCBO determined that certain departments of the WCB hold mail until the claim file returns to area. That material is only later provided to a client during a subsequent disclosure which gives the impression that information is being withheld. WCBO shared this information with the divisional directors in compensation services and with the Board’s Freedom of Information and Protection of Privacy office. The compensation services division sent out a reminder to all locations with reference to the practice of holding mail.

Disclosure of the potential for different results by different interpreters
Complainant contacted WCBO with reference to the use of an interpreter during an Medical Review Panel hearing. WCBO asked the Registrar to consider notifying complainant’s in advance what they could expect re: interpretation services. Discussion ensued with the Legal Department. It was ascertained that the Medical Review Panel presently makes use of legal interpreters rather than conversational interpreters. WCBO recommended that, if the practice is to use legal interpreters, then complainants be advised that the proceedings may unfold differently than if a conversational interpretation was
being undertaken. The Medical Review department is presently creating a policy/practice manual. The WCBO will be following up on this issue once he has received a copy of that manual.

Conflicting policies
Complainant contacted Assessments with reference to a query from an employers' association pertaining to an Appeal Division decision and a relief of cost issue. The Appeal Division concluded that costs should be relieved as per RSCM 113.20 (Charging of Claim Costs/Occupational Diseases) rather than 113.21 (Charging of Costs/Pneumoconiosis/Silicosis). On discussion between the Compensation Services and Assessments divisions, it was ascertained that the policy manuals did not agree. Assessments will be adjusting their manual to reflect the RSCM policy. To date no adjustments have been made to the manuals. It is an agenda item to be changed.

Staff knowledge of evidentiary issues
Complainant’s agent brought a concern to the WCBO pertaining to the primary adjudication of evidence. WCBO became concerned with the knowledge base of staff pertaining to evidentiary issues. WCBO approached the Director, Central Services with the issue. The WCBO recommended that the Compensation Services Division consider handbook and training document amendments which will provide adjudicative staff with a convenient and accurate guide with which to deal with evidentiary issues pertinent to the adjudication of claims. Compensation Services has indicated document development and training is scheduled for the fall of 1997. The agent called back in September 1997 to attest to the successful review completed by WCB management. As part of the new case management training program developed in 1998, a comprehensive training module was written. WCBO suggested that the module form part of the abridged training for present staff moving into the position of Case Manager and that it not be restricted to “new hires” only.

Disclosure of compromising personal information
Complainant alleged that WCB staff inappropriately disclosed private, personal information to his employer, which resulted in the complainant’s termination from that employment. The WCBO’s investigation showed this to be the case. Complainant had since secured alternate employment, but at a lower wage rate. WCBO spoke with the Director of Vocational Rehabilitation re: possible resolution options including a letter of apology and a letter of recommendation to assist Complainant seeking further work, should he so choose. When the Director discussed resolution options with Complainant, it was determined that: 1) a letter of apology would be written to the Complainant; 2) a letter of recommendation from the previous employer would be written attesting to Complainant’s work record there; 3) a vocational rehabilitation budget would be created for Complainant to take “employment enhancing” courses, on his own time but at the Board’s expense, to increase his competitive employability in the marketplace. Recently, an e-mail was distributed to all staff. Also, a Practice Directive dated August 1996, reminded staff concerning the disclosure of information. It is an ongoing topic for the WCB.
Disclosure of a complainant’s criminal record to others
Complainant’s criminal record was investigated by field officer, but not at the request of the claims adjudicator. Claims adjudicator had requested surveillance of complainant only. Adjudicator used the unsolicited field officer criminal record information in the adjudication of the claim. Complainant was concerned over the release of the information to a 3rd party (i.e. employer); Review Board Compensation Services reviewed the situation and applied practice directive 8 re: removing irrelevant information from the file on disclosure. Letter was sent to the employer who had received disclosure of the information already. A “V” file designation (for violent or potentially violent person) was placed on the claim flagging system for the safety of staff. The Division committed to conduct a training session for field officer staff with reference to these types of situations.

Complaint supports need for a MRP procedure manual
Complainant approached WCBO with reference to an Medical Review Panel certificate. Complainant reviewed the certificate and requested clarification. General issues were raised and a formal request was made to the Registrar, Medical Review Panel pertaining to administrative practices governing Medical Review Panels. The procedure manual was already being created by the Medical Review department, but this complaint highlighted the need for such a manual. This complaint was not the sole impetus for the manual.

WCBO looks inward
Complainant approached WCBO with reference to an investigation completed by the office of the WCBO. Complainant was not satisfied with the processes followed during the investigation. WCBO reviewed case process. Investigative procedures were amended to reflect complainant’s concerns.

Board needed specialized committee
Complainant complained to WCBO about the processes surrounding the adjudication of complex occupational disease claims and evidence. WCBO discussed with senior Board management. The Board was considering the creation of a technical assessment committee designed to undertake a critical appraisal of literature pertaining to complex medical issues and the adjudication of claims. WCBO recommended the creation of a specialized sub-committee to undertake a critical appraisal of literature and submissions pertaining to complex medical issues and the adjudication of occupational disease claims.

2) SYSTEMIC PROBLEMS - OTHER BOARD FUNCTIONS

Complainants part of investigation of Board staff
An individual brought forward a circumstance where they had not been contacted to obtain their view of the alleged infraction. WCBO contacted the Executive Director of Compensation Services with reference to an investigation process by which the service delivery location (unit) manager does not contact complainants to verify the content of a complaint relating to a staff person’s behaviour. Rather, only the staff person is questioned
as to the facts of the case and then the service delivery location (unit) manager writes a letter to the complainant outlining that there is no substance to their complaint. The division now ensures that the service delivery location (unit) managers contact the complainant as part of the investigative process.

