REPORT TO THE
ROYAL COMMISSION ON WORKERS' COMPENSATION
IN BRITISH COLUMBIA

Availability of Appeals,
Reopening and Reconsideration A Comparison of the
Workers' Compensation and Tort Systems

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On

Availability of Appeal, Reopening and Reconsideration -
A Comparison of the Workers' Compensation and Tort Systems
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INTRODUCTION AND PRELIMINARY COMMENTS

I have been asked to compare the availability of appeals, reconsideration and reopening under the tort and workers' compensation systems, and to assess rationales which may exist for differences between the two systems in this regard.

Since the primary focus of this report involves comparing the tort and workers' compensation systems, I have looked primarily at the processes for review of the types of decisions which both systems are called upon to make. This means that I have concentrated on the processes applicable in the workers' compensation system to determinations involving workers' entitlements to benefits. I have not looked in detail, for example, at decisions relating to other types of issues such as employer assessments, penalties and relief of costs, as these have no counterpart in the tort system.

As with my prior reports, the fact that a comparison is being made between the tort system and the workers' compensation system does not imply that one system is superior to the other. The object has been to identify similarities and differences between the two systems and, in the case of differences, to analyse and discuss reasons why differences may or may not be appropriate or desirable.

My focus has been on the overall structure and general principles underlying the scope of review under the two systems, as opposed statistical analyses or procedural issues, which have been dealt with in reports to the Commission by various other researchers and consultants (including Sharon Samuels, Karen Ryan, Victoria Macfarlane and Diana Tindall). For example, I have compared the number of levels of appellate review available under each system and the grounds upon which review is available, but have not undertaken my own evaluation of procedural issues such as time limits for seeking review or the availability of oral hearings. Nor have I undertaken independent statistical analyses regarding who actually seeks reviews, upon what issues, or with what results.

In this report, I am using the general term "review" to mean any type of additional look at an original decision, whether that is a reconsideration by the original decision-maker, an informal review by an immediate superior, or a formal appeal to a quasi-judicial body constituted under the Act.

I use the term "appeal" to describe a formal review of a decision by a superior body in the review hierarchy, whatever form that review takes.

"Reopening" and "reconsideration" are terms which I use to describe review by a body at the same level as the original decision-maker.

The Manual distinguishes between “reconsideration” and “reopening” on the basis that reconsideration occurs where the original decision is alleged to have been invalid, while reopening is based not any invalidity of the original decision, but rather on circumstances having changed since it was made. As discussed below, the terms are not always used the same way in the governing legislation and policy. Except where noted, I have adopted the distinction made in the Manual.

References below to provisions in the "Act" are taken from the Workers Compensation Act, R.S.B.C. 1996 c.492 and references to excerpts from the "Manual" are taken from the Rehabilitation and Claims Services Manual. I
have not appended materials referred to below which are already available in the Royal Commission’s library. Except as noted, copies of legal authorities are attached to the original of this report.

SUMMARY

The tort system allows in general for fewer levels of appeal, fewer grounds on which review is available and fewer varieties of review, in that reopening or reconsideration is almost never available. In the case of procedural decisions, as opposed to final decisions, the tort system provides for a much more complex appeal process. This factor, combined with appellate courts’ reluctance to make findings of fact and resulting tendency to refer matters back to the trial court after a successful appeal, can often give rise to “treadmill” problems similar to those complained of in the workers’ compensation setting.

Many of the differences in review processes between the workers’ compensation and tort systems result from underlying differences in the systems themselves. Opposite policy choices between flexibility and finality have been made in the two systems, and these choices have had impacts far beyond the structure of review processes. It should therefore be considered whether changes in review processes might necessitate changes in other areas. For example, one of the rationales for limited grounds of appeal in appellate courts is that the parties in the courts below had both an obligation to ensure that all relevant issues, evidence and authorities were put before the trial Judge, and an opportunity through the complex rules governing pre-trial processes to fulfill such obligations.

If a choice is made to impose similar limits grounds for appeals or the number of appeal avenues in the workers’ compensation system, it may be necessary to put systems in place to ensure that all relevant matters have been brought out at the earlier stages. Thus, the result might be fewer appeals, but more complex proceedings at lower levels.

There are several practices employed in the tort system for simplifying review processes. For example, the tort system has different processes for different types of matters. Different review processes generally apply to different types of decisions, such as procedural and final decisions. A simplified process (Small Claims Court) may be used for matters where the amounts in issue are relatively small. Interlocutory appeals and appeals to the highest body (the Supreme Court of Canada) can only proceed with leave of the court. As a matter of practice, many decision-makers at the first level attempt to make alternative findings where feasible, to lessen the likelihood that matters will be referred back to square one if appeals from their decisions succeed. Processes are in place for requiring parties with a history of abusing the system to obtain leave before bringing further proceedings.

The Commission may wish to consider whether some of these procedures could be adapted to the workers’ compensation system with a view to addressing some of the current problems with delay, administrative demands and multiplicity of proceedings, without the necessity for a complete overhaul of the present review system.

DISCUSSION

I. Overview of the Availability of Appeals, Reopening and Reconsideration in the Tort System

A. Appeals

In B.C., as in other Canadian jurisdictions, there are technically four possible levels of decision-making in the tort system. Depending upon the court in which an action is commenced, appeals are available to either one or two
higher courts. There are two separate appeal processes, depending upon whether the decision in issue is a final decision on the merits of a case, or an interlocutory decision involving procedural issues.

1. **Appeals from Final Decisions**

Tort claims which involve relatively small damage claims may be commenced under the Small Claims process in the B.C. Provincial Court. (I will refer to this simply as Small Claims Court). The maximum amount currently recoverable in Small Claims Court is $10,000.00. Therefore the only actions commenced in that forum are those where the claimant either has suffered less than $10,000.00 in damages or is willing to abandon any claim to damages in excess of that amount in order to avoid more costly, involved and time-consuming Supreme Court proceedings. In practice, many parties consider it impractical to pursue a Supreme Court trial for matters involving less than $20,000.00 or so (and some place the threshold considerably higher than that). Consequently matters involving larger claims may end up in Small Claims Court, but the claimants will be unable to recover more than $10,000.00.

An appeal from Small Claims Court is available to the B.C. Supreme Court. The hearing before the Supreme Court may be a review on questions of fact as well as questions of law, and the Supreme Court may order that the appeal proceed as a trial de novo. (Small Claims Act, ss.5 and 12) As a result, the Supreme Court may consider whether there were errors made in the court below, or it may simply substitute its own judgment for that of the original trial Judge. The Supreme Court is free to hear new evidence and is not limited to matters on record in the Small Claims Court trial.

Section 13 of the Small Claims Act provides that the Supreme Court may make any order which could be made by the Provincial Court and that there is no appeal from the Supreme Court’s order. There have been several Provincial Court decisions suggesting that the Supreme Court does not have jurisdiction to refer a matter back to Small Claims Court for retrial, but must either dismiss the appeal or else render judgment itself as it sees fit.

Thus there is only one level of appeal available for cases commenced in Small Claims Court, and that appeal results in a final resolution of the whole matter. Given the relatively small amounts in issue and the cost of pursuing an appeal to Supreme Court, many parties do not find it practical or worthwhile to pursue their right of appeal.

In light of the relatively low monetary jurisdiction of the Small Claims Court, tort actions are more commonly commenced in B.C. Supreme Court. Supreme Court proceedings tend to be complex and time-consuming and there are detailed rules in place for a host of pre-trial procedures including parties’ disclosure of relevant documents, examinations under oath of opposing parties and witnesses, advance disclosure of expert evidence, processes for obtaining admissions, etc. These rules are aimed at narrowing the issues to be dealt with at trial and at facilitating settlement prior to trial by allowing the parties to evaluate the strengths and weaknesses of each other’s cases in detail well in advance of the scheduled trial date. (In fact, only a small percentage of cases end up proceeding to trial.)

Final decisions of the B.C. Supreme Court can be appealed as of right to the B.C. Court of Appeal. The proceeding before the Court of Appeal is a review on the basis of the record of the proceedings in the Supreme Court, and not a rehearing or trial de novo.

