Alternative Dispute Resolution in Workers' Compensation

by

David K. Law, LLB
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Introduction

The concept of alternative dispute resolution, or "ADR", is among the greatest concerns facing workers' compensation administrators in North America. ADR appears to offer the promise of better customer service, quicker decision-making, lower administrative costs and a higher degree of stakeholder satisfaction. So it is no surprise that many jurisdictions have adopted forms of ADR, or are considering the move.

This study confronts the issue from basic questions:

1. what is the standard model of administrative decision-making in British Columbia workers' compensation?
2. what is ADR?
3. how is ADR practiced in comparative workers' compensation jurisdictions?
4. what forms of legal and policy framework are required to implement ADR in workers' compensation systems?

1. The standard form of decision-making in workers' compensation

Born as a form of insurance adjusting when BC adopted the administrative system of workers' compensation after the 1916 Pineo Report\(^1\) the Board's adjudication model is well-entrenched and understood. Accident reports are filed, typically by employers but also by workers and/or their physicians, and are reviewed by adjudicative personnel. These staff exercise authority delegated by policy and guidelines from the Board of Governors (whose powers are now exercised by the Panel of Administrators). In using this authority, adjudicators are under the heavy sway of long-time practice as articulated by senior staff and, most importantly, in

\(^1\) Report of the Committee of Investigation on Workmen's Compensation Laws, March 1, 1916 ("the Pineo Report")
written policy guidelines. One form of adjudicator or another determines all issues of claims, assessments and penalties under the Act.

The unique properties of this system are these:

- it is swift, at least in comparison to the system of litigating civil actions which preceded it;
- there are few, if any, rules of "due process" which oblige the decision-maker to collect or weigh the testimony or submission of any party;
- instead, there are practices and policies which call for the collection of evidence which the adjudicator deems necessary;
- there is an absolute prohibition on the use of precedent to govern decisions, a rule originally designed to operate as a privitive clause to protect the Board from judicial oversight but subsequently interpreted as precluding even the internal use of governing rulings;
- almost all issues are adjudicated without in-person contact with the parties, although field investigations can be undertaken; most investigations are completed by telephone, and all decisions are to be communicated in a letter format;
- the deliberation process is undertaken completely \textit{in camera} by the adjudicator, resorting to whatever information s/he has collected and whatever rules s/he considers relevant.

For decades this form of adjudication operated without significant trouble, although most Boards (including that of BC) adopted informal and increasingly formal methods of appeal.\(^2\) What is clear, from all the studies done and the growth of stakeholder groups in the past three decades, is that there has always been a remarkable level of perceived arbitrariness and insularity to front-line claims adjudication: decision-makers lack contact with the parties, do not seem subject to particularly sharp scrutiny by their supervisors or independent observers and issue

\(^2\) WCB Policy & Regulation Bureau, report to the Royal Commission, Workers’ Compensation Appeal System - a Briefing Paper, R.W. McGinn, August 5, 1997; this document offers a concise history of the emergence of formalized appeals in BC.
decisions which reflect the internal culture of the Board as much as the Act or policies. It was this culture which produced the call for more formalized rights of appeal, although there was no initial cry for formalized processes of appeal. That came later.

When formalized appeal rights and processes did crystalize in British Columbia, they did so first in the form of the Workers' Compensation Review Board (“WCRB”) and Appeal Commissioners; this second stage was later shaped into a semi-autonomous internal Appeal Division (“AD”) at the Board, with powers over all issues in the system and with authority to overrule the WCRB in particular decisions. These bodies still co-exist, of course, and have been the subject of extended and repeated study.³

A common feature of the Board's adjudicative methods, the WCRB's intake and processing of objections and the AD's management of appeals on all issues is that at no time, and in no way, do these bodies stray from the traditional method of a neutral decision-maker exercising total authority.

This model is one where the delegated authority of the Board or Review Board is embodied in a single, or three-person panel. The neutral is an employee of the public agency processing the claim or issue. The neutral has no interest in the result, and is required to comb all the facts and apply all of the policies relevant to the matter, issuing a decision which is binding upon the Board's administrative organs.⁴

Technically, it is important to note that the decision-maker's ruling (or "finding" as it is often called in BC) is not binding upon the parties, because the parties are in fact not really "parties" to the matter. The worker and employer, although having an interest in the outcome of the finding, are at bottom information-providers who will express a view as to what constitutes the right outcome. They have no authority.

³ To name a few: the 1988 Munroe Report which gave birth to the Appeal Division concept, the 1995 Governance Review, the varied studies conducted by the Royal Commission on Workers' Compensation in British Columbia (1996-present).
under the Act to exercise any power or to make any decision; their participation in
decision-making, therefore, is fundamentally at the sufferance of the Board or
Review Board, as the case may be. It is arguable that the Charter of Rights and
 Freedoms may now make it necessary for the Board or WCRB to provide due
 process, but that of course is a very recent development (further, there is still hot
debate as to whether any agency administering workers' compensation is a court of
competent jurisdiction subject to judicial interpretation of process under the
Charter.)

The worker and employer are actually *non-parties* under all Canadian workers'
compensation laws. To describe the worker and employer as "non parties" is not
an attempt to diminish their role in the system, or to denigrate the significance of
the regime's actions as they affect the interests of employers and workers. This is
a technical description which helps us understand what the founders of WC were
trying to (and did) achieve.

The object of workers' compensation was to lift the matter of injury compensation
out of the lives of master and servant, converting what was a private dispute into a
public service. Just as the criminal law converted certain wrongs into matters
demanding the sovereign's attention, so too did workers' compensation in the
Meredith model (as followed by the Pineo report) transform the tort into the social
insurance issue. The whole point of the exercise was to socialize the matter, and in
so doing inoculate employers from private liability and protect workers from the
uncertain outcomes of court.