**Shielding calls for staff working at home**
A complainant mentioned a situation involving the use of call screening. WCBO contacted WCB Security to remind staff calling from home that there is a method by which they can shield their phone number which is important if staff decides to call from their homes. WCB Security provided information and reminder to staff.

**Removing red flags**
Complainant’s agent contacted WCBO with reference to having a flag removed from their file. WCBO investigated the processes which presage the placement of such a flag as a warning to staff. It was determined that no processes existed for considerations involving the removal of a flag. The Executive Director requested that the division give consideration to the request and prepare a procedure/process for removing flags from claims when appropriate.

**Use of personal option protection**
After receiving a complaint, the WCBO raised the issue that the rate of personal option protection purchased is not always used to establish benefits rates. The WCB has been asked to review the situation and either change current practice through the RSCM or update the literature from the Assessment Department.

**Missing fax numbers on web page**
Complainant approached WCBO with reference to the fact that fax numbers were not included on the WCB web page for the assessment and prevention divisions. Complainant had attempted to fax documents to Prevention Division and had ascertained that neither BC Tel nor the website contained fax numbers for either division. WCBO verified that data. Four days later, the situation was rectified and the fax numbers were posted.

**Recalculation of assessment adjustments**
Complainant, an employer agent, contacted WCBO with reference to the status of requests for recalculations of assessment adjustments per S 39 1 E relief of costs. Ultimately, department determined that advance payments could be considered re: account adjustments pending.

**Accreditation of alternative health service providers**
The Complainant was an agent group and brought forward a complaint referring to alleged inconsistencies in the application of WCB practice pertaining to acupuncture treatment. Ultimately, the administration commenced a review which will result in recommendations for amendments to the procedure/practice guidelines re: accreditation; process approval; and, fees.
Clarifying letters of understanding re: billing for health care benefits
Complainant complained that billings were not being paid appropriately. WCBO investigated and ascertained that letters of understanding (Health Care Benefits) had been arranged with Complainant, but that no practice directive was available which clearly explained the nature, extent and application of such letters of understanding. WCBO recommended that a practice directive be created. A practice directive is being created.

Internal harassment policy does not apply to third parties
The WCBO had raised the issue of the WCB/CEU harassment policy and its application to third parties. The Board reviewed the issue and determined that policy needed to be developed with reference to harassment by third parties.

When does a successor company have standing?
Complainant complained to WCBO that his claim file was wrongly disclosed (in appeal) to a “third party / successor company” employer. The injury employer had been bought out by a new company, which was, in turn, bought out by a third company. WCBO identified this as a systemic WCB matter, and convened a joint meeting with Compensation Services, Assessments and notice to FIPP. WCBO then suggested a flow chart which could be used as a training guide for staff in determining when a “successor” company has standing in the appeal, and when it can receive materials on disclosure.

No Board policy re: (sub) leasing to third parties
Complainants, a number of private sector employers, contacted WCBO with reference to the leasing of space in WCB facilities. WCBO ascertained that the Board did not have any criteria developed re: space rental to other parties. The Board is developing criteria for the rental of space in Board owned/leased facilities.

Reporting unsafe work practices
WCBO contacted the service delivery location (unit) manager with reference to an instance when the claims adjudicator informed Complainant that the onus of responsibility was on the complainant to report unsafe working conditions to the WCB. After having read the file, WCBO pointed out that an onus is also on the claims adjudicator and any other WCB staff to copy the F6/F7 data to Prevention when the description of a work activity outlines an unsafe and potentially injurious work practice. The worker had a bilateral disability and is entitled to an additional pension factor (enhancement). The enhancement in this case was granted and calculated and paid to the worker. The manager spoke with staff at a general meeting and referred staff to the manual which outlines their accountability for reporting.
3) UNIQUE CASES - COMPENSATION SERVICES

Removal of irrelevant comments from claim files
Complainant contacted WCBO with reference to the annotation on claim files of personal information and comments relating to Complainant who was an employer agent and not the claimant of interest on the file(s). WCBO made a formal recommendation to the WCB. As a result, the WCB undertook a review of all claims coded to the employer’s worksite where Complainant was employed. The review was undertaken by a Manager who had not previously worked with Complainant, as recommended by WCBO. In this case, the WCB was asked to consider the retroactive application of a recently amended policy and practice referencing the removal of irrelevant comments from claim files and remove any irrelevant comments referencing complainants. The WCB completed a review of the files in question.

A case of financial hardship
Complainant contacted WCBO with reference to the implementation of a Review Board finding. Complainant had conformed to the vocational rehabilitation advice re: plan of action which was later denied by a vocational rehabilitation manager. Letters of understanding were sent. Complainant was now in financial hardship. Complainant requested the Director to review based on financial hardship and RSCM 89.11. Benefits paid pending completion of earning assessment. The recommendation was for the Director to reconsider the complainant’s eligibility for benefits pending the completion of the employability assessment.

An overlooked adjudication issue
Complainant contacted WCBO with reference to a long-standing issue pertaining to an Appeal Division decision. WCBO contacted the service delivery location (unit) manager with reference to the complaint. The manager agreed to review the file and report back to Complainant and WCBO. The manager’s review indicated that an adjudication issue had been overlooked. A subsequent adjudication was completed which provided payment for the period November 10, 1989 through March 1, 1992.

Discrepancy in a disability pension
Complainant approached WCBO with reference to a disability pension. WCBO reviewed file and noted a discrepancy. WCBO referred issue to Disability Awards manager who determined that the complainant was entitled to an enhancement for a permanent partial disability award.