While the usual rule is that the appeal must be heard on the basis of the evidence which was before the lower court, the Court of Appeal has discretionary authority to admit new evidence at the appeal stage (B.C. Court of Appeal Rule 24). This is generally only permitted where the new evidence is such that it could lead to a different outcome, and the evidence was not available or could not have been uncovered by reasonable exercise of due diligence prior to trial. (Eg. Bradbury v. I.C.B.C. (1990) 42 B.C.L.R. (2d) 397 (C.A.))

It is sometimes said that an appellate court will only interfere with a lower court’s decisions where there has been an error of law. However that is something of an oversimplification, and there are circumstances where appellate
courts may also review decisions on the grounds of error of fact or error in the exercise of discretion. Different standards of review apply depending upon which ground is under consideration.

Questions of law provide the most common basis for appeals and involve the lowest standard of review. Where a lower court has made an error of law, the appellate court is free to substitute its own decision as to the law and its application.

Questions of mixed fact and law which cannot be separated are generally reviewable on a somewhat higher standard. Appellate courts have indicated it is appropriate to interfere with such decisions not where the appellate court would simply have arrived at a different conclusion, but where there has been some "palpable and overriding error" in the court below. ("Palpable" generally means obvious or readily perceived, and "overriding" is used in the sense that it affects the outcome or final disposition of the matter in issue.)

It is also sometimes said that a trial Judge of the B.C. Supreme Court is the sole arbiter of factual issues and the Court of Appeal must defer to the latter's findings of fact. Again, this is something of an oversimplification, as there are a number of situations where appellate courts will review factual findings. For example as just noted, an issue may be characterized as one of inextricably mixed fact and law, and hence reviewable in the case of "palpable and overriding error." (The distinction between issues in which fact and law are separable or inextricably intertwined can be extremely difficult to draw.)

Even in the case of pure questions of fact, there are many instances where appellate courts have been willing to interfere with lower courts' findings on the basis that they are clearly and obviously wrong. While appellate courts apply a higher standard of review in such cases than is applied to questions of law, it is not entirely clear what that standard is or how it applies. The most that can be said with certainty is that an appellate court may interfere if the trial Judge has made some manifest and overriding error of fact, but cannot simply substitute its own views on the basis that it would have weighed the evidence differently and arrived at different conclusions. (See, eg. the discussion in H. Brinton, British Columbia Appellate Practice, at pp. 2-9 to 2-10 and 2-25 to 2-29)

In addition, I note that a finding of fact which is unsupported by evidence can be characterized as an error of law. (See, for example, Yukon Energy Corp. v. Yukon Utilities Board (1996) 74 B.C.A.C. 58 (C.A.) at para.46, where the Court went on to suggest that a finding which overlooks or misapprehends relevant and conclusive evidence is also an error of law.)

A higher standard of review also applies to the review of a lower court's exercise of discretion. Discretionary matters generally involve those where the law does not dictate a specific result; instead, a court is called upon to weigh competing considerations, and opinions as to the appropriate balance may reasonably differ. Examples include procedural issues such as whether to grant an adjournment of trial and final issues such as whether to grant an equitable remedy such as an injunction as opposed to a legal remedy such as damages.

Because the law generally allows for different choices and opinions in discretionary matters, the decision itself is not generally open to review. Instead, an appellate court is limited to reviewing the manner in which the decision was reached in order to ensure that the discretion was exercised upon proper principles. This generally involves a review of whether there was an adequate foundation on which the lower court could proceed with an exercise of discretion at all and, if so, whether the court erred by considering factors irrelevant to the proper exercise of the discretion in question or failing to consider relevant factors.

At the conclusion of an appeal, the Court of Appeal may dismiss the appeal, make an order substituting its own disposition of the matters in issue, or refer the matter back to the Supreme Court.

A further appeal may lie from the Court of Appeal to the Supreme Court of Canada. The same general principles as those discussed above apply with respect to the procedure, evidence, standards of review for various types of errors, and range of orders which can be made on disposition of the appeal.
The key difference between appeals to the B.C. Court of Appeal and the Supreme Court of Canada is that in tort matters (unlike certain criminal matters), there is no right to appeal to the Supreme Court of Canada, and leave is required in order for such appeals to proceed. Leave applications are decided by a three member panel of the Supreme Court of Canada. A decision to grant or refuse leave is discretionary, and the Court does not give reasons for its decisions on this issue. Section 40(1) of the Supreme Court Act sets out some of the factors which the Court will consider in deciding whether or not to grant leave:

**Appeals with leave of the Supreme Court**

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment... of the highest court of final resort in a province, or a judge thereof... where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it...

A key consideration on leave applications is thus whether the proposed appeal is of general public importance. One of the Court's key concerns is the allocation of judicial resources at the highest level, where demand invariably far exceeds supply. (I note that the Supreme Court of Canada decides on average about 450-500 leave applications each year. The Court hears approximately 125 cases each year on all areas of law, about two thirds of which proceed by leave.)

Thus, for all but the very select few tort cases which proceed to the Supreme Court of Canada, there is effectively only one level of appellate review available for cases commenced in B.C. Supreme Court. As noted, that review is generally limited to issues of law, and decisions involving findings of fact or exercise of discretion are reviewable on more limited grounds.

2. **Appeals from Interlocutory Decisions**

As noted, the foregoing only deals with the appeal system which applies to decisions which make some final disposition of the parties' rights. A separate process applies to what are known as interlocutory appeals. Interlocutory decisions are those which relate to practice or procedural issues and do not constitute final determinations on the rights of the parties.

There is a limited right of appeal from interlocutory decisions in Small Claims Court. As the pre-trial process in that forum is a good deal more informal and less involved than in B.C. Supreme Court, parties have less occasion to make interlocutory applications. (Given the smaller amounts in issue, they also usually have less incentive to incur the additional effort and expense which such applications can entail.) The Small Claims Court Rules provide that certain types of procedural orders may be made by a Registrar and that such orders are reviewable by a Judge, who may confirm or change the Registrar's decision (Rules 16(2) and 17(22),(23)). The Small Claims Act only allows for appeals to the B.C. Supreme Court of orders allowing or dismissing claims, and no such appeal is available from interlocutory decisions (s.5).

Given the complex rules governing the conduct of civil proceedings in the B.C. Supreme Court, interlocutory applications are very common there. The appeals process pertaining to them is also a good deal more complex.

Most interlocutory applications are decided at first instance by a Master. An appeal is available from a Master's decision to a Judge of the Supreme Court. (B.C. Supreme Court Rule 53(6).) As a general rule, a Judge will not vary the Master's finding unless it was clearly wrong. However, in limited circumstances where the Master's ruling raises issues vital to the final issues in the case, the review by the Judge may take the form of a rehearing. In the latter case, the Judge is free to substitute his or her judgment as to matters of law, fact and discretion. New
evidence which had not been before the Master may also be heard on such a rehearing, with leave of the court. (Eg. Abermin Corp. v. Granges Explor. Ltd. (1990) 45 B.C.L.R. (2d) 188 (S.C.))

An interlocutory decision of a Judge of the Supreme Court can be appealed to the Court of Appeal only if leave to bring such an appeal is first granted. The leave application is heard by a single Justice of the Court of Appeal. If leave is granted, the appeal itself is then heard by a panel of three Justices. (A panel of five may hear appeals in exceptional circumstances.) The decision as to whether or not to grant leave to appeal is discretionary and involves a host of considerations. Some of the particularly key factors which the Court will consider in deciding how to exercise this discretion include the prospects of success of the proposed appeal, the importance of the proposed appeal to the parties themselves and to the public or practice of law generally, and the effects which an appeal might have on delaying the progress of the proceedings in the Supreme Court.

The decision of a single Justice refusing to grant leave to appeal is itself reviewable by a three member panel of the Court of Appeal. (Court of Appeal Act, s.9(6). This was recently amended in 1995 to preclude such review where leave was granted.) As the granting of leave is discretionary, the review is generally limited to whether the Justice made an error of law or failed to exercise the discretion upon proper principles. The review panel may take into consideration changes in circumstances or new evidence arising since the original decision, although this is relatively uncommon.

The Supreme Court of Canada has indicated that it will not interfere with appellate courts’ denials of leave to appeal. Thus the decision by the single Justice where leave is granted, and the review by a panel if leave is refused are conclusive.