This last point is also critical to appreciate, because by taking the dispute away
from the "parties" and making it a matter of public concern, the Canadian WC

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4 Reference material prepared for the Royal Commission by S.Samuels, and others.
5 Final Report on Laws Relating to the Liability of Employers, Sir. Wm. Meredith, 1913 ("The
Meredith Report")
6 The Meredith Report
model sought to cure the substantial imbalance of power and wealth that existed between most employers and most “workmen.”

Further to this, by appropriating the decision and the cost to the neutral third party Board, the WC model removed a certain degree of accountability from both employer and worker, clearing a sometimes rancorous dispute from the management-labour table.

Of all issues central to ADR it is that one - who owns the adjudicative decision - that defines Canadian workers' compensation and distinguishes it from its American cousin. In the latter system, state legislatures (and the federal government in certain areas of its exclusive jurisdiction, such as maritime employments) ruled that employers would be immunized from certain liabilities if they subscribed to insurance on behalf of their employees.

The matter of liability still sits with the employer, to the extent that the employer is able (in most jurisdictions) to enter agreement with workers on degrees and forms of insurance coverage in particular cases, notwithstanding the minimum thresholds of coverage ordained by law. Such agreements to waive any part of entitlement are of course absolutely proscribed under the British Columbia Workers' Compensation Act\(^8\) - a rule consistent with the approach that the worker and employers are, in fact, not parties and thus not competent to enter contracts relevant to issues under the Act.

Recognizing the fundamental nature of the employer and worker as non-parties to the workings of the Board and Review Board, in the writer’s view, is essential to any understanding of how ADR does, or might, operate in the British Columbia WC regime.

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\(^7\) Still a major issue. Note the arguments of T. Ison, Compensation Systems for Injury and Disease: the Policy Options. Toronto: Butterworths, 1994 p. 156-57

\(^8\) The Workers’ Compensation Act, RSBC 1996 c.492
2. Alternative Dispute Resolution - a General Description

It is fair to say that ADR is the most talked-about (and perhaps most "hyped") innovation in the public administration of law in the last decade. A literature search of the acronym turns up hundreds of entries in the periodical journals devoted to law and the public sector.

What is ADR? To begin with, it is an attempt to reduce the formality and complexity of legal decision-making in any context. Typically ADR is recognized as a means of determining conflicts of interest without resort to full-blown litigation. The CCH Canada Ltd. "Alternative Disputes Resolution Practice Manual"\(^9\) describes the "dispute resolution spectrum" of methods of solving problems, from the least formal and externally-guided to the method which demands the most in terms of procedural requirements and third party governance. It includes a "dispute resolution spectrum" which is particularly applicable to civil disputes, but which is helpful at the outset in this study.

The CCH ADR Practice Manual "dispute resolution spectrum"\(^{10}\)

\[
\text{Informality, party} \quad \bigarrow\quad \text{Formality, 3rd party neutral control}
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<thead>
<tr>
<th>Partnership</th>
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<td>Conciliation and Mediation</td>
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As we progress from "partnering" to "litigation" we see increasing degrees of formalized procedure, third party neutral authority and diminishing levels of

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\(^{10}\) Ibid
autonomy and decision-making by the parties. Where does traditional workers' compensation adjudication fit on this sliding scale? Technically, nowhere, because the "dispute resolution spectrum" describes methods of resolving conflicts between adversarial parties which "own" the dispute and have the right to resolve it themselves.

The standard approach to ADR is not to push matters to the extreme point of "partnership" (which better describes a situation where disputants have a close and ongoing personal or business relationship requiring counselling-style intervention) but to introduce a neutral third party, into the matter to explore possible settlements before the decision-making machinery takes over. In litigation matters, the standard methods are "conciliation / mediation" or "mediation/ arbitration."  

The conciliation system uses a neutral third party, with no decision-making power, to meet separately and/or together with the disputants to explore possible resolutions. Typically the concilator/mediator will use what is now called the "interest based" approach to finding solutions, rather than "positional bargaining."  

The focus on "interests" asks each disputant to assess and articulate, off-the-record and without prejudice, his or her real aspirations or desires in the situation. This is contrast to the "position" taken, which essentially is an artificial construct used to induce the other party to acquiesce, or to produce a middle ground. "Positions" are inherently confrontational and designed to create more conflict, rather than reduce differences. Positions are taken to defeat the opponent, while interest-based negotiation is used to reach (hopefully) a "win-win" result.

Conciliation and mediation work when the outcome is relatively uncertain, but the possible results of losing are predictable. This means that the parties understand what's at stake, but are not confident enough of their positions to risk gambling with
a third party decision-maker. It is particularly fruitful where the parties are joined in a longstanding relationship from which they are unlikely to escape (i.e. collective bargaining). The conciliation/mediation method can only work where both parties know they can lose, know what they can lose, and know they can live with something less than they originally sought.

Not everyone is comfortable with conciliation or interest-based bargaining, be it conducted by a third party or by the disputants themselves. Some people simply want, or need, to win - which is why matters still go to trial, or arbitration.

Arbitration, like a civil trial, uses a neutral third party trier of fact and law. The arbitrator, unlike a judge, is usually selected on a consensual basis by the parties themselves, but in most other respects the arbitrator has authority under the parties' agreement (and often under the jurisdiction's arbitration laws) to craft and impose a decision after hearing evidence and argument.

Yet while the DR spectrum above doesn't capture British Columbia's true legal regime, it would be fair to say that when the BC claims adjudication system operates normally it is with a low degree of formality (telephone calls, memoranda on-file, references to policy guides where necessary but not in all instances, etc.) On the other hand, there is little or no discretion among the parties once they institute a claim, or where the Board has initiated action to charge an assessment rate or occupational health & safety penalty. It would be best to describe claims adjudication and front-line decision-making as a hybrid format.