Implementing a MRP certificate
Complainant had received a Medical Review Panel Certificate. The Panel had been asked specific questions by the Appeal Division pertaining to the complainant’s medical condition. The certificate answered the question of causative significance but the WCB refused to implement on the grounds that the situation was not covered under the WCAAct. WCBO discussed the situation with the division. Ultimately, an adjudication implementing the certificate occurred.
Taking care of pets
Complainant contacted WCBO with reference to attendance at a six week residential medical treatment/assessment program. WCB staff had indicated that wage losses would cease due to Complainant’s non-cooperation if Complainant did not attend the program. WCBO followed-up with Complainant re: the particulars of the program. Complainant then indicated that he owned two large dogs which he did not want to leave unattended. WCBO discussed with vocational rehabilitation consultant and Vocational Rehabilitation shared the cost of sheltering the animals which facilitated completion of the assessment.

Removal of irrelevant medical advisor comments
Complainant requested that irrelevant comments made by a Board Medical Advisor be removed from the claim file. Director of Medical Services concurred. Follow-up activities ensued with reference to the new practice directive on removing irrelevant information from claim files. The comments were removed.

Clearer communications
Complainant approached the WCBO with reference to the fact that access to a Medical Review Panel had been denied to the complainant. WCBO reviewed the file and noted issues relating to evidence on the file. WCBO also noted that the Appeals Officer had attempted to alert the claimant to the potential in obtaining a second opinion re: a bona fide medical dispute. WCBO questioned whether Complainant had clearly understood the letter which may have been clear to a reader expert in compensation jargon but which may have been misunderstood by a lay reader. The Registrar of the Medical Review Panel struck a panel pursuant to S 58(5) of the WCAct.

Immaterial internet information
During the review of a claim for an unrelated complaint, the WCBO noted that information obtained from the internet pertaining to Complainant’s private life had been placed on file. The WCBO was not able to discern the pertinence of the data to any completed or imminent adjudication. The division was asked to review the data. It was deemed not relevant to any adjudications on the file. It was removed from the file. The issue was discussed with the appropriate staff. This problem has not arisen in other complaints to date.

Refusal to implement a MRP certificate
Claimant’s adviser approached WCBO with reference to the implementation of an Medical Review Panel certificate. WCBO recommended that the disability awards department implement the certificate. The department refused. WCBO sought a legal opinion. Pending receipt of same, the Review Board issued a finding ordering the implementation of the medical review panel certificate. The Review Board acted independently and the WCBO has not read the finding. It may be that the WCBO data formed part of the debate. The WCBO is maintaining his request for a legal opinion.
A case of reliance
Complainant alleged that WCB had declared his surgery non-compensable after having paid for his airline fare and stay at the WCB residence. As well, after declaring surgery non-compensable, the WCB declared an overpayment on the claim. WCBO asked for a Manager Review, which overturned all negative decisions and rescinded the overpayment.

Agreed vocational rehabilitation plan later disputed
Complainant brought forward a complaint with reference to vocational rehabilitation eligibility and payment for a period during which payments had been denied. WCBO reviewed case noting that Complainant and the vocational rehabilitation consultant had disagreed on a vocational rehabilitation plan. Ultimately Complainant agreed to the plan advanced by the consultant. The consultant refused to pay allowances for period of disagreement. The vocational rehabilitation manager sustained the refusal to pay. WCBO approached Vocational Rehabilitation Director outlining that ultimately the parties had reached agreement on the vocational rehabilitation consultant’s plan. Complainant was paid allowances for the period in dispute.

Appeal Division finding implemented
Complainant’s agent complained with reference to the implementation of an Appeal Division finding. WCBO approached the Director of Vocational Rehabilitation to review situation. In joint meetings with the Workers Advisory, the Director and WCBO, the issue (re: the wage rate and the rehabilitation plan) was clarified and actions were modified by the WCB. The wage rate was ultimately adjusted upwards, a new rehabilitation plan was developed and implemented.

Reliance on an oral promise
Complainant approached WCBO with reference to the payment of mileage from his home in the interior to the Lower Mainland. The claims adjudicator refused to pay mileage but paid bus fare equivalency for the trip. A telephone memo on file notes that travel mileage was to be paid. The claims adjudicator argued that the telephone memo did not constitute a “decision letter” and therefore would not be honoured. WCBO raised the issue that the verbal discussion with Complainant had resulted in Complainant taking action and therefore constituted an implied contract. Mileage was paid to the complainant.

Personality difficulties resolved by file transfer
Complainant’s agent brought forward a number of complaints pertaining to treatment by the WCB. WCBO reviewed the file. The interaction between Complainant and the Area Office had proved difficult over time. WCBO became concerned re: evidentiary and adjudication issues. WCBO requested that the file be transferred to another Area Office for ongoing management and for a review of all prior adjudications. The file was transferred.
Wrong information provided to a client
Complainant approached WCBO with reference to the denial of a manager review which had been requested within the 90 time limit outlined in the RSCM. The request was denied, as the agent was told that Manager Reviews were no longer being contemplated. WCBO requested clarification from manager. Manager responded that staff had been updated on the manager review issues and the requirements outlined in the RSCM. This became a protracted case for a number of reasons. Ultimately, the agent was contacted.

Overpayment due to death of claimant
Complainant approached WCBO with reference to the declaration and recovery of an overpayment which resulted from the death of complainant’s claimant husband. The WCB alleged that the claimant’s estate had not notified the Board in a timely manner concerning the death of the claimant. After reviewing the file, the WCBO determined that Claimant’s estate had provided such notice. WCBO recommended that the overpayment be waived. The overpayment was deemed to be not recoverable.