3. "Treadmill" Effects in the Tort System

While the single avenue of appeal available in most tort actions may give the appearance of simplicity, this can be quite deceptive. When one takes account of appeal tracks for both final and interlocutory appeals, the potential exists for various aspects of the same case to make its way through the system more than once.

These comments will apply primarily to actions commenced in the B.C. Supreme Court. There is far less scope for review of matters commenced in Small Claims Court.

In Supreme Court, the system for interlocutory appeals can itself make for a highly complex and time-consuming process for resolution of issues. For example, a defendant might make an application to a Master on a point relating to whether that defendant is entitled to disclosure of certain records in the possession of the plaintiff. As that issue only addresses the procedural rights of parties in the trial process and not their substantive or final rights in the action, the interlocutory appeal process applies. Thus, the party dissatisfied with the Master's decision can appeal that decision to a Judge of the Supreme Court. The party dissatisfied with the latter decision could then seek leave to appeal to the Court of Appeal. A decision refusing leave could then be reviewed by a panel of Justices. If leave were granted at that stage, there would subsequently be the appeal hearing. The issue would have given rise to a total of five separate hearings on only one interlocutory issue. Meanwhile the case might have essentially stalled in the court below pending resolution of this point.

Technically, there is no limit on the number of interlocutory applications which may be made in a given action, although the costs associated with pursuing them and the parties' own desire for a speedy resolution will often impose practical limits. Thus, the foregoing process could conceivably arise in the same case over and over again.

A second matter which may complicate the appeal process in the tort system is that if an appeal is allowed, the result may not be a final determination of the matter, but an order referring the matter back to the trial level. Thus an entire case can proceed through the whole system more than once.
Various procedures have developed in the B.C. Supreme Court which allow for a final determination of limited issues at different stages, rather than the more typical determination of all issues at a single trial. For example, parties might agree to sever liability and proceed with a trial on that issue only. Or, one party might proceed with a summary trial application on only certain issues such as liability. Or, parties might agree to proceed by way of process known as a special case, whereby the parties provide the court with an agreed statement of facts and request that the court give an opinion on a specific question of law or fact or both.

Many of these procedures are aimed at promoting an earlier determination of key issues in a case, with a view to promoting settlement or resolution short of a full trial. However, when they do not ultimately help to achieve these ends, such procedures can have a complicating effect on the overall appeal process, as the result may be another decision which must work its way through the entire process.

An illustration of the complexities which can result from the above factors can be found in Canson Enterprises v. Boughton & Company. That case involved issues regarding the obligations owed to the plaintiff by the defendant lawyers in connection with a property transaction which took place in the late 1970's. The plaintiff's action was commenced several years after that. In February, 1988, the parties argued a "special case" as permitted by the B.C. Supreme Court Rules. For the purposes of the special case, the parties agreed upon a set of presumed facts and asked the B.C. Supreme Court to give judgment regarding what the defendants' legal obligations would be, and what measure of damages would apply if those facts were true.

Judgment was rendered on the special case in June, 1988, and was appealed to the B.C. Court of Appeal which gave its decision in September, 1989. The latter decision was further appealed to the Supreme Court of Canada which gave its decision in November, 1991. The matter then went back to the B.C. Supreme Court for a determination about whether the assumed facts presented on the special case were true and an assessment of damages. The B.C. Supreme Court's decision was rendered in July, 1992. The damage award was reconsidered as the result of a minor error and varied in November, 1992, when the additional matters of interest and costs awards were also decided. Once again, the B.C. Supreme Court's decision was appealed to the Court of Appeal. The appeal was argued in October, 1994 and a decision rendered in September, 1995. In March, 1996, the Supreme Court of Canada dismissed an application for leave to appeal, only then bringing the proceedings to a final conclusion. (I attach headnotes only of the various decisions at (1988) 31 B.C.L.R. (2d) 46 (S.C.); 39 B.C.L.R. (2d) 177 (C.A.); 61 B.C.L.R. (2d) 1 (S.C.C.); 72 B.C.L.R. (2d) 207 (S.C.); 76 B.C.L.R. (2d) 389 (S.C.); 11 B.C.L.R. (3d) 262 (C.A.); 48 C.P.C. (3d) 384n (S.C.C.)

Coupled with the potential for a series of multi-level interlocutory appeals in the same matter, these kinds of circumstances can lead to a situation which rivals the sort of "worst case" never-ending review scenario referred to in the course of submissions to the Commission by those critical of the complexity of the current workers' compensation review processes. Thus, although a single appeal system without rights to reopening or reconsideration predominates in the tort system, this has not eliminated all problems of the sort which some parties complain about in connection with the much more complex workers compensation system. (It is also worth noting that the "worst case" scenarios do not necessarily present a sound means for evaluating whether each system works well overall. As discussed below, if only a limited number of cases present problems, possible solutions might involve different "streams" for those particular cases rather than revising the whole system.)

I will discuss below some additional methods which courts have adopted in an effort to control the problem of multiple proceedings besides limiting the number and grounds of appeals. (These include the practice of making alternative findings at the trial level and a special process for dealing with vexatious litigants.) Unfortunately, the single most effective feature limiting the volume of proceedings in the courts is probably the prohibitive cost involved in pursuing all of one's technical rights of review. That is viewed as one of the great shortcomings of the tort system, and is hardly a feature which anyone would advocate adopting in the workers' compensation model.
B. Re-opening and Reconsideration

The appeal is the main vehicle for review of a decision in the tort system. There is very limited scope for either reconsideration on the basis that the original decision was incorrect or reopening on the basis of change in circumstances.

The B.C. Supreme Court, B.C. Court of Appeal and Supreme Court of Canada all allow for the possibility of further evidence and argument within a relatively brief window of time prior to entry of the court's order. This can occur after the parties have already argued the matter before the court, and even after the court has issued reasons for judgment, but must occur before a formal order embodying the court's disposition has been entered. (When a Court makes final determinations, a formal order of the court is entered reflecting those determinations. There is generally a lapse of time - usually a matter of a few weeks or less - between the Court's issuance of reasons for judgment and formal entry of the order. "Entry" occurs when the order, having been signed by the parties who took part in the trial or appeal hearing, is stamped as entered by the Court registry.) Until the order is entered, the Judge or Justices who presided at the hearing retain jurisdiction over the matter and the authority to reconsider any aspect of it.

After an order has been entered, there is a more limited power to correct orders where there has been a clerical mistake or error arising from an accidental slip or omission, or to amend an order to provide for any matter which should have been, but was not addressed. (See B.C. Supreme Court Rule 41, and B.C. Court of Appeal Rule 23.) Courts are also generally thought to have an inherent jurisdiction to amend orders after entry as an aspect of their authority over their own processes.

The Supreme Court of Canada has the discretion to order a re-hearing upon application by one of the parties. The re-hearing may be sought anytime before judgment is rendered if judgment has been reserved, or within 30 days if judgment has been pronounced. In practice, re-hearings are much more likely relate to overlooked collateral matters such as awards of interest and costs, rather than the merits of the main issues. Courts at all levels are generally reluctant to allow parties to use the re-hearing process for a "second kick at the cat" and this is particularly true at the Supreme Court of Canada level where competing demands far outweigh available judicial resources. (See Supreme Court of Canada Rule 51 and annotations in the Supreme Court of Canada Practice Manual, at pp. 95-99.)

Subject to the exceptions just noted, the rule in the tort system is that if a trial level decision is in error, that can only be addressed by way of appeal and not by reconsideration. As noted, errors involving findings of fact and exercises of discretion are appealable only in limited circumstances.

While appellate courts have some discretion to hear new evidence, that does not assist a party who experiences a change in circumstances after the time for bringing an appeal has expired. Similarly, each level of court may hear new evidence prior to entry of an order if it is material and was not available at the time of trial. However, that does not assist a party whose circumstances change after an order has been entered. Thus whether a party can get evidence of a change in circumstances before a court is strictly a matter of luck, since it depends entirely upon the stage proceedings have reached when the change in circumstances happens to occur.