The request for reconsideration of a decision, or for a Managers' Review, is essentially a repetition of the informal procedure by the same, or a senior, adjudicator. It is only when a case is escalated to the Review Board (for appeals

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13 J.Goldschmidt's “Bargaining in the Shadow of ADR: Analysis of Judicial and Attorney Attitudes toward Settlement under a medical screening panel system” The Justice System Journal, v.16, no.3 1994 discusses the concern about negotiating in the company of the potential decision-maker. The over-arching worry is that of prejudicing the case, and/or losing tactical advantages, in negotiations before the judge. On the other hand, the majority of responses to the
dealing with entitlement issues) or the Appeal Division (all matters, including employer concerns such as assessment, penalty and classification) that substantial degrees of procedural formality are injected into the system.

Even then, the availability of the "read and review" option of appeals (wherein the decision-maker(s) simply read the case file to render judgment) is clearly quite informal and not burdened with concerns about the right to testify or make submissions. Again, though, no matter how informal the processes may appear, at all times in the current BC model the decision-making authority resides with the adjudicator or Panel.

Where this technicality is noted, but not really followed, is in instances when decision-makers or intake staff provide opinions to parties about the merits of their cases. Usually this takes the form of commenting on the evidence that is typically required to prove a point, and noting the deficiencies (or strengths) of the case at-hand. This practice (done informally and not professed openly by the appeal bodies) is intended to enable the worker and employer to exercise the one clear option they do have in the system - to withdraw a complaint, or to cease a position of objection either to what the Board has done or what the other stakeholder seeks.

It is notable that the Medical Review Panel (MRP) also has a set of procedures which formalize a person’s pursuit of ultimate adjudication on medical ability issues. Again, full authority resides with the MRP and there is no mechanism other than cessation of the appeal for a person to have a determinative effect the decision-making process.

To summarize, ADR is a product of a disputer-driven and owned adversarial contest. It evolved to eliminate expensive processes and to enable disputants to

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Goldschmidt study professed to prefer this method of case resolution over other alternatives (or no ADR at all).

14 Persons involved in the appeal system described this practice, but were reluctant to do so on the record.

15 S.Samuels, et al, report to the Royal Commission “Second set of flowcharts”
bargain issues down to mutually acceptable, if not always satisfactory, agreements. The current BC system contains *none* of the elements of any form of alternative dispute resolution, other than-to have well-informed members of the adjudicative bodies suggest to disputants how the cases are likely to fare with decision-makers.

3. **ADR as practiced in comparative workers’ compensation jurisdictions**

This study examines ADR as it is practiced in two very different jurisdictions - Ontario and the State of Washington.

**Ontario**

It is useful to begin by noting the similarities between the Ontario and British British Columbia. Both introduced workers’ compensation during the same period of legislative reform, and both followed the general premises and recommendations of the Meredith Report. Ontario and BC both developed large-scale, monopoly insurance-provider systems of mandatory coverage for included employments and workers.

Even the administration of these functions is similar, insofar as each houses the bulk of its staff and activity at a central office but has placed service delivery units in other towns and cities. Their adjudicative models have, until recent changes in Ontario at least, mirrored each other - and they still retain the same basic framework of frontline adjudication, intermediate internal review and formalized external appeals (although BC of course returns the final round of appeal to the Board, while Ontario operates its external Workplace Safety & Insurance Appeals Tribunal).

At the core of the matter, both BC and Ontario have statutory systems which, as mentioned earlier, remove the matter of workplace injury liability from the employer and worker, depositing it solely in the agencies created under their respective Acts.
That Ontario moved towards "mediating" disputes upon enactment of the enormous changes made under the "Bill 162" amendments in 1990. At that time it created a new form of entitlement, the right of an injured worker to be re-employed by the accident employer in either the pre-injury or suitable work, depending upon the worker's ability. This confronted the Board with an entirely new form of benefit to adjudicate - one provided by an outside entity (the employer).

The concern at the time was two-fold: stimulating observerance of the new rules without waging war upon the employer community, while keeping administrative budgets within reasonable bounds. The answer lay in a peculiar provision of the new re-employment rules, one which required the Board to seek a worker's application for the particular benefit before adjudicating the rule.

The Board adopted a policy of requiring workers to consider whether they wished to "apply" for re-employment rights. The new "Re-employment Branch" then used mediators, working either in-person or on the phone with the "parties" to discuss the merits of the re-employment claim. Where the worker's application lacked merit, the mediator sought to defuse the situation and persuade the worker to withdraw.

Where the employer seemed to be obligated under the law to re-employ, the mediation effort was to (a) persuade the employer to re-hire the worker, without penalty, (b) persuade the employer to give the worker something else. As long as the worker voluntarily elected to withdraw his or her application, the Board did not "endorse" or otherwise inquire into the result.

This of course was controversial and initially uncomfortable in workers' compensation circles, as nothing like it had been attempted or approved-of before (after all, it seems to walk very close to the line of a worker waiving his rights under the Act). A worker's decision to withdraw the application could never be "final" however, holding over the employer the risk of another re-employment claim if the employer didn't honour the "deal." Similarly, the Board tacitly approved voluntary

16 The Workers' Compensation Act, RSO 1980
17 Ibid, s.54
arrangements by assuring employers that if a deal was struck and dishonoured by the worker, that worker's subsequent application might be adjudicated but would carry no penalty or cost to the employer.

The particular feature of this system was that it worked - it rapidly educated employers about their obligations under the law (the minority of cases that proceeded to hearing were given extraordinary attention, time and publicity by the historic standards of workers' compensation - one hearing went 11 days). The process was viewed internally as a method of educating the public about the system and enabling them to make their own decisions about proceeding with a re-employment claim. It also helped the Board keep its resource commitment to a minimum in adjudicating this new rule.