Conflicting legal opinions
Complainant’s agent approached WCBO with reference to the implementation of an Appeal Division decision involving retroactive wage rate review and adjustment which had been recommended by a WCB officer. The WCB refused to implement the decision arguing a legal point. WCBO suggested implementation. Again, the WCB refused to implement. WCBO requested a legal opinion. The WCB’s counsel advised to implement the Appeal Division decision as recommended by WCBO.

Chaperone for a minor
Complainant was attending the Rehabilitation Centre for treatment. Complainant was a minor and had been chaperoned by his grandmother to Vancouver from the Area Office. At some point, the WCB felt that the mother (instead of the grandmother) should be the chaperone. The mother was not able to travel to Vancouver when asked. WCBO contacted Area Office which in turn contacted the Rehabilitation Centre and the grandmother remained the chaperone.

Lost file found
Claimant’s agent complained with reference to the implementation of the appellate finding which was in excess of one year. WCBO determined that the file had gone astray. Brought forward to manager who apologized to agent and assured them of the resolution of the implementation.

Going a bit further
Complainant has 31% function PFI from a 1972 accident was recently re-evaluated for an increase in the functional award. As part of this process, the Vocational Rehabilitation Department had extended some job search assistance, July to September 1997. WCBO’s review suggested that, given the severity of the compensable disability, additional rehabilitation planning, rather than just job search allowance, was indicated. Vocational Rehabilitation management reviewed the file, concurred with WCBO, and re-instated both
vocational rehabilitation benefits and proactive vocational rehabilitation planning to the
complainant.

**Treatment for non-compensable problems should be considered**
Complainant complained to WCBO that “extenuating circumstances” occurring during the
last year were not taken into consideration when the long term wage rate was set on his
claim. Complainant’s explanation to WCBO suggested that circumstances indeed were
such that consideration should be given to the time the Complainant was receiving medical
treatment for non-compensable problems. WCBO advised Complainant to submit medical
proof of this disability, which he did; this ultimately resulted in an upward adjustment of
the 8 week rate from $21.32 per week to $373.27 per week.

**Necessary adjustments to vocational rehabilitation benefits**
Complainant approached WCBO with reference to a training program away from home.
Complainant had chosen to use vocational rehabilitation assistance per RSCM 88.51.
Complainant’s own plan demanded Complainant to be away from home for some nights
per week. Complainant was spending the vocational rehabilitation money to accommodate
his own plan. However, difficulties were arising away from home. WCBO arranged for
WCB to establish contacts in the new locale which Complainant could access in an
emergency.

**Workers’ information in the wrong file**
Complainant complained that all documents relating to injury had been submitted for an
electronic file. It was determined that assessment information was being investigated.
Compensation Services division obtained the necessary information and expedited the
adjudication of the worker’s claim.

**Wage losses of an injured employee cannot be applied to money owning to the Board as an employer**
Complainant alleged that wage loss owing him had been applied to an overpayment owing
to the WCB which had been incurred when Complainant had been an employer.
Complainant’s company had gone bankrupt, but the bankruptcy had not been discharged.
Complainant had recently been injured while in the employ of another company.
Complainant was experiencing financial hardship. WCBO approached the Assessment
Department per AM 70.20.80. Complainant was paid the wage loss owing. This was a
unique case, as it involved an altered status under the Act as the complainant was now a
worker rather than an employer. The financial hardship was the extenuating circumstance.

**Delay in payment of benefits owing**
Complainant queried the length of time expired between a Review Board finding in his
favour and the payment to him of benefits owing. As well, Complainant questioned the
issues being investigated by the Board as part of the Review Board finding. WCBO asked
WCB management for: clarification of the exact nature of the Review Board finding, an
adjudication/interpretation of the Review Board’s findings, and an estimate of when
benefits would be paid. Forty one days later, the complainant was paid approx. $47,000
pursuant to the Review Board decision. The delay was due to a clerical error which resulted in the file being sent to filing before the actions were completed.

**Failure to change the classification of a compensable condition**
Complainant complained that she had been diagnosed with thoracic outlet syndrome but the Board still classified her complaints as “soft tissue injuries”. As well, Complainant complained that her graduated return to work ended prematurely. WCBO’s preliminary investigation suggested merit to both of Complainant’s concerns. WCBO brought both matters forward to WCB management who, after review of the case: 1) acknowledged the diagnosis of thoracic outlet syndrome and formally accepted same, by way of letter, as compensable; and 2) re-instated wage loss to the full completion of the graduated return to work.

**Adjudication held in a catch-22**
Complainant complained to WCBO about a delay in obtaining file disclosure. WCBO’s investigation showed the disclosure consent had been faxed to Complainant’s lawyer in September 1997, but as of February 1998, the claimant’s claim remained in Disclosure filing. Both Complainant and lawyer maintained that the form had been signed and returned to the Board in late September or early October, 1997. The re-opening investigation was also delayed, as Complainant’s claim remained in Disclosure filing. The area office denied receiving the signed consent or holding it separately from the file. For remedy, WCBO faxed the request for disclosure and authorization to Complainant’s lawyer; Complainant signed same and returned by fax to WCBO; WCBO walked the signed disclosure to unit 22 (disclosure department) whereupon the manager of the department immediately began full disclosure of the file to Complainant and his lawyer. The claim was released to the area office that afternoon, so re-opening adjudication could proceed.

**Missing benefits**
Complainant was injured in 1995 and sustained a brain injury. Complainant had received a wage loss steadily for 3 years, but when an wage loss finalled cheque was issued in March 1998, no vocational rehabilitation or pension benefits were implemented. By June 1998, Complainant had still not received any vocational rehabilitation or pension money and was now experiencing financial hardship. WCBO asked the Senior Vocational Rehabilitation Manager about vocational planning status; vocational rehabilitation benefits of $10,150 were subsequently paid to Complainant on June 16, 1998, retroactive to the end of wage loss in March 1998. As well, additional vocational rehabilitation budgeting and planning began.