For the most part, the aim of the tort system is for all relevant facts, both present and future, to be found at the time of trial, and that is in part why such extensive procedures for pre-trial investigation and exchange of evidence and expert opinion are mandated. If circumstances change after the trial (or, if any appeals were taken, after all appeals have been exhausted), the parties typically have no recourse to the courts to address this. Thus, an award at trial might be based on the assumption that the plaintiff has fully recovered from the effects of his or her injuries. If the plaintiff experiences a recurrence of symptoms one year after the trial, he or she is simply out of luck and would be undercompensated. Similarly, if an award is based on the assumption that an injury will persist for many years but the plaintiff experiences an unexpected full recovery one year after the trial, the defendant would have no recourse to the courts for a downward adjustment of the award and the plaintiff would be overcompensated.
The tort system favours finality over flexibility, and considerable pains have been taken to help ensure that the parties are in a position to seek, and the court is in a position to grant, full and final disposition on all issues by the time a trial proceeds.

II. Overview of the Availability of Appeals, Reconsideration and Reopening in the Workers' Compensation System

I understand that the Commission has access to the extensive flow charts prepared by Sharon Samuels outlining avenues for appeals, reconsideration and re-opening of matters in B.C.'s workers compensation system. I do not propose to exhaustively list these here but will instead focus on the general structure and key provisions in the Act and Manual.

As noted, my emphasis is on determinations of workers' entitlements rather than other types of decisions for which there is no basis for comparison with the tort system. I note however that procedures for relief of claim costs, OSH penalties, assessment appeals, etc. are generally less complex and involves only one appeal by right to the Appeal Division (ss. 96(6) and (6.1)). These types of decisions tend to have a less far-reaching impact on the affected individuals and that may be the rationale for the more streamlined procedure.

I have not been able to determine the rationale for allowing only one level of decision-making for s.11 certifications. In cases where there is apt to be a significant difference between compensation available through the courts and through the workers' compensation system (such as those cases where a large claim might be advanced in the courts for pain and suffering), s.11 determinations would seem to have similarly far-reaching impacts for the workers involved.

The review system under the Act has been one of increasing complexity as the legislation has evolved. I note for example that the 1942 Sloan Royal Commission Report recommended against providing for appeals, while the 1952 Sloan Royal Commission Report limited recommendations to a system for appeals of medical decisions. A system of comparable complexity to the one which now exists has been in place since the mid-1970's, and the current structure has been in place only since 1991.

The vast majority of appeals and requests for re-opening and reconsideration are instituted by workers. A worker who considers an original decision unfavourable generally risks little by pursuing a review, since the usual result if the worker does not succeed is that the original decision simply stands. Thus a worker is often no worse off if unsuccessful on review, but stands to benefit if successful. At the risk of oversimplifying, those representing workers' interests tend to favour the current system in that it gives workers many opportunities to have unfavourable decisions overturned, while those representing employers' interests tend to regard the current system as unduly complex and too often disposed in the workers' favour.

A. Appeals

There are three levels of appellate review in the B.C. Workers Compensation system: the Review Board, the Appeal Division and Medical Review Panels. The key features of each are as follows.

1. Review Board

The first avenue of appeal from a decision of an officer of the board "with respect to a worker" is usually to the Review Board. (Act, s.90. As discussed below, it is possible to first proceed with an informal review or an
appeal of a medical decision to a Medical Review Panel. In most cases though, the first formal appeal is to the Review Board.) The Review Board is an external body which is independent of the Workers' Compensation Board. It was noted in some submissions to the Commission that this independence is not always apparent to parties involved in proceedings before the Review Board, but this has nonetheless been considered an important feature of this body throughout its historical development.

A "decision... with respect to a worker" has been interpreted to mean a decision involving an issue which affects a worker financially (Manual, #102.27). This type of decision can be appealed by a worker, employer or dependent of a deceased worker.

If the decision in issue involved an exercise of discretion rather than a matter of rights, the Review Board's role is simply to ensure that the discretion was properly exercised and to return the matter to the adjudicator if it was not. (Manual, #102.24) This is similar to rules which usually apply to a review of the exercise of discretion in the tort system.

For non-discretionary decisions, the Review Board's role is "substitutional," meaning the Review Board proceeding is de novo and the Review Board is free to substitute its own judgment on all matters decided by the original adjudicator. (Manual, #102.24) The Review Board also has the option of directing a reassessment or reconsideration of the original decision, rather than substituting its own decision. Any findings of fact made by the Review Board are binding in the context of that reassessment or reconsideration. If the outcome does not change, an appeal lies back to the Review Board or, if appropriate, a Medical Review Panel. (Manual, #102.51)

Proceedings before the Review Board follow an inquiry model rather than the adversarial model followed in the tort system. (This applies to all levels of decision-making in the workers' compensation setting, including the Appeal Division and Medical Review Panels as well.) Thus appellate bodies have considerable powers to compel witnesses and take other steps necessary to assist them in finding the necessary facts, and have the discretion to consider evidence which was not before the lower tribunal or adjudicator.

"Interlocutory" is not a term used in the Act or Manual. It does appear however, that many determinations which might be characterized as procedural cannot be appealed.

For example, decisions classified as "administrative" are not subject to the appeal system (Manual, #102.21). Administrative decisions include decisions as to how to go about implementing an earlier decision. (The example given in the Manual relates to a Pension Clerk's termination of benefits payable to a foster mother in respect of her children upon the youngest child reaching 18. The Pension Clerk's act was characterized not as a "decision" but as an "administrative act" — implementing a decision made when the compensation was originally awarded.)

In addition, the manner in which a decision-maker proceeds may not be characterized as a "decision" and thus may not be appealable. For example, the Manual suggests that a Rehabilitation Consultant's conduct in gathering information or delay in performing his or her tasks do not involve "decisions." Complaints about such conduct are of an administrative nature and to be dealt with by complaints to superiors rather than the appeal process. (Manual, #102.26)

2. **Appeal Division**

Review Board findings made pursuant to s.90 of the Act can be appealed to the Appeal Division by a worker, employer or deceased worker's dependent (Act, s.91). Again, the proceeding is de novo and the Appeal Division may reopen, rehear and redetermine any matter dealt with by the Review Board, and may undertake investigations and consider what evidence it sees fit. (Eg. Decision No. 1 (1991) 7 W.C.R. 33, at para. 3.6, pp. 43-4)
In addition, the President may refer Review Board findings to the Appeal Division for redetermination. However, redetermination in such instances is limited to cases where there has been an error of law or contravention of published policy of the Governors (Act, s.96(4)).

The Appeal Division can substitute its own decision or direct the review board to reconsider the matter generally or as to a particular issue, and the Appeal Division may withhold its decision pending the Review Board's finding. (Decision No. 1 (1991) 7 W.C.R. 33, at p. 44)

The Appeal Division's jurisdiction under s.91(1) relates to findings made by the Review Board. This is generally interpreted to mean a finding after the Review Board has considered an appeal on the merits, and not to decisions made solely on procedural points or preliminary determinations. The latter relate to the Review Board's control over its own processes and are more properly addressed by way of complaints to the Review Board itself. However, the Appeal Division will consider appeals from "preliminary" Review Board findings where these have the effect of a final determination of an appeal. Thus a Review Board decision refusing an extension of the time for appeal would be appealable to the Appeal Division on the basis that although it does not deal with the merits, it results in a final disposition of the appeal to the Review Board. (Decision No. 1 (1991) 7 W.C.R. 33, at p. 37.) This is a departure from the interlocutory appeal process in the tort system, in that appeals to the Appeal Division are not available for the many types of decisions on procedural issues.

Although the general rule is that the appeal division's decision is final and conclusive, there are exceptions to this. First, section 96.1(1) makes this finality "subject to sections 58 to 66", which are the provisions relating to determinations on medical decisions by Medical Review Panels. Second, section 96.1(2) allows a worker, employer or dependant of a deceased worker to apply for reconsideration on the ground that new evidence is available. I will discuss both of these exceptions in more detail below.

3. Medical Review Panels

Medical findings or medical decisions at any level, including the Review Board and Appeal Division can be appealed to a Medical Review Panel, whose decisions on such issues are final and binding. (Act, ss. 58, 61, 65. The Act does not actually use the term "appeal" but I believe that this is an appropriate description since a Medical Review Panel is a superior body whose findings then bind the body whose decision it reviews.)

