COMPLAINTS

[Note: I have been asked to provide an overview of this topic only, as it is technically outside of the scope of the adjudication and appeals project].

Summary of Issue
The Royal Commission received a number of submissions complaining about inappropriate conduct by WCB and appeal authorities during the claims adjudication and appeal processes. Several stakeholders called for the improvement of the existing complaint process or establishment of a new, more independent complaint process.

The topic of complaints appears to fall implicitly within the Inquiry's terms of reference, Section 3(f) is concerned with inquiring into "organizational performance and service" in the workers' compensation system. A public complaint system is a primary vehicle through which members of the public can voice their concerns about "organizational performance and service" and be assured that such concerns are being addressed.

Defining Terms
The dictionary definition of a "complaint" is an "expression of dissatisfaction." All public expressions of dissatisfaction (including those made by employers and employees) about the WCB, other than appeals, have been referred to below as "complaints."

Such complaints may be concerned with:

- alleged misconduct or inappropriate behavior on the part of WCB employees or appeal authorities;
- service levels of the WCB or appeal authorities; and
- policies of the WCB or appeal authorities which may not be challenged as part of the appeal process.

Appeals to the WCRB, Appeal Division or MRPs could also be characterized as "complaints," since they are an expression of dissatisfaction with decisions about claims adjudication by the WCB. However, in this report these have not been referred to as "complaints", but rather as "appeals."

Submissions
J. Sayre, on behalf of injured workers, has commented that complaints about the conduct of WCB staff are fairly common:

Another principle we have advanced is that the Board must be accountable for its specific conduct in administering a claim, as well as its policies.¹

Workers are not merely upset with perceptions of rudeness, distrust, and lack of concern on the Board’s part. Such perceptions are common, and arouse justified resentment.²

The Royal Commission received a number of similar submissions from workers. For example, the following problems were identified by the Disability Action Movement for Women (DAME):
A general lack of respect for claimants is a frequent experience for workers. Some examples are:

- reluctance or refusal to inform workers of others in the organization who could provide information or hear complaints;
- women feel they are not believed;
- treatment by WCB staff does not reflect an appreciation of the workers right to fair and decent treatment;
- workers feel powerless; this is compounded for women who already face power imbalances simply because they are women;
- no consistency in the system for continuity of handling claims (e.g., numerous adjudicator for each claimant each with their own biases);
- reluctance or refusal of staff to inform workers of their rights.

Mr. Bates, on behalf of the WCB, responded to Mr. Sayre's assertions concerning perceptions of rudeness or misconduct on the part of WCB employees:

It is difficult to adjudicate claims at the best of times and it is not surprising that there can be a high degree of emotions involved. All of us before the commission have acknowledged that in every barrel there is a bad apple or two but the vast majority of the BC work place are honest, hard working people whose intent is to go to work and do a good job... Here at the Board there are many dedicated officers, at all levels, including the senior level.

Law and Policy

The WCB Ombudsman

The office of the WCB Ombudsman (WCBO) was established in April of 1996, at the recommendation of the BC Ombudsman. The WCBO has been described as "an internal public complaint process" for the WCB. Its purpose is to "deal with complaints of unfairness related to the Workers' Compensation Act" which may include concerns about the fairness of WCB decisions, recommendations, actions or omissions procedures, practices, or regulations may contact the WCBO. For example:

Parties in claims may be dissatisfied with delays in resolving issues, uncertainties as to entitlements, irritation with being unable to speak to the appropriate Claims Officer, Adjudicator or manager, personal slights or seemingly prejudicial statements, insensitivity, or a host of other sources of frustration or anger.

Although the WCBO is an employee of the Board, he is considered to be "completely neutral" and is expected not to "side with the WCB, its employees, the complainant, or anyone else." The WCB Ombudsman "employs an informal dispute resolution process" and has a mediation role. He "opens the lines of communication to the person who
can address the concern and works to help resolve the problem." He is an advocate for fair practice and fair process."¹¹

The WCBO has "access to WCB files, documents and anyone within the organization" and is able to offer "impartial recommendations on issues within the jurisdiction of the office".¹²

The WCBO is expressly prohibited from "[advising] on an issue under appeal or involving a right to appeal" and cannot handle "issues pertaining to the law".¹³ It appears that, when such matters are brought before it, the WCBO functions as an information and referral service.¹⁴ The WCBO cannot make decisions for WCB and appeal authorities and cannot impose sanctions on WCB employees or on members or staff of appeal tribunals who are the subject of complaints.