**Vocational rehabilitation benefits reinstated**
Complainant, an injured worker, complained to WCBO about the termination of vocational rehabilitation benefits and uncertainty over rehabilitation planning. In light of what Complainant told WCBO, the office asked the Senior Vocational Rehabilitation Manager to review the vocational rehabilitation planning process, including any indication for additional vocational rehabilitation benefits. Upon review of the case, the Manager: 1)
directed re-instatement of vocational rehabilitation benefits to Complainant, and 2) asked that the vocational rehabilitation consultant to assist Complainant with development of a business plan.

4) UNIQUE CASES - OTHER BOARD FUNCTIONS

Contract results in payments
The complainant was a clinic working with WCB cases. The Complainant complained of billings owed that had not been honoured by the WCB. The WCBO found that the Complainant needed to enter into a contract with the WCB to provided some specific additional services. Past billings were paid with accrued interest.

First Aid Certificates delayed
Complainant, an employer, complained to WCBO that Occupational First Aid Level 1 Instructor Certificates had been promised to two individuals, but were not received. WCBO asked Prevention management to follow-up; certificates were drawn up and sent out later the same week.
Attachment #5

EXTRACTS FROM THE PUBLIC HEARINGS RE:
THE WCB OMBUDSMAN

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Presentation of Cassandra Koybayashi, WCB, March 6, 1998

JOHN STEEVES: Now the Provincial Ombudsman has jurisdiction over the Workers’ Compensation Board – do you know that or? Do we take that as given?

CASSANDRA KOYBAYSHI: Jurisdiction?

JOHN STEEVES: Yes.

CASSANDRA KOYBAYSHI: Yes. They have the authority to recommend.

JOHN STEEVES: To investigate complaints?

CASSANDRA KOYBAYSHI: Investigate, inquire.

JOHN STEEVES: Recently that authority has been taken over – to use a non-legal term - by an internal Ombudsman of the Board?

CASSANDRA KOYBAYSHI: No, I don’t believe it’s been displaced.

JOHN STEEVES: What is your understanding of the arrangement – first of all there is an internal Ombudsman within the Board?

CASSANDRA KOYBAYSHI: Yes, now I’m not at all expert in discussing the internal Board Ombudsman. But if I’m sure that if there is a question on that that we can bring the appropriate people here. Peter Hopkins is the Board’s internal Ombudsman. And he is part of the administration - he reports, I believe, to the President and will investigate complaints that come to his attention. The Provincial Ombudsman still continues to exercise their authority as far as I know to inquire into any complaints that they receive.

JOHN STEEVES: And has the internal Ombudsman – Mr. Hopkins - referred matters to the Appeal Division?

CASSANDRA KOYBAYSHI: He has from time to time inquired of us about complaints he’s received.

JOHN STEEVES: Has he made it a formal referral to you?
CASSANDRA KOYBAYSHI: A formal referral. He has – he has brought matters to our attention in his capacity as Ombudsman but I’m not sure what you mean by formal authority?

JOHN STEEVES: Well, the Ombudsman of BC has the authority under its statute to refer a matter to you make a decision on it – correct?

CASSANDRA KOYBAYSHI: That’s correct.

JOHN STEEVES: Does Mr. Hopkins have the same authority and has he exercised it?
CASSANDRA KOYBAYSHI: He has not got the same authority as far as I am aware – again because he is part of the administration – reporting to the President – there is some separation in our functions, however we do take complaints, concerns from many quarters in the course of our day.

JOHN STEEVES: And you say that Mr. Hopkins has made – I’m not sure if this is your wording – inquiries – contacted you in any case – what was the nature of those without disclosing the particular situation?
CASSANDRA KOYBAYSHI: I can’t actually remember – I think one might have had to do with a delay but I’m not – I’m not sure in fact if I would have been aware of them all. This is Jay Jamieson, he is the Assistant to the Chief Appeals Commissioner – the recent inquiries that I recall may be in relation to contacting an individual to advise them on the grounds for reconsideration of ...

Presentation of Jim Sayre, CLAS, April 8, 1998

JIM SAYRE: … I think this is an appropriate time to refer to something that as far as I can recall has not even been mentioned in either the Board’s presentation or anything that we’ve said to you but it could be a significant part of the accountability process and that is the role of the Ombudsman. The - historically the BC Ombudsman has heard a great many complaints about the Workers' Compensation Board. There was a very important report that the Ombudsman issued in 1987 I believe it was – when Steven Owen was the Ombudsman – that made a number of significant recommendations. I think that that report was a very important part of the process that led to the establishment of the Munroe Committee and ultimately to the present legislation as it now stands. Since that time within the last few years there was a decision which I don’t believe has any legislative foundation to it. That complaints to the Ombudsman’s office about the Workers’ Compensation Board be redirected to an internal Ombudsman who is a gentleman named Peter Hopkins who works at the Board. And I’ve known Peter for years and have a great deal of respect for him. He’s one of the fairest people I know here and I think he has done his very best to resolve complaints when he’s received them. But once again as in the other comments that I’ve been making about the complaint process and the appeal process, the problem is that when people go to the Ombudsman it is very often that the stage that they are at is that they have exhausted their appeal rights. They have firmly viewed – at that point they are firmly viewing the Board as their adversary and their enemy and to be directed from an external Ombudsman’s office to an internal part of the Board to process your complaint is not going to be satisfactory to a lot of those workers. They are not going to feel that that is really providing the objective advisory view that the Ombudsman is
supposed to provide and of course the other problem of the Ombudsman’s role as a solution to the accountability problem is that the Ombudsman has no authority as such.