Determinations by Medical Review Panels are strictly limited to medical issues, and can be requested by workers, employers, or the board. In the case of deceased workers, medical determinations as to cause of death can be requested by workers' dependents but not by employers. I was not able to determine the rationale for the latter restriction.

There is a screening process of sorts before certain matters proceed as far as a Medical Review Panel. Requests made by workers or employers must be accompanied by a physician's certificate stating that there is or may be a bona fide medical dispute to be resolved and stating sufficient particulars to define the question in issue. I note that determinations about the adequacy of these certificates as well as whether the issue in dispute involves a "medical" question are made by Medical Appeals officers, whose decisions are appealable to the Review Board, rather than to a Medical Review Panel, and hence to the Appeal Division.

Physician's certificates are not required where Medical Review Panel determinations are requested by the dependants of deceased workers pursuant to s.63 or by the Board pursuant to s.58(5). The Manual states that the purpose of s.58(5) is to enable the Board to refer a worker to a Medical Review Panel where there are "unusually difficult or complex medical questions." (Manual, #103.30(d)) This suggests that the Medical Review Panel is to be used sparingly by the Board and the majority of medical questions are to be determined by adjudicators at lower
levels. Workers also tend to resort to this process more frequently only after a matter has already been appealed to both the Review Board and Appeal Division.

Matters certified by Medical Review Panels pursuant to s.65 are conclusive and binding. Barring a change in the underlying facts on which the Medical Review Panel’s findings were based, they are not subject to any further review within the workers’ compensation system.

B. Reopening and Reconsideration

As noted, the Manual makes a distinction between "reopenings" and "reconsiderations" in connection with the Board's discretion under s.96(2) of the Act to reopen, rehear and redetermine matters other than Appeal Division decisions:

An application for reopening is one that does not question the validity of any previous decision and does not request that a change be made in that decision but requests that further compensation be paid on the basis that the claimant’s circumstances have changed since the decision was made.

An application for reconsideration is one that questions the validity of a previous decision on a claim and requests that a change be made in that decision. (#106.20)

While this provides a convenient distinction, I note that it is not one which is consistently made in all contexts. For example, s. 96.1 provides for "reconsideration" by the Appeal Division, but suggests that this is only available on the ground that new evidence has arisen or been discovered. Where new evidence has arisen in the sense that circumstances have changed, the review would be more in the nature of a "reopening" as the latter term is used at #106.20 of the Manual.

To avoid any potential confusion as to what is meant by terms such as "reopen," "rehear," "redetermine," and "reconsider" currently used in ss.96 and 96.1 of the Act, the Commission may wish to consider recommending definitions in the Act for such terms (perhaps along the lines of those given in the Manual), and consistency in the use of them throughout the legislation.

Section 96(2) of the Act gives the board very broad discretion to determine when it will reopen previous decisions. There are relatively few guidelines for the exercise of the discretion to reopen. Common examples where matters are reopened include situations where a disability has worsened since a pension assessment or where a worker experiences recurrence of a disability from which he or she was previously thought to have fully recovered. (Manual, # 106.20 and 107.10) The discretionary nature of the board’s power to reopen also means that workers have no absolute right to have claims reopened.

Applications for reopening are dealt with in the same manner as new claims and the same avenues for appeal are available with respect to decisions made on applications for reopening. (Manual, #107.00)

Reconsideration is dealt with in much greater detail in both the Act and Manual. There are several statutory provisions dealing with reconsideration, including the general provision in s.96(2):

96. (2) Notwithstanding subsection (1), the board may at any time in its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

Notwithstanding the broad discretion conferred by s.96(2), applications for reconsideration are not considered unless grounds for reconsideration are specified (Manual, #108.10). The Manual sets out examples of grounds where reconsideration is appropriate. These include new evidence becoming available, a clear error of law or mistake on the evidence in the original decision, or a result which works an injustice in an individual case or treats some group unfairly in comparison with the general standards of the system (Manual, #108.10). This provides for
very broad grounds for review, and does not strictly limit reconsideration to cases where there has been some kind of error or misapprehension in the original decision.

The Manual indicates that before a decision is made about the merits of an application for reconsideration, a decision must first be made as to whether grounds for reconsideration exist. The Manual further suggests that decisions about whether there are grounds for reconsideration are not appealable, noting that otherwise, statutory time limits for appeals could be circumvented (Manual, #108.40 and 108.50). However, the Appeal Division has found that the language of the Act does not support this restrictive view of which decisions are appealable. (Decision No.94-0194, 10 W.C.R. 313)

Pursuant to s.96.1(2), reconsideration by the Appeal Division is limited to particular circumstances:

Reconsideration by appeal division

96.1 (1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.

(2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or been discovered subsequent to the hearing of the matter decided by the appeal division.

(3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)

(a) is substantial and material to the decision; and

(b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,

he or she may direct that

(c) the appeal division reconsider the matter, or

(d) the applicant may make a new claim to the board with respect to the matter.

The issue of whether reconsideration is appropriate must first be determined upon application to the Chief Appeal Commissioner. This is somewhat similar to an application for leave to appeal. As with a leave application, the decision is discretionary. The Chief Appeal Commissioner has a discretion to direct reconsideration or a new claim where the requirements of s.96.1(3) are met, but is not obliged to do so. As for the requirements of s.96.1(3), these are very similar to the tests employed by the Court of Appeal in determining whether to admit new evidence. Essentially in both cases, the evidence must be such that it could influence the outcome of the matter and the evidence must not have been available or discoverable through due diligence prior to the earlier hearing.

The latter requirement is an interesting one in light of the inquiry model preferred under the workers' compensation system. In the tort system, the strictures upon introduction of new evidence at an appeal often prevent a party from relying on new evidence where the failure to introduce the evidence at trial resulted from his or her own carelessness. A party who could have discovered the evidence through the exercise of due diligence in time to bring it before the lower court is generally not permitted to introduce such evidence on appeal.

The same "due diligence" standard applies under s.96.1(3), but the question arises as to whose diligence is relevant. Participants in the workers' compensation are not "parties" in the same fashion as plaintiffs and defendants in the tort system, are less likely to be represented by counsel, and do not have the same obligations to
present all evidence and make all arguments to a neutral adjudicator. Adjudicators at each level have independent authority to undertake their own inquiries.

A plain reading of s.96.1(3) would suggest that if, say, an adjudicator at a lower level failed to exercise due diligence which would have led to the discovery of evidence on which a worker now seeks to base a reconsideration application, the Chief Appeal Commissioner will have no authority to direct reconsideration. It seems unlikely that this is what is intended by the section.

The Commission may wish to consider whether it is appropriate to impose any due diligence obligations upon workers, dependants and employers to ensure that relevant evidence is presented in a timely way. If so, the Commission may wish to consider recommending a clarification to s.96.1(3)(b) if the "due diligence" in issue is only that of workers, dependants and employers, and not adjudicators or appeal tribunals. If not, the Commission may wish to recommend an amendment either removing the reference to "due diligence" from that section or specifying that the Chief Appeal Commissioner has discretion to direct reconsideration even where the s.96.1(3)(b) requirements are not met.

Further specific provision is made elsewhere in the Act for reconsideration of certain benefits. Section 24 allows workers to apply for reconsideration of benefits in some circumstances. Such applications can be made no more often than every ten years, and only by workers who have received a permanent disability award based on either a projected loss of earnings calculation or on a percentage of 12% or more total disability. The reconsideration cannot result in a downward adjustment of the applicant's benefits. The key portions of section 24 are as follows:

**Reconsidering benefits**

24. (1) This section applies to the claims for compensation that the board may by regulation determine, provided that

(a) the worker is still suffering from a compensable disability sustained more than 10 years before the application under subsection (2); and

(b) a permanent disability award was made by the board based on a percentage of total disability of 12% or greater, or the case is of a kind in which the board uses a projected loss of earnings method in calculating the compensation.

(2) With respect to a claim for compensation to which this section applies, the board must, on application by the worker, reconsider the compensation benefits; and, if it decides that, in its opinion, the worker is not receiving adequate compensation having regard to the projected loss of income resulting from the disability, periodic payments must be established or raised accordingly.