It was likely this latter effect - the seemingly more rapid movement of cases through the system with limited resources - that made "mediation" attractive in other forms of decision-making. The success of re-employment mediation also drew the attention of those grappling with the inadequacies of the vocational rehabilitation system. In the early 1990s the mediation process was extended, by way of policy and practice, to the resolution of differences between workers and their VR Caseworkers. In other words, the Board's mediators stepped-in between Board staff and injured workers.¹⁸

This, of course, is a sharply different situation than the conciliation of differences between employers and workers. To succeed, mediators had to take a fairly aggressive stance with Board VR staff - articulating and enforcing proper practices. Appeals adjudicators, waiting in the wings for cases that were not solved by mediation, had to work closely with mediators to ensure consistency of message and interpretation (in this the hearings officers were the authority). Over time, this process also worked - to the evident pleasure of the worker community which found

¹⁸ the Industrial Accident Victims Group of Ontario (IAVGO) Reporting Service Newsletter v.4, n.3 dated April 8, 1991 discussing the formal assignment of VR appeals to the re-employment mediators, and the Board's refusal to release its own practice methods. This reticence likely signified (a) the fluidity of practices in the new world of workers' compensation mediation and (b) the sensitivity of the Board to allegations that the mediation practice lacked statutory basis.
itself with a more sympathetic and like-minded group among the mediators and hearings officers. There was a palpable improvement in the management and documentation of VR cases, although there was also a substantial increase in cost and effort involved.

Explaining how the appeals hearings staff interpreted the rules surrounding the re-employment provisions, and the penalty provisions for failing to comply, mediators educated employers about the new system. As caselaw evolved and became well-known (for the first time, decisions were published) the employer community, the worker network and Board frontline staff became aware of the force of the new rules.

From the beginning there were doubts about the legality of this practice. The Board defended it, on those rare occasions when it was challenged, by pointing to its absolute authority to dictate its own practices. This was more than a convenient rationale - it was technically correct.

The Board used its mediation function from the beginning as a way of screening cases and educating participants; in that regard it was essentially a form of "intake counselling", a practice familiar to BC's appeals entities today. Where workers and employers resolved re-employment issues "on their own" (usually with a cash payment to the worker in return for his decision to withdraw the re-employment application) the system effectively gained a form of benefit for the worker, albeit not the benefit described in the statute.

This of course was revolutionary in Ontario, but it was also immensely popular. The system communicated the object of re-employing workers, without forcing the issue in every case. It used high-profile, large-penalty rulings to signal resolve where an employer was intransigent, which likely had the effect of increasing both rates of re-employment compliance and the quantum of the average settlement.

19 IAVGO, v.5 n. 5 August 28, 1992
20 Mediation attracted "tremendous support" from stakeholders, according to the employer-voice Ontario Workers' Compensation Review, v.9. n.3 August 1995.
Workers and their representatives were generally highly satisfied with a system which gave them options as to what form of "benefit" to seek, and employers appreciated the opportunity for once to avoid the gruesome mechanics of Board bureaucracy. So satisfactory was the process that many stakeholders sought to engrave mediation into the law, so as to protect it and extend its reach.

Since that time, mediation has been formalized into the Act\textsuperscript{21} and has been administratively extended to all issues. In the current model of appeals adjudication, Appeals Resolution Officers (\text{"ARO\text{"}) are assigned cases with the first object to determine the issues, seek agreement between worker and employer on as many concerns as possible, and then to narrow the agenda of adjudication to the minimum points. Those issues are then determined, preferably though a form of "read and review / phone adjudication" and, to a decreasing extent, through formal hearings.

This process works to move cases more quickly through the appeals system, and is part of a larger effort to shift responsibility for the appeal onto the disputant worker and employer:

- the old two-step appeal system (an internal "read and review" stage called Decision Review, following by formal oral hearings) has been replaced by a single layer of appeals resolution officers
- appellants are required to complete lengthy and detailed objection forms before their cases are assigned to appeals staff
- appeals staff will, if possible, attempt to resolve the issue in dispute between the outside party and the Board decision-maker whose ruling is under scrutiny
- the outside parties are asked to participate in pre-adjudication phone conferences, much like the discovery process in civil matters, to clarify points, narrow the issues and illuminate case merits

\textsuperscript{21} The Workers\textExperimental Compensation and Occupational Health & Safety Amendment Act, RSO 1995 s.72.1
• the external appeal body remains available for formal, 3-person panel reviews (although it too is considering changes and has pioneered a radically different form of "round-table" discussion type of oral hearing in vocational rehabilitation cases).

The key to this model, in the writer's view, is that the Ontario Board treats the worker and employer as "parties" entitled to, and expected to, participate in the decision-making process. The unrelenting object of the appeals system is to persuade the disputants to accept some form of decision which the appeals staff person believes is acceptable under the Act, or to withdraw their appeal altogether.

Another experiment in the appeals area, initiated in the mid-1990s and now the rule, is that appeals staff work with specific industries or clusters of employers. This builds technical expertise and, hopefully, credibility in the relationship of the Board personnel to employers and workers. The hazard, of course, is that might breed relationships which are too close, too informal and might afflict one stakeholder or another with a permanently unfriendly adjudicator. This is a risk of the entire Ontario system, now, as all levels of claims adjudication there have since late 1997 been organized on an industry-based model.

The real question about the Ontario mediation model is whether it is "mediation" at all. The primary role of the ARO (and its predecessors) is to adjudicate, in any fashion which the parties will tolerate and with varying degrees of due process. To avoid having to adjudicate formally, AROs are encouraged to build consensus between disputants and, where necessary and appropriate, effectively endorse that consensus by force of the delegated decision-making power. It might be better to label this process one of "consensus-building", issue-rationalizing and agreement-endorsement. The tricky part, of course, is ensuring that whatever is agreed-upon is actually feasible under the Act.