I understand that Mr. Hopkins is able to resolve a good many of the complaints that are referred to him, particularly things that deal with rudeness and failure to respond to communications – that sort of thing – quite quickly and effectively because he does have access to Board officers and he’s respected by people throughout the Board and when he comes and says this is wrong or you shouldn’t have done this or you should respond to this person’s complaint action is often taken fairly quickly.

From what sort of third hand knowledge I have of the effectiveness of that office I’m not – you know certainly not here to criticize them in the sense of saying that they don’t try to do their best to resolve problems but there’s two difficulties with that process; one is that it has no decision making authority. So in the end if Peter Hopkins goes to a manager and says your officer has done something wrong in administering his claim. I have looked at the documents and I don’t think it should have been done this way and I think the decision should be changed and the manager says I don’t agree with you that is the end of the story. He can’t go any further – he has no power to order that it be changed so it doesn’t take the place of formal appeals. And he also has no power to order that there be any remedy where he finds that something was done that was wrong and it should not have occurred.

So the kind of cases that I have referred to when the worker has come and said that because of the failure of the Board to follow its own policies they’ve – for example – say a worker comes and says the Board cut off my wage loss benefits – they didn’t tell me. There were continuity benefits available; it took over a year to assess my pension. The Board wouldn’t give me any money, the bank foreclosed on my house, I had to move, my family has been disrupted by this - there is nothing that the appeal process; nothing the Ombudsman can do except to say you know that shouldn’t have happened and perhaps you should be entitled to some retroactive benefits that the Board should have awarded at that time but it is not going to restore the home.

And it is not going to compensate – even in a financial sense for the disruption that occurred. So what I’m suggesting is an external body that will have some teeth and some authority to provide positive remedies and we could talk at length perhaps at another time about what the nature of remedies would be but I don’t know that it’s possible at this point to specifically, concretely outline them. But some remedies that would give workers some satisfaction that if the Board has done something wrong that has injured them that the Board - that can be recognized through the complaint process and remedied. And secondly that if the officer has done something wrong in the sense that’ I’ve also referred to and you have often heard of – something wrong in treating them rudely and cutting them off when the evidence clearly said that they shouldn’t have been cut off – that in some of those cases the officer – there should be some consequence for that officer – there should be some element in the process. We know that Board officers when they make decisions know that they can’t go and allow every claim. They go and give every worker the maximum wage rate. Because if they do the manager is going to be standing at the desk saying – what are you doing here? Your statistics are – you are spending twice as much money or authorizing twice as much money as any other officer in this department and we can’t have that. So there is going to be
accountability if the officer errs in favour of workers and don’t follow the rules and are too generous to workers but there is no process by which there will be accountability if the officer is in the other direction.

And what is needed in my submission is a complaint process where clear errors at least can be identified and if nothing else there can be a formal recognition by the complaint process that this decision was wrong and hopefully that officer is going to think – well I don’t want too many of those documents sitting in my personnel file at the Board. I don’t want to be known as the one officer who is constantly making bad decisions because when my performance review comes around that’s going to be considered. And maybe I’d like to be a manager someday and if I am the object of a disproportionate number of complaints to the complaint process and many of those complaints have been upheld hopefully – I’m saying hopefully – the Board is not going to promote people like that. In fact if they don’t clean up their act the Board may – again hopefully – remove them from the decision-making role and find another role for them or show them the door. If it is that extreme. For accountability – for any of that to work there has to be a process where the people who most know when something wrong is happening – that’s the injured worker – has a way of initiating the process and it simply isn’t adequate in my submission to say that you can go to the person’s manager and make a complaint because the universal role of us as workers’ advocates and the managerial complaint process is virtually a waste of time. I can tell you we talked about that at our advocacy group meetings and the majority of advocates say that they don’t even bother to do it. Some say that it is actually damaging to the worker because all it results in is a manager writes a little better decision and sort of documents the decision a little better so it makes you a tougher case to meet when you finally get to an appeal. So it’s – we are looking for something much more objective and much more external than that kind of a process to deal with decisions from the Board – through the errors.

COMMISSION: I gather this process that you are suggesting does not – you would be suggesting to be the primary mechanism of performance review and quality decisions at the Board will it be in the most unusual of cases – how would you define those?

JIM SAYRE: Well I think they become defined – they define themselves in the sense that the workers who want to make complaints are directed to this process and then the complaint tribunal process will further refine them. As I said I think it is probably beyond what we have time to talk about today to talk about all of the procedural aspects of how that kind of a process might work. I don’t see it being a simple leap from the complaint by the worker to a full-blown hearing in front of two or three people who listen to evidence and then make a decision. There needs to be a front end process at the middle in which complaints based on misunderstanding by the worker – where there’s better explanations and where managers do look at the complaint again and so – so in many ways that process would roll in the role of the Ombudsman as it’s always been understood and filter out the complaints that are on the one hand that may be issues of new evidence that has arisen where it really is not that the officer did anything wrong – the officer wasn’t aware of everything and those things can be solved quickly if there’s somebody to drive that process.