(3) Where a worker is under the age of 65 years, compensation is considered adequate for the purposes of this section if it equals 75% of the projected loss of earnings resulting from the disability.

(4) Where a worker is 65 years of age or over, compensation is considered adequate for the purposes of this section if it equals 75% of the projected loss of retirement income resulting from the disability.

(10) A worker may reapply under this section for reconsideration of his or her compensation benefits after a further 10 years have elapsed since the last previous application under this section.

(12) A decision under this section must not result in periodic payments to a worker being lower than they would be if no application had ever been made under this section.
In addition, there is an automatic review of loss of earnings awards two years from date of assessment (or after the date of the last decision in the appeal process, if applicable). There are no further automatic reviews, although there is a general discretion to conduct further reviews. Workers and employers can request reviews, but only have a right to them where there has been a change in the worker's physical condition. These reviews may involve either reconsideration or reopening, as the adjudicator will consider whether "an error was made or there is new evidence to suggest that the original assessment was wrong." Differences of 5% or less between earnings or projected earnings as between the review and prior assessment are disregarded. While it is intended that permanent partial disability pensions will not be assessed until a worker's condition has stabilized, these review processes recognize that this is not always practical and future changes can always occur. (See Manual, # 38.10 and #40.30 and 42.00-20.)

I note as a general point that there is no limit on the number of times a party make seek review, nor the number of times or time frame within which changes in circumstances may be raised as grounds for review.

For example, workers can in theory seek numerous successive reconsiderations of decisions reached by the Appeal Division upon previous reconsiderations. See, for example Decision No. 97-0835/970841, 13 W.C.R. 83. In that case, the worker had been denied benefits on the basis that his application was filed too late, and the Review Board upheld that decision. The Appeal Division panel which initially heard the worker's appeal concluded that the claim had been filed in a timely manner. It then went on to consider the merits of the claim, without giving express notice that it would do so, and concluded that the worker did not suffer an injury arising out of and in the course of his employment. The worker sought a reconsideration of that Appeal Division decision on the grounds that the lack of notice constituted a breach of natural justice. A second panel determined that there had been no such breach. The worker applied for reconsideration of that reconsideration. The final Appeal Division concluded that there had been a breach of the rules of natural justice, and referred the matter back to compensation services for an adjudication on the merits of the claim.

The final Appeal Division panel noted that the general legislative intent behind s.96.1(1) is to provide "finality and closure" and that "administrative efficiency argues against numerous reconsiderations" and allows the Appeal Division to allocate limited resources to new matters (p.87). However the panel went on to note that the general rule of finality is tempered by a discretion to reconsider matters on the "new evidence" considerations outlined in the Act, and also on "common law grounds for reconsideration based generally on jurisdictional error, including a breach of natural justice" (p. 87 and 89).

Allowing reconsiderations of reconsiderations (and perhaps even reconsiderations of reconsiderations of reconsiderations) adds yet more complexity to a process which is already multi-layered, and the Commission may wish to consider a recommendation that if the existing appeal structure is maintained, instances and perhaps grounds for reconsideration be expressly limited.

In that regard, I note that the provisions regarding new evidence in s.96.1(3) make it very unlikely that such a basis for reconsideration would be maintainable on more than one or two occasions. Section 96.1 can be read as providing that a matter may be referred for reconsideration only when the specified conditions regarding new evidence are met. The Appeal Division's conclusion that it is also entitled to reconsider matters on natural justice grounds appears to go beyond the specified criteria in s.96.1, and gives rise to much broader grounds for reconsideration.

It is not entirely clear what is meant by those broader grounds. Some of the comments in the decision cited above seem to suggest any breach of natural justice or procedural fairness can provide grounds for reconsideration. On the other hand, the reference to breaches of natural justice as a form of "jurisdictional error" suggests that the Appeal Division has in mind the sorts of considerations which courts bring to bear on applications for judicial review in the face of the privative clause in the Act. (In fact the second reconsideration application in the matter cited above was initially commenced as an application for judicial review.)
The Commission may wish to consider whether, as between the various other appeal rights and the right to challenge errors going to jurisdiction in the courts by judicial review, there are ample avenues for review without adding procedural fairness as a ground for reconsideration or allowing reconsideration of the same decision more than once.

With respect to the time frame in which matters can be reopened, s.96(2) provides that the board may reopen matters "at any time." This means that requests for reopening can arise many decades after the events giving rise to the initial claim. (For example in Decision 94-0194, 10 W.C.R. 313 the worker had originally applied for compensation in 1957. The claim was rejected. It was subsequently reopened in 1985, when the adjudicator agreed with the 1957 decision to reject it. It was reopened again in 1989.)

I note that in the tort system, the B.C. Statute of Limitations imposes an ultimate limitation period of 30 years on almost all types of actions. The rule is based in part on the need for some finality as well as an acknowledgment that after so much time has passed, it is apt to be impossible to fully and fairly investigate the factual basis of a claim. That is apt to be true as well in the workers' compensation system where a claim lies dormant for several decades before reopening is sought. (Since evenly balanced possibilities are resolved in a worker's favour pursuant to s.99, gaps in available information are more likely to work in a worker's favour than in the tort system where the claimant bears the burden of proof on a balance of probabilities.) It is less likely to be true to the same extent where a claim has been ongoing or has been reopened periodically throughout the years since the original injury.

The Commission may wish to consider whether it is worthwhile or appropriate to recommend a statutory discretion to decline to reopen claims after a certain period of time has passed without activity. Perhaps 30 years could be specified, in keeping with the ultimate limitation period in tort law. A discretion rather than an outright bar would mean that some claims could still be reopened where, for example, the passage of time has not affected the board's ability to determine the necessary issues. It would also be more in keeping with the discretion to waive strict compliance with some of the other time limits which apply for commencement of claims and proceedings.

C. Informal Review Processes

Apart from the three formal appeal routes and statutory review processes outlined above, there is considerable scope for informal lateral or supervisory reviews of decisions in the workers' compensation system. For example, Managers' Reviews are a common part of the claims process. Where a matter is reviewed back for reassessment to the original adjudicator by the Review Board and the original adjudicator reaches the same result as in the initial determination, the matter is then referred to a second adjudicator for a second look and the second adjudicator's decision prevails in the case of disagreement (Manual, #102.51). Where a Medical Appeals officer makes a determination about the adequacy of a physician's certificate under s.58, the Medical Review Panel Registrar has authority to review that decision (Manual, #103.41).

These informal review processes have no counterparts in the tort system. They serve the dual functions of providing a vehicle for quality control over decisions at a given level (particularly helpful at lower levels, where decisions are not published or distributed), as well as providing a less formal means of resolving disputes short of recourse to one of the formal appeal avenues available to those affected by the decision. While they may add complexity to the overall process in cases where those affected by decisions still go on to pursue all available formal avenues for review, there is no means of calculating how many cases are simplified and formal review processes avoided because matters were resolved to the satisfaction of all involved through these informal reviews.
D. Judicial Review

As with most expert administrative bodies, there is no right of appeal to the courts and decisions made in the workers' compensation system are protected from judicial review by privative clauses (Act, ss. 65 and 96(1)). I will discuss some of the principles relevant to judicial review in my report on fundamental entitlement issues. For now, I note that administrative law principles do not permit total insulation from review by the courts for administrative bodies. Even in the face of the most strongly worded privative clauses, review by a court is still available in the case of jurisdictional error or "patent unreasonableness." Courts in B.C. have generally shown a high degree of deference to decisions made at various levels in the worker's compensation system.

III. Differences between the Tort and Workers' Compensation Systems

A. Number of Levels of Appeal

With respect to final decisions, the tort system allows for fewer avenues of appeal. In the vast majority of cases, there is only one avenue of appeal, and in the remaining few cases, there are two. In the case of interlocutory or procedural decisions, the tort system appears to be just as complex as the workers' compensation system, if not more so. There are generally two avenues of appeal from interlocutory decisions. One of these first requires a separate leave application, a denial of which is also reviewable.

In contrast, the workers' compensation provides for two avenues of appeal in most instances and three in the case of medical determinations. This tripartite system operates in conjunction with a system of informal reviews, as well as opportunities for reopening and reconsideration.