By December 31, 1996 approximately 1000 complaints had been directed to the WCBO. In the 1996 annual report of the BC Ombudsman, WCBO activity was described as follows:

*Activity is forty per cent above expected volume levels and there is only a small backlog of complaints at any given moment. To date, 80 per cent of all activity has centered on compensation issues.*¹⁵

The activity of the office is detailed as part of the WCB Annual Report.¹⁶

**The Provincial Ombudsman**

**BC Ombudsman’s role in establishing and monitoring the WCB**

Upon its establishment, the BC Ombudsman made the following comments in support of the WCBO:

*I am pleased to report that [the] President and CEO of the Workers Compensation Board, has agreed to establish and internal corporate Ombuds position at the WCB... The Ombudsman strongly believes that authorities should develop their own internal public complaints process and establish a fixed point of responsibility to provide fair services and processes in the first instance. An internal Ombuds-like position reporting to the Chief Executive Officer can provide invaluable information to management on how to make systems and practices effective as well as fair and to scrutinize the quality of services agency-wide.*¹⁷

More recently, the BC Ombudsman initiated an audit of the WCBO in order to "is to assess the effectiveness of this internal complaint and review mechanism within the WCB." She expects this audit to assess the effectiveness of the WCBO and "provide useful information about the possible application of this type of model to other agencies, and general information about internal complaint handling." It is expected that the results will be detailed in her 1998 annual report.¹⁸
The existence of the WCBO does not preclude the statutory right of WCB clients to take their complaints to the BC Ombudsman. However, when a person with a complaint about the WCB contacts the office of the BC Ombudsman, he or she is routinely informed about the existence of the WCBO and invited to lodge the complaint at that office first. It appears that the Ombudsman's role in investigating WCB complaints has diminished significantly since the WCBO began its operations.19

The BC Ombudsman has the following characteristics which distinguish her from the WCBO:
- she is independent of government, appointed on the unanimous recommendation of a special committee of the legislative assembly;
- she is an officer of the provincial legislature;
- she has powers to conduct formal investigations;
- she has subpoena powers;
- she has strong legal safeguards for the confidentiality of records;
- she is required to file an Annual Report with the Legislative Assembly.20

The BC Ombudsman can take the following steps respecting a complaint:
- "Advise a complainant about steps to take with the public body.
- Refer a complainant to an available remedy.
- Investigate a complaint.
- Talk to anyone and see any documents or evidence the public body has in its possession.
- Recommend that a public body change a policy, practice, process, guideline, regulation or law to make it fair.
- Negotiate a settlement or recommend a resolution."21

However, the BC Ombudsman cannot:
- "make decisions for a public body or reverse decisions it has made;
- reverse decisions of tribunals or appeal boards;"22
- investigate a complaint if there is a legal right to appeal and it has not been used first,23 or
- impose sanctions on WCB employees or on members or staff of appeal tribunals who are the subject of complaints.24

Sayre's Proposal for an Independent Complaints Process
J. Sayre recommended that an independent complaints process, patterned to some degree after the new BC police complaint system, should be instituted for dealing with complaints about misconduct:

One of the most common complaints of injured workers who appeared before the Commission was that the Board cannot be held accountable for the damage it does through improper conduct and unfair decisions. We recommend that an independent process be created to allow complaints of serious misconduct by the Board itself to be investigated and to provide an appropriate response when such complaints are found to be justified. Such a process might resemble the police
complaint procedure in some respects, although in other ways it would be very different. To be effective, the essential requirements are that it be independent of the Board and that it have the authority to provide a real remedy to a worker who can show that the misconduct caused losses that are not met by later awarding the denied benefits at an appeal or review.

In addition to showing greater respect for the concerns of aggrieved workers, and in some cases granting a meaningful remedy, the mere existence of such a process would be a motivation to staff to treat workers properly, particularly if the accountability body also has a disciplinary role (if only on an advisory basis). 25

When asked to comment on the details of his proposed complaints process, Mr. Sayre elaborated as follows:

**Need for more independence**

Mr. Sayre emphasized that complainants "are not going to have any more confidence in the fact that the [WCBO], who works for the Board, says that the Board's conduct was okay..." He called for an "external, objective" process, which would be "independent of the Board." 26

**Need for a complaints authority with "teeth"**

Mr. Sayre stressed that the new, independent complaints authority should have "teeth." That is, the ability to impose or recommend sanctions and financial remedies:

> [There are] two difficulties with [the WCBO] process; one is that it has no decision making authority... And he also has no power to order that there be any remedy where he finds that something was done that was wrong and it should not have occurred..." 27

Mr. Sayre recommended several types of remedies:

- **Damages for "actual proven financial losses" for "the most clear and most extreme cases"**
  "If the worker can show that there were extra losses suffered because of a failure to follow the Act or failure to follow the policy there ought to be a remedy for that - and ideally there ought to be a remedy that doesn't require some sort of very difficult law suit in the Supreme Court against the Board assuming there is jurisdiction to sue the Board for that kind of thing." 28

- The imposition of remedial or punitive sanctions for WCB employees found guilty of misconduct

**Apologies**

"More commonly there would be remedial orders [which] would go to a significant way to making the worker feel somewhat vindicated if there was simply a formal apology from the Board about the way the case was handled... [Some] of the most prominent people that have come before [the Royal Commission] were workers who said that "the Board didn't even ever apologize to me for what they did to me." That was a significant part of their
grievances... about the way they were treated - is that there was never even a recognition that anything was... A complaint process could restore some sense of vindication to a worker who hadn’t been treated the way they should be.”

**Punitive sanctions**

“...And the [punitive] type of remedy [would apply] only in cases where it is fully indicated that... the officer clean up their act [so that] this sort of conduct not be repeated by that officer. And that is probably the most important remedy in the sense of improving the system - that there is going to be a sense on the part of the officers that... "I don’t really want to be the most common name that this complaint tribunal sees in front of them when they... are dealing with these things - it is not going to be good for me; it’s not going to be good for my career... I don’t want the complaints department at my desk constantly... so I’ve got to try and make the right decision for workers and the Board.”

**A continued role for the BC Ombudsman**

Mr. Sayre recommended a continued role for the BC Ombudsman:

I wasn’t meaning to suggest that the Ombudsman be moved in or merged in. What I was suggesting was that part of the complaint processing - the complaint process at the front end involve some of the kind of things that the Ombudsman’s office has traditionally done. It wouldn’t replace that office; you would still have an Ombudsman. I think one of the advantages of an Ombudsman is if at the end of the day there is no formal appeal rights left; there is still somebody can come to who might be able to persuade the agency that they should voluntarily change what they have done. And that’s why when the Ombudsman’s office was first enacted - when the Act was first enacted in BC and so the Ombudsman wasn’t given any actual remedial powers; they were essentially intended to focus on situations where the appeal routes had been exhausted. Or where there were simply no appeal remedies or it was the kind of thing that couldn’t be appealed - like cases of being treated rudely or letters or phone calls not being returned or that sort of thing where it is a process to complain as opposed to effective complaints. And we think there’s still a role for - an important role to be performed there and it should continue to be performed by an Ombudsman’s office.

**A continued role for the labour process**

Mr. Sayre envisioned a continued role for the normal labour process in protecting employees' rights where discipline or dismissal is at issue which would parallel the complaints process:

The grievance process... should be able to protect the - any employee’s employment rights in the sense of their income if it is shown that they didn’t do anything wrong and that is still going to be adjudicated in ordinary terms... There are issues of justification... people saying, “look I’ve done well for ten years - I was under stress when I did this and you’ve got to take this into account in deciding whether to punish me.” Those are all Labour Relations concerns, but they don’t really answer the complaint of the worker who is affected and treated badly by the process. It’s a different focus.
Concerns about the routine referral by the BC ombudsman to the WCBO

Mr. Sayre also expressed the following concerns about the routine referral by the BC Ombudsman to the WCBO:

.. within the last few years there was a decision which I don’t believe has any legislative foundation to it. ... [c]omplaints to the [BC Ombudsman’s] office about the Workers’ Compensation Board are redirected to [the WCBO]...

What I’ve been told is that if [a complainant] doesn’t want to deal with the internal [WCBO] they can get an appointment with the provincial Ombudsman and the provincial Ombudsman won’t literally shut the door in their face but they have to know enough to demand that. The routine of the provincial Ombudsman’s office as I understand it is to refer all inquiries to the Board’s Ombudsman. 32

The problem is that when people go to the [WCBO] it is very often that the stage that they are at is that they have exhausted their appeal rights... At that point they are firmly viewing the Board as their adversary and their enemy and to be directed from an external Ombudsman’s office to an internal part of the Board to process your complaint is not going to be satisfactory to a lot of those workers. They are not going to feel that that is really providing the objective advisory view that an Ombudsman is supposed to provide. 33

Discussion: Should a new WCB complaint process be patterned after the police complaints process?

As noted above, Sayre proposed that his proposed new WCB complaint process be patterned after new police complaints process. The new BC police complaint system is complex and detailed. All of its features, stages and underlying principles could be examined in light of their applicability in the WCB context. However, given current time constraints, the following analysis highlights only those points which are most significant:

- **independence through appointment**

  Under the policing model, the Police Complaint Commissioner (PCC) has a high degree of independence, being an officer of the Legislature. This appointment process is designed to insure impartiality and counter the perception that "police investigate themselves." The WCBO does not enjoy the same degree of independence, being an employee of the WCB. The perception that "the WCB investigates itself" is therefore more likely to arise.