COMMISSION: Do you believe the Ombudsman’s position should be external as well?
JIM SAYRE: Well, yes, I do – as I said the perception – I don’t think that – part of the Ombudsman’s role is obviously to try and solve problems for people when they can but the other part is to give them the sense that if - if the problem can’t be solved that they’ve been given a fair hearing and the concern I have about an internal Ombudsman is that the person that is unsuccessful at the end of the day is going to walk away and say well the Board just turned me down again. And they are not going to have any more confidence in the fact that the Ombudsman who works for the Board says that the Board’s conduct was okay then they had in the first place. As I said Mr. Hopkins is a very courteous and pleasant person – and I think that they may walk away with the sense that they’ve been treated with more respect than they were perhaps by the other officers that they dealt with – that isn’t usually the crux of what they were there for. They are there because they think the decision itself was unfair and the benefits they received were unfair and if they are not going to get that remedied then it would be helpful to have in a sense that at least an outside body had done they could for them. Now having said that I understand that the –as I said this was an administrative practice, there was no legislative change when the internal office was set up and what I’ve been told is that if the person doesn’t want to deal with the internal Ombudsman they can get an appointment with the Provincial Ombudsman and the Provincial Ombudsman won’t literally shut the door in their face but they have to know enough to demand that. And the routine of the Provincial Ombudsman’s office as I understand it is to refer all inquiries to the Board’s Ombudsman. I think that it would be better if – as I said if the Ombudsman’s role was rolled into the complaint process and handled with the sensitivity that Mr. Hopkins has been able to handle a lot of these things then it would accomplish as least as much as his office is able to accomplish. I can feel that the Board would cooperate with that – with whoever was performing that role just as much as they are cooperating with the present internal Ombudsman. And it would be seen as external and objective and independent of the Board and those are good things in themselves.

COMMISSION: I don’t understand the role that you are describing of the Ombudsman – in my view you are describing something that – a position that service – let’s call it the quality of service that the individual is getting – that the worker is getting and also you seem to be asking that the Ombudsman look at the substantive issues of the claim itself and in my view that it would make sense that that be part of the formal appeals process whereas I think the Ombudsman’s office in the Board itself – at the Board has been set up to look at the issues that you started with which is the quality of service and the quality of treatment that workers get – would that not – not be sort of more of appropriate to narrow the role of this Ombudsman/quasi-complaints department?

JIM SAYRE: I think you are right in a broad sense. That the role of – the focus of the complaint process and the focus of the Ombudsman’s process is more on the procedure and the treatment that a person has received and than on the substantive correctness of decisions. But at the same time it is virtually impossible to separate those from a worker’s perspective when the worker feels that they’ve been mistreated and they’ve been told that one of the remedies that you have is to talk to the Ombudsman that mistreat may be two things. It may be that I was treated rudely and the officer didn’t listen to me and didn’t listen to my doctor. Now that is a procedural complaint. But as a result of that the Board made the wrong decision. And of course the worker is angry because the decision is wrong and at that the same time the way the decision was made. So I don’t know that it is possible to neatly divide the two streams and …
COMMISSION: So is it possible

JIM SAYRE: At the outset of the process.

COMMISSION: Given what you’ve said – then it would make sense to have an Ombudsman’s office – is it not better that whatever complaints take place that they are treated as part and parcel of a – they are treated in their entirety – although the managers’ review doesn’t work clearly the manager is someone who would be familiar with the case and that’s where the best – where one would get the best redress or the best satisfaction I would think if let’s say in theory – let’s say the manager who was reviewing the complaint hadn’t worked for whatever reason and I’m not sure – you may be able to make comment on that on why that doesn’t work?

JIM SAYRE: Well, I can tell you one of the reasons why and I’m not sure if this is still the Board’s position or not – Mr. Bates may be able to update us on this – that there was a tension between the adjudicators and the managers at one point – where the adjudicators were letting the managers know that they weren’t happy being overruled by their own managers on their own decision. There was a – I believe at one time a document that said in effect that the Board managers will not change a decision unless the decision has been found to be contrary to policy or contrary to the Act so instead of the managers simply saying I’m going to take an objective view of the evidence and see whether you’ve overlooked something or you failed to recognize that the balance of the evidence is in favour of the worker or is equally balanced so it should be decided in favour of the worker – manager was almost acting like a legal tribunal looking for errors of law and if they didn’t find one they were saying – well – you know I’m not going to second guess my staff here by changing this decision. And it was at the time that most complaints that I can recall made by our group about the managerial process – that’s the way it worked and I’m not sure that that has really changed – I’m not sure if that document is still considered to be the definition of how a managers’ review works but the concern about any managerial review process where it goes to the manager of the person working is that something in terms of human relations it is difficult for somebody who works together with the person making the decision to be constantly going in and saying – you messed this one up – you messed that one up – it’s not tactfully but it is a lot easier if it is done by an external tribunal that walks in.

COMMISSION: You would be surprised – in a lot of agencies and organizations that is perceived to be an integral part of the manager’s role.

JIM SAYRE: Yes.

COMMISSION: To do that kind of education and training on the job. Mr. Bates may be able to find us a copy of that document that you are referring to; I’d be interested in taking a look at it.

... 

COMMISSION: I just had one question Mr. Sayre – I didn’t quite understand the model of the Ombudsman being part of a public complaints process in that sense that they could grant remedies to injured workers. Doesn’t that undermine the traditional role of the Ombudsman?
JIM SAYRE: I’m sorry; I wasn’t very clear about that – I wasn’t meaning to suggest that the Ombudsman be moved in or merged in. What I was suggesting was that part of the complaint processing – the complaint process at the front end involve some of the kind of things that the Ombudsman’s office has traditionally done. It wouldn’t replace that office; you would still have an Ombudsman. I think one of the advantages of an Ombudsman is if at the end of the day there is no formal appeal rights left; there is still somebody can come to who might be able to persuade the agency that they should voluntarily change what they have done. And that’s why when the Ombudsman’s office was first enacted – when the Act was first enacted in BC and so the Ombudsman wasn’t given any actual remedial powers; they were essentially intended to focus on situations where the appeal routes had been exhausted. Or where there were simply no appeal remedies or it was the kind of thing that couldn’t be appealed – like cases of being treated rudely or letters or phone calls not being returned or that sort of thing where it is a process to complain as opposed to effective complaints. And we think there’s still a role for – an important role to be performed there and it should continue to be performed by an Ombudsman’s office. In spite of Mr. Hopkins’ qualities I have – and I mean that very sincerely I have concerns in a philosophical sense about having that role performed internally. And we are suggesting that it might be beneficial to consider restoring the external nature of the office or to look for some kind of a hybrid but that’s separate from the complaint matter altogether.