To the writer, it is here where this practice becomes hazardous, or at least difficult, in that decision-makers make the subtle shift from making "the decision under the Act" to "a decision under the Act." The difference is this: in standard Canadian
adjudication (including that of BC) the decision-maker is expected to render the ruling which appears required by the force of the law, policy and facts. In a consensus-building/endorsement approach, the decision-maker works under the same legal framework but seeks a decision which is both feasible under the law and agreeable between the participants. There may be a range of possible decisions from which to choose, or more likely, within-which to negotiate.

In fairness to those administering this system, it does not mean that appeals adjudication has been converted to a non-adjudication model. Decisions still pour out of the Workplace Safety & Insurance Board Appeals Branch, and roll from there to the external Appeals Tribunal. What is at work in Ontario, the writer believes, is the steady emergence of a different culture of workers’ compensation - one where responsibility for making decisions (and increasing for the provision of benefits) is assigned to the employer and worker.

The State of Washington

The American workers’ compensation system is divided into several categories insurance systems, across the state and federal jurisdictions:

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<th>System</th>
<th>number of jurisdictions</th>
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<tr>
<td>exclusively by private insurance arranged by the employer</td>
<td>2</td>
</tr>
<tr>
<td>private insurance or authorized self-insurance</td>
<td>32</td>
</tr>
<tr>
<td>exclusive insurance offered by a state fund</td>
<td>5</td>
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<tr>
<td>state fund or authorized self-insurance</td>
<td>3</td>
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<tr>
<td>private insurance, state fund or authorized self insurance</td>
<td>12</td>
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The State of Washington falls into the fourth category, one where employers are required to subscribe to insurance from the state fund (much like the British Columbia provincial monopoly) or to self-insure (sometimes analogous to directly

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22 Source: State Compensation Insurance Funds, American Association of State Compensation Insurance Funds
liable employers under the BC scheme). In that regard it is one of the best United States jurisdictions with which to draw comparisions with the British Columbia scheme. Most Washington employments and workers are covered by the State Fund insurance system; one-third of workers are covered by employer self-insurance.

The Washington State Fund undertakes the first, and most pro-active form of "dispute resolution" which is to educate the public, and system participants, on issues and standards within the system. This includes telephone hotlines to advise claimants and employers on their rights, obligations and chances (although care is taken to in no way prejudice the State Fund's position). Workshops, brochures and the usual gamut of public relations techniques attempt to inform stakeholders so that they can manage claims more efficiently within the system. A remarkably detailed website, for example, walks people through the decision process. All of these are "preventive" efforts.

The Washington State model of adjudication has three distinct levels, each under a separate organization. The Department of Labor and Industries ("DLI") performs the basic claim collection and primary adjudication functions (Case Managers). Those unhappy with a decision can file a "protest" to the DLI, which results in a referral of the case back to the Case Manager or to a more senior Case Consultant. This is intended to be a process of open-minded reconsideration by the Department, but observers are increasingly of the view that the DLI tends simply to confirm its past rulings without thorough review.

As a result, more parties are taking cases into the formal appeals stream through "appeals" filed with the Board of Industrial Insurance Appeals (the "BIIA" or "Board"). The BIIA devotes its initial attention to ensuring that all the procedural

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23 Ibid
26 Ibid.
steps required to move a case from the DLI to the appeal level have been followed, and to clarify legal issues of jurisdiction.

Even where the BIIA has jurisdiction over an appeal, however, it can "lose" the case back to the DLI if the Department chooses to "reassume" the matter. Washington is unique in giving its DLI the option to "reassume" a claim from the appeal organ, at the DLI's discretion, to try and resolve the differences existing between employer and worker, or client and state fund). The DLI has strict time limits, typically of 30 or 60 days, to act upon a reassumption of a file. While an increasing proportion of reassumptions reportedly lead to little progress in the case (that is, the DLI reassumes the file and essentially re-confirms its previous ruling, forcing the parties to lodge another appeal) it is still true that the DLI resolves or adjudicates over 80 percent of lost time claims with no further appeal by either party.

If the DLI has exhausted, or not contested, jurisdiction a claimant or employer objects to a decision that objection is formally taken to the Board of Industrial Insurance Appeals ("BIIA") which is responsible for mediating and/or adjudicating those appeals which are not reassumed by the DLI.

As noted above, objections to the BIIA go first to a New Appeals Specialist, who conducts a jurisdictional review. At times, this stage can lead to issue review like the British Columbia WCRB intake process, where the official can make an effort to clarify issues and remind the parties of the necessities of making their case. This will lead either directly to hearing, or more likely to formal mediation.\footnote{Ibid, also note its predecessor and more extensive study, Workers' compensation in Washington. Cambridge: WCRI, 1989 which details the fine points of appeal adjudication in the state.}

The BIIA operates with a panel of administrative law judges, numbering about 35 at any given time, a portion of which is devoted solely to taking cases into a mediation process. Fifteen of the judges are responsible for either mediating cases, or reviewing the decisions of their peers; this "mediation and review" function is handed to the most senior decision-makers. This is crucial to the success of the
system, as the effort to resolve cases informally is conducted by the judges whom the parties and advocates know to be the most expert and influential in the system. The hope, of course, is to promote the credibility and effectiveness of the mediation process.

These "mediation judges" assess the issues, seek agreements on any areas of fact and law possible and then identify the focal points of outstanding dispute. About 20 percent of cases are simply shipped to the hearing stream, because agreement is clearly impossible in the opinion of the mediation judge. These statistics reflect the overall system results - individual judges have their own methods and rates of resolution and referral.