- **geographic independence**

  Complainants are given the option of lodging their complaints at the police station or at the office of the PCC, which is housed at a separate geographic location. This is because complainants may be reluctance to complain to the same person or at the same office where the conduct complained of took place. There is a perception that internal authorities may be biased in favor of the officer who is the subject of the complaint. Because WCB complainants generally lodge their complaints with an internal authority
situated within the WCB complex in Richmond, the perception of bias is greater than under the policing model.

- **investigation powers**
The PCC’s powers of investigation are much broader than those of the WCBO’s. The PCC has statutory authority to carry out several kinds of investigation. The PCC may direct that an external investigation be carried out, using either another municipal police force or the RCMP. He may also use a staff investigator from the Office of the PCC to write an independent report on the investigation. As well he has powers to arrange public hearings before a provincial court judge. While, the WCBO has access to WCB files and documents and has some authority to conduct investigations, these powers are not as extensive as the PCC’s and are not enshrined in legislation.

- **ability to impose sanctions**
The WCBO has no authority to impose or recommend sanctions of any kind for misconduct. These matters are dealt with by the WCB according to the collective agreement.

Under the policing model, it is the Chief Constable (or delegate) who imposes sanctions or corrective measures for misconduct. Internal matters involving misconduct which are deemed not to be a matter of public trust are dealt with internally according to standard labour law principles. However, where the PCC determines that the public trust is at issue, the complaints process applies. In such a case, if either the complainant or officer is dissatisfied with the imposition of discipline by the Chief Constable, he or she may ask the PCC to arrange a public hearing before a Provincial Court Judge. The PCC must arrange such hearing if there are grounds to believe it is in the public interest. The provincial court judge decides whether the complaint has been proved and whether disciplinary or corrective measures are warranted. The judge is mandated to affirm, increase or reduce disciplinary or corrective measures and may recommend that the Police Board provide financial compensation to complainants. This decision is appealable on question of law to a Court of Appeal.

- **authority to make recommendations about service and policy matters**
Under the policing model, a complaint about services or the policies of municipal police department are sent first to the appropriate Police Board for consideration and possible action. The Police Board then notifies the complainant about the action it has decided to take. After receiving a detailed summary of the steps which the Police Board plans to take, a complainant who remains dissatisfied may ask the PCC to review the matter. The PCC then has broad statutory powers to make recommendations; require status reports; review and comment on conclusions of Police Boards; recommend that the Attorney General initiate audit functions; and recommend that the Attorney General initiate a public inquiry under the Inquiry Act. By contrast, the WCBO is able to offer “impartial recommendations on issues within the jurisdiction of the office.”34

[Jurisdictional comparison in progress]
Preliminary Recommendations
A new, statutory, independent complaint process could be put in place, which could include some or all of the following features:

- a more independent appointment process;
- geographic independence;
- greater investigative powers;
- authority to impose or recommend remedial and punitive sanctions;
- authority to award financial compensation in serious cases; and
- authority to make recommendations about service and policy matters, including a follow up mechanism regarding implementation.

4 Transcript of notes taken at 2nd Phase Royal Commission Hearings, April 8th
Note the following qualifying statement accompanying these transcripts: "Please be advised the Hearing Summaries are notes taken of the proceedings and are not actual verbatim transcripts. Every endeavor has been made to insure that the content of the proceedings has been preserved and presented."
6 Peter Hopkins "Putting Fairness First at WCB Guest Comment ", Ombudsreport 1996, Annual Report of the Ombudsman,
7 Paraphrased from an information sheet, entitled "WCB Ombudsman", sent to Gerry Schive by WCBO Peter Hopkins on Jan. 9, 1997, p.1 (Hereafter, "WCBO Information Sheet") and a WCBO public brochure entitled "The WCB Ombudsman, when you feel you’ve been treated unfairly ", Jan, 1997 (Hereafter "WCBO Brochure").
9 The WCBO is appointed by the WCB senior executive committee and reports directly to the president. O. Darcovitch, "The Ombudsman", Building Safely, 1997, p.19.
10 Peter Hopkins "Putting Fairness First at WCB Guest Comment ", Ombudsreport 1996, Annual Report of the Ombudsman,
11 Peter Hopkins "Putting Fairness First at WCB Guest Comment ", Ombudsreport 1996, Annual Report of the Ombudsman,
12 WCBO Brochure. See WCBO Information Sheet for more details regarding access to information.
13 WCBO Brochure. The WCBO also cannot handle issues being considered by the provincial Ombudsman, cannot accept referrals from WCB staff, and cannot deal with Criminal Injuries Compensation Act complaints.
14 The WCBO is mandated to "Advise how the WCB system works and how outstanding issues might be resolved and assist in reaching the individual authorized to deal directly with a particular concern" [WCBO Brochure]. The WCBO office "helps people to deal with their
feelings of frustration so they become better equipped to deal with their problems.” [WCBO Information Sheet]