COMMISSION: I think what I then need - want clarification on for the benefit of the Commission is we have the appeal process that deals with substantive issues and errors being made or poor exercise of discretion and then we have the Ombudsman who deals in a non-legalistic way to try to rectify injustice. You say that the ordinary disciplinarian process by – through management is in your view ineffective. I’m not exactly sure what this public complaints commission would do – what part of the territory you are anticipating that it would cover?

JIM SAYRE: I wasn’t – I am not sure that I would say that the disciplinary process is ineffective; I’m sure when management wants to discipline someone they’ve got a lot of teeth and can do it.

COMMISSION: Are you saying that it is not utilized?

JIM SAYRE: I’m saying that workers don’t – that’s not an effective way for a worker to be able to complain about mistreated – is to go to a manager and say you should discipline this officer. It has simply been the experience of advocates that that does not generally lead to any kind of satisfactory result.

COMMISSION: What kind of remedies would the public complaints commission – not commission – the public complaints body provide to workers?

JIM SAYRE: In extreme cases they could be given authority to award some additional compensation for actual proven financial losses – again I’m not talking about someone just doling out money in large wads but where a worker can show that they suffered a foreclosure of their home or additional moving costs and that sort of kind of thing because the Board policy was because the officer simply didn’t follow policy in providing continuity of income benefits – it seems reasonable
that in addition to whatever retroactive benefits may be payable if the worker can show that there were extra losses suffered because of a failure to follow the Act or failure to follow the policy there ought to be a remedy for that – and ideally there are ought to be a remedy that doesn’t require some sort a very difficult law suit in the Supreme Court against the Board assuming there is jurisdiction to sue the Board for that kind of thing.

COMMISSION: So it’s a financial remedy only then that the public complaints body would provide?

JIM SAYRE: To the extent that I’ve thought about that I think that the financial remedies would be a relatively rare and would be saved for the most clearest, and most extreme cases. And as I said would be saved for cases where there can be proven financial losses that more commonly there would be remedial orders and in some cases I think it would go to a significant way to making the worker feel somewhat vindicated if there was simply a formal apology from the Board about the way the case was handled. I think some of the most prominent people that have come before you – workers whose cases have been well known and have talked about it have said that the Board didn’t even ever apologize to me for what they did to me. That was a significant part of their grievances about the whole – about the way they were treated – is that there was never even a recognition that anything was wrong so in a sense that is a free remedy that a complaint process could give that would restore some sense of vindication to a worker who hadn’t not been treated the way they should be. And the other type of remedy and again only in cases where it is fully indicated that some sort of direction that the officer clean up their act then this sort of conduct not be repeated by that officer. And that is probably the most important remedy in the sense of improving the system – that there is going to be a sense on the part of the officers that you know I don’t really want to be the most common name that this complaint tribunal sees in front of them when they see – whey are dealing with these things – it is not going to be good for me; it’s not going to be good for my career and while I don’t want the manager at my desk because I’m constantly giving away benefits that I shouldn’t be giving I also don’t want the complaints department at my desk constantly doing things that I shouldn’t have done so I’ve got to try and make the right decision for workers and the Board. And I guess….

COMMISSION: Have you thought through the model carefully enough to consider the labour relations consequences of such a body’s decision – whether the trade union representing the Board officer would be involved – you haven’t got to the details? I’m just wondering…

JIM SAYRE: You mean whether an officer could file a grievance if the complaint process said that they should be reprimanded or ….

COMMISSION: It seems to be sort of intervening into the Labour Relations area?

JIM SAYRE: I would say and I think I have to say in my capacity as a speaker for interests of injured workers that if it came to a dispute between the employment rights of the Board officer and the complaints process that said the Board’s officer had mistreated the Board’s client – the injured workers – that the latter should be found to be more important. The Board – the grievance process might be able to protect – should be able to protect the – any employee’s employment rights in the sense of their income if it shown that they didn’t do anything wrong and that is still going to be
adjudicated in ordinary terms in these issues of litigation – there’s issues of justification and people saying – look I’ve done well for ten years – I was under stress when I did this and you’ve got to take this into account in deciding whether to punish me – those are all Labour Relations concerns but they don’t really answer the complaint of the worker who is affected and treated badly by the process. It’s a different focus.

Presentation of Ed Bates, WCB, April 8, 1998

ED BATES: In regard to the discussion concerning the Ombudsman I have been advised to tell you that the Ombudsman has been reviewing the internal structure of the Ombudsman’s role, not only at the Board I would anticipate, but perhaps in other institutions.

I can tell you from personal experience as indicated by my friend that Steven Owen was very instrumental when he was Provincial Ombudsman in initiating these internal concepts of Ombudsmanship.

I recall attending a meeting at the Ombudsman’s office where ICBC was held out to be an example of an internal Ombudsman’s office that had been created with some degree of success.

The existence of the internal Ombudsman here at [the] Board is very much at the request of the Provincial Ombudsman and I just wanted to make that point as well as the fact that the Provincial Ombudsman is conducting a review of the concept and the commission might be interested in that.