The remaining cases undergo some form of mediation effort, typically one or two telephone conference calls with the parties to illicit more information, explore the issues and focus everyone's effort. While the process is informal (and Washington officials interviewed stressed that each mediation judge has his or her own style) the proceedings are documented by a court reporter (even though the statements made are not "testimony" and do not prejudice the parties in any later proceedings). The purpose of such documentation is as much to ensure the parties honour their compromise & release (C&R) agreements, and to protect the BIIA mediation judges from accusations of bias or flagrant failures of due process.

Another crucial fact about the mediation process is that the insuror is present - the DLI sends a paralegal, or sometimes an attorney from the state Attorney General's office, to represent the interests of the State Fund covering the claim. This places the parties under some pressure to achieve resolutions that are defensible under the law - that is, to tailor their agreements to the general terms and provisions of the Industrial Insurance Act. It also protects the State Fund from gratuitous agreements whereby the parties concur on a plan to pay the worker money out of the State Fund with little or no demonstration of the link between the compensated condition and the worker's employment.

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28 A compromise and release agreement is basically an agreement between the parties, settling the terms of payment and releasing the parties from further liability.
Further, while the DLI is viewed as taking a strongly defensive approach to cases at the outset (preferring to deny claims and see them go through the appeal system) the mediation process invites them into a true discussion of the merits with the parties. Thus, the DLI will tend to soften its line somewhat at the mediation stage, agreeing to essentially endorse employer-worker resolutions that include payments to the worker which the DLI originally would not have accepted. Part of this is a difference in view between frontline decision-makers and DLI representatives at mediation, and part of it is the practical mandate of the DLI representative to achieve a cost-effective outcome for the system as a whole.

Washington Board mediations succeed in about one half of cases, "success" being defined as either a settlement of the matter on agreement of the parties or a withdrawal of the complaint. A further quarter of cases are, at some point, "reassumed" by the DLI - a fact which must also be counted as a success of BIIA dispute resolution, insofar as it shifts the decision back to the agency primarily responsible for administering the insurance or regulating self-insurance. 29

A small number (17%) of cases go to formal adjudicative processes within the BIIA, and these are hard cases indeed, as fully half of those decisions are appealed to the third and final rung of decision-making, the state courts. A final, and unique aspect of the Washington state system, is that the BIIA holds full and fairly formal oral hearings - the records of which are used in appeals to the state court, normally read aloud there to a jury; this trial de novo, based on the junior body's hearing record, is exceptionally rare and seems to create incentives for parties to resolve or abandon the matter before court, if at all possible.

The parties are able, at any time, to resolve an issue themselves by agreeing to payments out of the state fund within the limits of the prescribed schedule.

29 note the views of R.Victor, author of Pathways to Success in Containing Workers' Compensation Costs in the "Success Stories" volume edited by Mr. Victor for WCRI in 1993. In this study, the
What is key to the Washington system is that the BIIA mediation process attempts to bring the parties to self-adjudicated resolutions within the broad ambit of the law. Where the parties achieve a settlement and the worker withdraws the claim, the BIIA will typically not test the merits of that settlement.

This is the *fundamental distinction* between the Washington State and Canadian systems - in Canada the statutorily prescribed benefit is technically the only benefit payable to the worker, and waivers or adjustments to that are prohibited. In the United States (and Washington specifically) the parties treat the insurance system as more of a menu, with a maximum number of choices.

Only Ontario, which gives workers limited options to select either formal adjudication of their re-employment rights or an "alternative" settlement directly from the employer, goes anywhere near the U.S. model of client ownership of the issue and authority to decide.

It may be useful at this point to use another "spectrum" to illustrate these systems:

<table>
<thead>
<tr>
<th>Worker &amp; employer ownership &amp; control</th>
<th>Board ownership &amp; control</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Self-adjudication &amp; self-insurance</td>
<td></td>
</tr>
<tr>
<td>- Compromise &amp; Release decisions sanctioned by the Board</td>
<td></td>
</tr>
<tr>
<td>- A mix of Board decisions, mediation and C&amp;R agreements</td>
<td></td>
</tr>
<tr>
<td>- Board decisions with facilitative intermediaries to narrow issues and &quot;settle&quot; differences, but with no benefit variation</td>
<td></td>
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<tr>
<td>- Board decisions only</td>
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Currently the Ontario Board can be described as a process of Board decisions, using facilitative intermediaries to narrow issues and reduce the volume of decision making actually required. The Washington system is in the middle - one where the

author cites the "building of bridges" between mediated disputants as part of a cultural change which led, in part, to dramatic decreases in claim frequency and duration in the 1988-92 period.
administrative apparatus will make a decision if the parties do not, but which employs considerable resources to promoting private decision-making. British Columbia is one of total administrative ownership and authority, with little or no resources engaged in encouraging "settlements." This is the traditional Canadian position.

4. The Framework for ADR in workers' compensation

Before exploring what kinds of policy and legal framework are necessary to import ADR into a workers' compensation system (specifically that of British Columbia) it is necessary to determine precisely what we would be trying to achieve through introducing ADR.

It is important to emphasize the difference between ADR as a *process* for achieving certain ends within the tradition of administrative adjudication, and ADR as a way of achieving *different kinds of decisions*.

As a *process*, ADR is characterized by informality, typified by off-the-record, without prejudice discussions and focussed on reducing the need to adjudicate, or at least narrowing the scope of the enquiry. Contacts are made by phone, letters exchanged rapidly through fax and email, parties neither required nor expected to obtain representation unless they so desire.

The administrative advantages of this process are a reduction in the transaction costs and numbers of different resources applied to a case. The parties often prefer the experience because it saves time and money. The disadvantage is that when it fails, it has sometimes only added another step in the process.