Peter Hopkins "Putting Fairness First at WCB Guest Comment ", Ombudsreport 1996, Annual Report of the Ombudsman,

Peter Hopkins "Putting Fairness First at WCB Guest Comment ", Ombudsreport 1996, Annual Report of the Ombudsman,


This conclusion has been drawn by comparing statistics in the 1995, 1996 and 1997 annual reports of the BC Ombudsman:
In 1995, 311 inquiries were received by the BC Ombudsman about the WCB. 298 were investigated. 1634 matters were closed.
In 1996, 168 inquiries were received by the BC Ombudsman about the WCB. 161 were investigated. 11005 matters were closed.
In 1997, 106 inquiries were received by the BC Ombudsman about the WCB. 112 were investigated. 576 matters were closed.
It is not possible to tell from these statistics which percentage of these inquiries were complaints (e.g. conduct) and which were adjudication/appeal matters.

The following complaints can be investigated by the BC Ombudsman:

- "A complaint that a decision: is unjust or oppressive; discriminates against a person or group; is unreasonable or arbitrary is based on wrong or irrelevant facts; is based on the wrong interpretation of the law.
- A complaint that an act: is done for an improper purpose; is done negligently; is done without adequate reasons.
  A complaint that a decision or act is unreasonably delayed.”


Note:
In 1992, Jenkins recommended that a complaint process be instituted specifically for addressing complaints about MRP Chairs:

A process should be established for receiving complaints with respect to Medical Review Panel Chairmen. For example, complaints from Specialists with respect to certain Panel Chairmen or complaints from workers with respect to their examinations by a certain Medical Review Panel (see also V - Appointments of Specialist Members,
IX - MRP Conduct and X - Quality Assurance Programs). This information would be confidentially coordinated by the Registrar, MRP. A special Quality Assurance Committee of three Chairmen (chosen by the Chairmen themselves) would be advisory to the Registrar, who would chair this committee. --“Jenkins Report” at p.62.

In 1992 the MRP Advisory Committee made the following “priority recommendations” respecting complaints and misconduct of MRP Chairs and MRP Specialists:

- The Committee concluded that there should be a mechanism for dealing with complaints about MRP Chairmen and MRP Specialists from workers, employers, MRP Chairmen, MRP Specialists and others. Such complaints would be directed to the Registrar who would bring them before the Committee for discussion. Depending upon the nature of the complaint the matter could then be raised in a general way at the next MRP Education Day. If that was not sufficient to resolve the problem, the Committee would have to consider dealing with the complaint in a more personal way. Complaints involving impropriety would be referred directly to the College of Physicians and Surgeons. Confidentiality would be maintained at all times.

- It was suggested that, in considering the guidelines for conduct of an MRP examination, the responsibilities of the Chairman when a Specialist is unable to properly conduct the examination due to substance abuse be defined.

- A Specialist should be terminated or not reappointed for "cause" which would include substance abuse impairing ability to conduct his or her duties, incompetence, proven impropriety and ceasing to be a member in good standing with the College.


In 1998, when asked about quality control and how complaints concerning MRP panel members are handled, one member of the MRP Advisory Panel gave the following explanation: If a complaint pertains to the quality of a certificate, it will be sent to the medical advisory committee. On the other hand, if the complaint relates to the conduct or ethics of a panel member, then the Medical College will handle it. Quality assurance is also addressed when the Registrar reviews the certificates. It depends upon the complaint.

--"Royal Commission on Workers’ Compensation Meeting with the Medical Review Panel Advisory Committee (Chairs)", January 21, 1998. Notes taken by Karen Ryan. Present: Dr. Ian Connell, Dr. Nigel Clark, Dr. Leonard Jenkins, Judge Gurmail Gill, Terry Robertson, Gerry Stoney, Patrick Lewis, Karen Ryan, at p.4.

Present: Dr, Nigel H Clark, Dr, Ian Connell, Dr. J. T. Sandy (MRP Chairs and Members of the Advisory Committee); Dr, Leonard C. Jenkins, MRP Registrar; Heather Green, Legal Advisor, Office of the Board of Governors.

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