In the case of administrative or procedural decisions, the workers' compensation system is a good deal less complex. Some types of decisions cannot be appealed at all, and some cannot be appealed beyond the Review Board.

Suggestions for streamlining the process which focus on the number of appeal avenues have included eliminating one of the two general appeal bodies, and perhaps converting Medical Review Panels into advisory rather than appellate bodies.

B. Grounds for Review

Grounds for review tend to be much less stringent in the workers' compensation system. In the tort system, review by appellate courts is primarily confined to errors of law and scope for reviewing issues involving fact and discretion is limited.

In contrast, both the Review Board and Appeal Division may proceed by way of hearing de novo. This can mean that all issues involved in the claim are exhaustively reviewed, reargued and redetermined at three different levels. In the tort system, the only comparable process to this arises on appeals to the B.C. Supreme Court from Small Claims Court decisions, and that is limited to that single level of appeal.

The Small Claims process has something in common with the workers' compensation adjudicative process in that both involve far less complex and detailed mandatory pre-hearing procedures. Matters have not been subject to the same degree of scrutiny and preparation before they come to trial or initial adjudication as they have in Supreme
Court. Also in both instances, there is apt to be a less detailed and comprehensive record of evidence and arguments considered by the lower body, in contrast to records of Supreme Court trial proceedings which are put before appellate courts.

On that basis, there may be more to be gained in taking a more detailed and far-ranging "second look" at the whole case, as is done both on appeals from Small Claims Court and on appeals to the Review Board. However, the same rationale would not support a second appeal de novo from the Review Board decision, and the Commission may wish to consider whether it is appropriate to limit grounds for appeals to the Appeal Division and replace the proceeding de novo with a review for errors of various kinds.

Another vital distinction is that the workers' compensation system allows for reopening of claims at any time on the grounds of changes in circumstances. There is no provision for this in the tort system, where the aim is instead to achieve full and final adjudication as far as possible at the first level of decision-making.

There are key differences between the two systems which are relevant to the different approaches to reopening. One of the benefits to workers achieved through the historic compromise was immediate, or at least very swift, receipt of compensation and other benefits. (For example, the Workers' Compensation Board briefing paper entitled "An overview of the historical development and current structure of the Workers' Compensation Board of British Columbia" indicates that over 50% of workers receive benefits within 17 days of injury. See Table 6.2 at page 20.)

In the tort system, injured parties can often wait years before proceeding to trial, in part out of concerns that their conditions have not stabilized and awards made at trial may turn out to be inappropriate in light of post-trial events. Throughout this period, parties receive no compensation. Financial constraints can often end up forcing the parties to settle for what they can get, or to go to trial before their conditions have resolved and take their chances as to what the future holds. This was one of the disadvantages regarding the tort system which has been recognized many times in connection with the historic compromise.

As noted above, the workers' compensation system does not seek to set permanent partial disability pensions before a worker's condition has stabilized (although that used to be the practice for "PPD's with review" - see Manual, #42.10). Nevertheless, there is considerably more pressure to resolve entitlement issues earlier than in the tort system. The fact that there is an automatic two year review in the case of all loss of income pensions may suggest that changes are expected to be fairly common. Processes for periodic review or reopening help to ensure that workers are not being overcompensated or undercompensated as a result of inaccurate predictions about the future at the time benefits were initially determined.

The alternatives to the present availability of reopenings and reconsideration would seem to be (a) requiring the parties to wait, as they do in the tort system, until there is less risk of future change and predictions about the future are likely to have a higher degree of accuracy; or (b) continuing to make decisions at an earlier stage and accepting that as a result more workers will be under compensated or overcompensated in the long term as a result of inaccurate predictions about the future.

The first alternative is apt to reintroduce a problem which the workers' compensation system was in part designed to eliminate, and may call into question the delicate balance achieved through the historic compromise. The second alternative would almost certainly result in more instances of unfairness to individual workers (who would, for example remain under compensated upon worsening or recurrence of disability) and to employers (who would collectively fund continuing payments to workers who achieved levels of recovery not anticipated when benefits were initially determined).

Balanced against the disadvantages of the foregoing two alternatives would be the saving of administrative costs and resources resulting from the elimination or curtailment of reopening and reconsideration. Since these processes can themselves result in some cost savings (i.e. when benefits are reduced), one can only speculate about whether any net cost benefit would actually result if use of the processes was restricted.
There appear to be sound reasons in principle for the availability of reopenings and reconsideration in the workers' compensation system. However, the Commission may wish to consider whether some of the administrative challenges presented by their current scope could be addressed in part by measures discussed elsewhere in this report, such as limiting the number of reconsiderations, imposing further time limits or varying the availability of reopening and reconsideration depending upon the importance of the matters in issue.

C. Subject Matter

An additional factor which may account for some of the differences between the tort and workers' compensation systems is the subject matter of issues before the decision-makers in each context. Courts deal with factual and legal issues of all types, while the issues before decision-makers in the workers' compensation system are much more limited. The latter often have a special expertise related to many of the issues which come before them. This is particularly true of Medical Review Panels, a body with highly specialized expertise and jurisdiction over a limited range of issues. That sort of separation of adjudicative functions has no counterpart in the tort system. Instead, parties and courts rely upon expert opinion evidence in specialized areas such as medicine. It has been proposed that Medical Review Panels be discontinued and that similar bodies of medical experts instead play an advisory role to the decision-makers. That is more like the approach in the tort law.

The Commission may wish to consider whether Medical Review Panels, if retained in their present form, might better be employed as the sole avenue of appeal on medical questions. Presumably, that issue involves the weighing of costs and other administrative concerns rather than matters of principle. I note that most matters which ultimately go to Medical Review Panels have already been to the Review Board and Appel Division. If matters involving only or primarily medical questions had gone to the Medical Review Panel first, the other two proceedings might well have been eliminated. On the other hand, in cases involving additional non-medical issues, the result is apt to be a bifurcation of the appeal processes and a resulting increase rather than decrease in the number of appeal proceedings pursued. It is difficult to predict whether such a change would result in any net savings of time, costs and resources.

One feature of the tort system which might be adapted in the workers' compensation system is the tailoring of processes to the importance of the matters in issue. Thus, for example, a simplified process with more limited rights of appeal applies to matters within the Small Claims jurisdiction. Similarly, appeals to the highest level in the system, the Supreme Court of Canada, are only heard in cases having a particularly significant impact on the parties involved (i.e. certain criminal proceedings involving higher penalties) or involving issues of general importance. On similar principles, appeals to the Court of Appeal on final decisions are available as of right, while appeals on procedural issues can proceed only with leave. (As with the process for appeals to the Appeal Division on procedural issues, appeals of such decisions are more likely to be heard where their practical impact on the parties is substantial.)

The Commission may wish to consider whether one alternative to the present system is to structure it so that matters of differing importance may be separated into different "streams," with the full range of current avenues of review available for matters of greater importance, and a simplified process with fewer rights to appeal and other types of review for matters of lesser importance. Determinations as to which “stream” should apply might be made by way of set guidelines or, to allow for greater flexibility and discretion although at the cost of more administrative complexity, by a process comparable to a leave application. This would help to channel resources at the higher levels of the system toward matters where the amount in issue is substantial or issues raised are of widespread importance. It would also create more proportionality between amounts in issue and amounts spend on determining same, a factor which may be one basis for the simplified procedures applied to many employer appeals.
Interlocutory appeals to the Appeal Division and certain employer appeals provide some instances where these sorts of approaches are already applied in the workers' compensation system. In addition, the Manual specifies limits on reconsideration where the amount in issue is relatively small:

An application for reconsideration will not be considered where the amount involved is slight compared with the resources that would be required to consider the application. (#108.00)

D. Role of Precedent

In contrast to the tort system, precedent plays a very small role in the workers' compensation system, where s.99 of the Act specifically provides that legal precedent is not binding. Thus decisions are technically only binding with respect to the particular matter in question and not other claims. This makes the outcome of appeals in other matters less predictable, since either appeal body is always free to depart from prior decisions on a given issue. Although the general aim is to treat like cases in a like fashion, there is no binding obligation to do so in any given case. Thus individuals who have an argument which seems unlikely to succeed in light of prior decisions may still find it worthwhile to try their luck on appeal. (In the tort system, such appeals are much less likely to proceed not only because precedents tend to make outcomes more predictable, but also because the costs of failed appeals are apt to be very high.)