There are also serious concerns about whether ADR meets minimum thresholds of due process, and in the workers' compensation system particularly, there is constant worry that the de-formalization of process prejudices the "weaker" party (a
self-description more often adopted by workers and labour) because more formal methods enhance the impartiality of the decision-maker.

When all the parties are in a room together for a finite time, and where only the facts and arguments elucidated in that room have import, everyone knows exactly what went into the decision. That simplicity is lost when adjudication occurs in a myriad of phone calls, discussions and in camera considerations. There is also concern, of course, that the informal adjudicator will be swayed by one party or another in the informal debate.

The profound advantage of this methodology is that in begins to bring the parties together. As mentioned earlier, "bridge building" between workers and employers is believed to educate the parties about each others' motives and needs, so as better both to prevent, reduce the frequency and mitigate the damage of work-related injuries.  

If workers and employers are brought together, in any minimal fashion, to forge agreements simply as to facts and on the agenda before the decision-maker, this can be the first step towards their assumption of a broader and deeper sense of responsibility and ownership for prevention and cost mitigation.

The other advantage attributed to ADR is the reduction of litigation frequency and complexity. This is the principal reason it appeals to administrators, who see it as a budget control device.

Caution is urged here, as the provision of mediators also creates budgetary needs and the introduction of "soft" activities such as educating the parties can be difficult for inexperienced adjudication managers to integrate into their measures and processes. There is absolutely no guarantee that mediation will save money; while the experience of Ontario in introducing mediation to re-employment likely meant

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30 See footnote 27, "Pathways to Success".
that the new provisions were communicated with lower adjudicative cost, the introduction of mediation to VR undoubtedly meant a growth not only in the size of the mediation group, but also in the cost of VR programs as mediators and hearings officers enforced more flexible and forgiving interpretations of policy across the Board.

Further, even states such as Washington, which by all accounts is deemed a "success" in how it uses mediation judges to narrow, resolve and organize cases, are now reconsidering the size of their mediation investment and wondering how to maximize return on the significant cost of the program. The point, of course, is that ADR can eliminate certain types of activity and thereby reduce related costs, but can only do so by instituting other types of activity with their related costs. It is no panacea for budget managers.

Aside from process, the other dimension to ADR in workers' compensation is that of its use as a way to achieve different kinds of decisions. By this the writer means not the manner in which a decision is reached, but the range of decisions (and decision-makers) available. Here, we see the term "ADR" used to capture the expansion of the range of available decisions and the inclusion of the parties as decision-makers.

The various forms of ADR explored in the jurisdictions described (and others) seem to fit four groupings: the first two include ADR processes, the second two also include ADR decision-making systems.

Four types of "ADR" - process and decision-making systems

(1) **Case Management** - to identify issues, discern facts quickly and efficiently, remove procedural barriers, expedite the process from intake to completion. This is at once a "customer service" initiative (the case moves faster through the

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32 Off the record interviews with Washington State system administrators.
system) and an "administrative benefit" (if it reduces the number of transactions and/or resources required to be applied to the matter).

This is often what spawns the administrator's first interest in ADR, as it removes problems and permits the processing of increasing numbers of cases within static budgets (witness the WCRB recommendations on ADR, for example). This is almost entirely why ADR caught-on with the Ontario Board, for example, and has been piloted as a remedy to the ills of the civil litigation system in many areas.

(2) **Flexibility for the decision-maker.** Looking again at the Ontario model, we have discussed the phenomenon where the decision-maker operates within a legal framework which is rigid in terms of scheduled benefits and assessments (there is no change in their quantum, or in how they can be paid, or even when) but there is a range of possible decisions with respect to how that rigid schedule is used.

This is the model described as "making a decision" as opposed to "the only decision". It is seen, for example, where the temporary benefit provision requires payment to the worker of 90 percent of net average pre-injury earnings for the duration of partial disability, provided the worker mitigates her wage loss through rehabilitation effort. In the past the appeals adjudicator might have made that assessment on the facts and simply denied all or part of a benefit claim on the basis of poor mitigation -- without discussing it with the parties.

Today that the Appeals Resolution Officer might point to deficiencies in the worker's mitigation as grounds for partially and temporarily reducing the quantum of benefits, but use "the benefit of the doubt" to resolve that issue in the worker's favour - provided the employer is relieved of some other burden. This process enables the parties to "saw off" issues (the worker drops a recurrence claim, which the Board agrees not to adjudicate, if the Board pays full benefits for a time when
mitigation might have been questionable). Both sides are satisfied and the matter requires no formal adjudication.\footnote{33}

In the process as described, the Act and policy provide absolutely no discretion as to the quantum or extent of benefits payable, but of course delegate to the Board officer the ability to decide the facts and how they apply to those rules. As long as the facts permit a decision, there is no reason to impose a so-called "better" decision when that latter ruling might propel the parties into further litigation, acrimony and create cost for all concerned.

This category of ADR is included as a form of "process" because it enables the administrative decision-maker to operate differently, but does not alter the fundamental character of the decisions being made.

\textbf{(3) A dynamic range of decisions available to the adjudicator}

This form of "ADR" crosses the faint line from process to type of decision, because it offers the administrative adjudicator the power not only to use ADR methods, but also to make or endorse decisions within a range of scheduled benefits, allowing partially commuted lump sum payments in lieu of pensions, etc, or to effectively endorse agreements between the parties. The Ontario experience with re-employment touched this ground, insofar as the Board looked the other way when the parties reached their own agreement (on any terms the parties chose) but stipulated a technical requirement that the worker withdraw his or her application, and would honour the outcome only so long as both parties met the conditions of whatever deal was struck.

\textbf{(4) A dynamic range of decision-makers and decisions}

\footnote{33 The experience of virtually every party and representative involved in this mediation system is one where the Board officer assesses the merits of the case and posits possible solutions, including some compromises. The Board itself would be less likely to profess this as the purpose of its ADR.}
Here we have a model of "ADR" which is closer to the American regimes' empowerment of the worker and employer to make decisions themselves as to the appropriate scope and quantum of awards and other issues. It is important to distinguish this, with its genuine "compromise and release" agreements from the Ontario re-employment mediation system described above. While Ontario required either a decision or endorsed a withdrawal, a more open and flexible model of negotiations includes the parties as decision-makers and may not require the imprimatur of the administrative adjudicator or mediator to achieve a resolution.

A striking example of this operates not in Ontario or Washington State, but in New York City. There, Local 3 of the Electrical Employees trade union has for over 30 years administered and adjudicated all the claims of its members as part of the Electrical Employees Self-Insurance Safety Plan (EESISP). Funded by employer payroll contributions but self-governing, the union-managed plan is responsible for avoiding deficits, maintaining benefits and performing all aspects of case management typically left to an insuror in the U.S. or workers' compensation board in Canada. The plan was approved by the New York State Legislature and is subject to regulation.

The EESISP is a notable success at maintaining its books and offering its members benefit rates significantly higher than state averages. This it achieves through a prevention strategy enforced in co-operation with contractors and employers, and through a subtle internal set of peer pressures which impose upon members the expectation that they will not take advantage of the system, because in doing so they cost themselves and their colleagues.

This may seem a rather remote and extreme "different kind of decision" and "decision-maker" but the point is simply to illustrate that workers, as well as employers, have considerable untapped intelligence and unexplored realms of motivation which might be brought to bear upon the administration of workers' compensation.

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4. The Necessary Framework for ADR

To implement an ADR process, be it case management or even flexible decision-making that includes considerations of the worker and employer views, the British Columbia workers' compensation system does not appear to require any statutory change.

Policy change would of course be necessary, to liberate decision-makers from the mechanical processes they are now required to comply-with.

That said, the move from the fairly formalized and traditional method of decision-making long followed in BC would entail serious adjustments to the expectations and habits not only of administrators, but also of stakeholders.

As the writer has mentioned in this paper (and also in the study of employer appeals issues) the Canadian workers' compensation system is one of a deliberate separation of participants from power: workers and employers are not supposed to be too closely involved in the system, except to the extent they are invited into-it. This has evolved from a positive premise (socializing workplace insurance at the turn of the century) into an introspective and internally-focused culture (where the clients are, to a certain extent, the material with which the Board and appeal organs manufacture decisions.)

Inviting, or even demanding, the closer participation of workers and employers through means even as limited as informal conferences will be a challenge, particularly to the population within the administrative apparatus (again, the WCRB proposals on ADR as a case management technique suggest that Board cooperation will be hard-fought).

To institute in British Columbia the kinds of decisions which this study has characterized as typical of ADR would require changes to the Act. The most significant change, of course, would be a removal of the prohibition on the parties'
entering contracts on matters of entitlement under the Act. This would certainly be revolutionary within the Canadian system, as the longstanding tradition has stood in opposition to the American-style "compromise and release" agreement.

**Conclusion**

*ADR as a process* offers significant advantages in terms of integrating the active, intelligent and productive participation of the parties in the consideration and, to a limited extent, the adjudication of issues. There are considerable cultural barriers to the introduction and growth of this practice in British Columbia, and certain institutional realties (the very complex existing appeals system, for example) which would sap the true value of an ADR process.

On the other hand, there are no evident legal or constitutional barriers to altering practices within the Board and Review Board so as to use case conferencing, mediation and informal appeal adjudication.

Insofar as ADR also embraces a *different type of decision* (such as compromise and release agreements) or introduces *alternative decision makers*, there do exist legal barriers. Making the worker and employer formal "parties" to the matters before the Workers' Compensation Board, the Review Board and the WCB Appeals Division is a radical shift from the traditional Canadian model of severing these matters from the interested persons.

If the Legislature were to contemplate new forms of benefits or rights (such as mandatory re-employment, or expanded forms of non economic loss award more analagous to tort damages) these provisions might be better suited to alternative types of decision or decision-maker. This is so particularly because the move towards "out sourcing" or "privatizing" workers' compensation services from the Board to the employer presents a logical, financial and natural justice rationale for enabling the employer and worker to achieve resolutions outside the Board.
The Ontario experience suggests that there is some merit in the view that simplifying the process and adopting an ‘ADR’ version of current adjudication can make the system easier to follow and less expensive to operate. On the other hand, more than one stakeholder interviewed in Ontario commented that there is a constant tension in the mediation/decision-making model, because tried-and-true due process requirements seem to be unavailable - making the parties more subject to the particular style and thinking of the less-encumbered appeals adjudicator.

The hazard of ADR, mentioned before and worthy of noting again, is that system administrators tend to view it as a way of reducing adjudicative resource investments - eliminating due process mechanisms and layers of appeal, saving cost while maintaining (or even enhancing) the bureaucracy’s degree of control and authority, without using it as means of altering the culture of the system.

The problem is that mediation isn’t really occurring in systems where the parties have no power (or where they aren’t really ‘parties’ at all but rather participants in a Board-driven process). Here, mediation has the potential to foster cynicism and distrust as they are invited-into a decision-making process wherein they have little or no real influence.

To summarize, ADR as an ‘add-on’ method to the traditional Canadian model of workers’ compensation decision-making can effectively simplify appeals adjudication while stabilizing costs (hence its attractiveness to system administrators). In the writer’s view, however, ADR can best affect the system when accompanied by a true devolution of some decision-making authority to the parties, and is perhaps best applied as part of a process of enabling the parties to administer all or part of their own claims.