As a result of such factors, it seems likely that introducing principles of precedent and stare decisis into the workers' compensation would reduce the number of appeals. However, at the same time, it would undermine the system's flexibility, ability to achieve fair results in individual cases, control over processes and policy, and ability to allow applicable principles to evolve over time. These features are widely acknowledged to be vital to the system and are the basis for the enactment of s.99. It seems likely that the latter considerations would outweigh concerns about limiting the volume of appeals.

E. Nature of Process

As noted, the tort system is adversarial, while the workers' compensation system follows an inquiry model. In the adversarial process, the idea is that two evenly matched opposing parties will between them define all the issues, uncover all of the relevant facts, law and arguments, and place these before a neutral decision-maker. In the workers' compensation system, there are no "parties" in this sense and the decision-makers themselves bear some responsibility for determining the applicable issues and coming up with the relevant evidence, authority and principles. This role may be even more pronounced at the appeal stage where employers' participation often decreases.

The responsibilities of the parties provides one basis for limiting grounds for appeal in the tort system. For example, if parties fail to identify and define particular legal issues or fail to locate and present relevant evidence at trial, they may be precluded from bringing an appeal based on the overlooked legal issue or introducing the overlooked evidence on appeal. The reason is not that such issues and facts are not relevant or material, but that parties who overlooked them must bear the consequences of this failure. Such results conserve appellate resources in the individual case, and in general also reinforce more careful trial preparation by parties in other cases. The latter promotes better results and fewer appeals overall.

This sort of reasoning makes much less sense in the inquiry context. Participants have considerably less responsibility for bringing all relevant issues, authorities and evidence to the decision-maker's attention, and rules of appeal which have the effect of penalizing them for failing to do this may thus be unwarranted.
In addition, I note that there may be more scope for relevant matters to be overlooked in the inquiry model, and this may warrant making appeals available on more extensive grounds, including questions of fact, in the workers' compensation system, at least at the first level of appeal.

F. Abuse of Process

I understand that a concern about the potential for abuse of the current process for review has been expressed in some submissions to the Commission. There does not appear to be reason to expect any greater likelihood that abuses will occur in the workers' compensation system than in other administrative and judicial contexts. However, given the number of opportunities for informal reviews as well as formal appeals, re-openings and reconsideration in the workers' compensation context, abuse of the system by a very small number of individuals can have quite a disproportionate and dramatic impact upon consumption of resources.

I note that while the civil litigation system does not address this issue specifically in the context of appeals, most courts have a separate process which can be invoked in order prevent abuse in general. Section 18 of the B.C. Supreme Court Act, provides as follows:

Vexatious proceedings

18. If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

The Court of Appeal Act contains a very similar provision:

Vexatious appeals

29. If, on the application of any person, a justice is satisfied that a person has habitually, persistently and without reasonable cause commenced vexatious proceedings in the court, the justice may, after hearing that person or giving that person an opportunity to be heard, order that proceedings must not be brought or commenced in the court without leave of a justice.

Presumably because a particular party would have limited opportunities for "habitually" bringing matters as far as the Supreme Court of Canada, the Supreme Court Act includes a process for dealing only with specific proceedings:

51.1 (1) Where a judge is satisfied that a party is conducting a proceeding in a vexatious manner, the judge may order that the proceedings be stayed, on the terms the judge deems appropriate.

(2) Where an application for leave to appeal has been dismissed, a judge may order that no further proceedings be filed relating to the leave application, where the judge is satisfied that the further proceeding would be vexatious or brought for an improper purpose.

Parties or the Registrar of the Court may request the above type of order, and affected parties are entitled to make submissions to the Court on the issue of whether such orders should be granted.
Depending upon whether the Commission is of the view that existing or potential abuses of the review process constitute a sufficient drain on resources to warrant a separate process, the Commission may wish to consider whether a similar process to that employed by the courts would be workable in the workers’ compensation setting.

It is worth emphasizing that the process employed by the courts does not bar any would-be participant from bringing proceedings. This recognizes that a party with even the most egregious track record of bringing unwarranted proceedings may still have a meritorious case on occasion. Rather, the system provides for an extra screening process for persons with a record of such conduct. In essence, once a party has been deemed a vexatious litigant, that party must obtain leave to bring any further proceedings.

Parties are not deemed to be vexatious litigants in the court system unless they have a history of "habitually" and "persistently" bringing proceedings "without reasonable cause." These terms have not been defined with precision. The application of the above provisions only arises in exceptional cases and there is not a large body of case law dealing with these questions. However, it does appear that there must have been at least several instances of prior conduct of the sort described, and that proceedings are brought "without reasonable cause" not simply where the party's position did not prevail in the end, where there was no arguable ground for such a position.

If such a process were considered at all, the Commission may also wish to consider who should make determinations as to whether a party's past conduct makes them a candidate for such a process, as well as determinations as to whether such parties should be given leave to proceed with new avenues for review. Courts do not refer such inquiries to external bodies. However, courts do not have ongoing relationships with parties of the sort which is apt to arise between individuals and the workers’ compensation board, particularly in light of the prevention and rehabilitation goals on which cooperative effort is so often desirable. Referring determinations pm “vexatious” proceedings to an external body (perhaps even to a court) might serve to reassure both affected individuals and the public in general that such an extraordinary process is being applied fairly and impartially.

G. Disposition Following Review

As noted, when a decision is overturned on review, the result is often a reference back to a lower adjudicator or tribunal. This can have promote the “treadmill” problem, whereby the same matter works its way through the entire system repeatedly.

Although there is no requirement that they do so, trial Judges sometimes attempt to lessen the chances of cases being referred back following successful appeals by making alternative findings at the conclusion of trial. Thus, for example, a Judge who finds that a defendant is not liable to the plaintiff may go on to make detailed findings about the damages which he or she would have awarded to the plaintiff had a contrary conclusion been reached on liability. In those circumstances, an appeal court which reverses the trial Judge on the issue of liability can award damages as found by the trial Judge rather than referring the matter back for determination of those issues.

As a rule, all issues necessary for the determination of a lawsuit are heard at the same time in the course of a trial. The assumption is that parties have only one shot at proving their case. Thus in the above example, the parties would not know how the court would ultimately rule on the issue of liability, and would typically have put forward complete evidence and argument on the question of damages as well. That being the case, it would not always add a great deal of time for the trial Judge to add hypothetical rulings on the damages issues in order to facilitate a final resolution of the whole case at the Court of Appeal level.

The added cost of making such hypothetical findings must always be weighed against the potential savings of avoiding a referral back after an appeal. Factors relevant to that weighing of costs would include both the additional time and effort required to make the alternative findings, and the fact that the majority of cases either will not proceed to an appeal or will be upheld if they do. I note that the workers compensation context may involve a very different weighing of such factors. For example, if an adjudicator determines that a worker’s
injuries did not arise out of or in the course of employment, it would in most cases be highly inefficient for the adjudicator to nonetheless undertake a hypothetical assessment of that worker’s pension entitlements in case the coverage decision is reversed on review. However, there may be other circumstances where alternative findings can be made without similar expenditures of resources and can be used to the advantage of appeal tribunals.

I note that there are already limited situations where adjudicators are specifically directed to consider alternatives and make decisions on both. For example, where a worker claims compensation in circumstances which could reasonably be either a recurrence of a previous injury (warranting reopening) or a new claim, such matters are to be treated as though the worker was claiming both in the alternative and the Adjudicator is directed to gather sufficient information and render a decision on both possibilities. (Manual, # 107.10) The Manual states that this is done in order to give the Review Board jurisdiction on both claims in the event of an appeal. However, I note that it may also put the Review Board in a better position to substitute its own decision on either issue, and lessens the likelihood that the Review Board’s own inquiries need be as extensive or that the Review Board need review the matter back.

The Commission may wish to consider recommending that ongoing efforts be made to identify more such circumstances where alternative findings can be made without undue potential for wasted expense.