DATE: August 26, 1997

FROM: Sharon Samuels

TO: Dewey Evans, Patrick Lewis, Karen Ryan

RE: Alternative Dispute Resolution During Claims Adjudication and Appeals: Draft in Progress.

As discussed, I have begun examining the topic of alternative dispute resolution ("ADR"). The following report summarizes my research in this area to date.

Please be aware that this is very much a draft in progress. Several key pieces of research are still missing:

- Most importantly, it has recently come to my attention that, last year, the Review Board began designing a pilot project for the use of ADR in the workers' compensation system. We have requested that the Review Board send us all information on this pilot project, but have not yet heard back. [December/97 update: We have now received this material but have not yet reviewed it].

- ADR is being used in a number of other jurisdictions as part of the workers' compensation system. Comprehensive statistics regarding the effectiveness of ADR (e.g., the degree to which formal appeals have been reduced since ADR was introduced) have so far been difficult to gather. This is probably due to the fact that ADR is relatively new to workers' compensation systems.
1. **ISSUES**

The term "alternative dispute resolution" ("ADR") refers to the use of neutral, trained mediators, negotiators or conciliators in the resolution of disputes.

ADR is an emerging trend, in both private and public law. Noted administrative law expert R.W. MacCauley has offered the following insight into why administrative agencies have been moving in this direction:

Many agencies hold hearings to resolve disputes, disputes which could better be resolved by conciliation or mediation, failing which there could be an adjudicative hearing by the agency. Examples of such agencies are Rent Review Agencies, Human Rights Commissions, Medical Dispute Boards and, for that matter, any agency, the mandate of which is to resolve a dispute or correct a complaint; the conciliator attempts to negotiate a settlement, which if accomplished obviates the need for an agency hearing. What we have to ask ourselves is why do we have to have a hearing if the complaint can be resolved without a hearing? Historically, agencies have always held hearings to resolve issues, but legislation could clearly enable an agency to utilize negotiators in the first instance.1

The main issue in this report is whether ADR should be introduced into the B.C. workers' compensation system as a mechanism for avoiding formal appeals --and if so, to what extent?

In addressing this issue, the following sub-issues will be examined:

**Can a case be made for using ADR in the B.C. workers' compensation system as a mechanism for avoiding formal appeals?**

- What advantages would be gained by using ADR?
- Do the experiences of other jurisdictions support the use of ADR?
- Is ADR in keeping with the historical and philosophical underpinnings of the B.C. workers' compensation system?
- Is ADR in keeping with principles of natural justice and administrative fairness?

**If a case can be made for using ADR, how should such a process be structured?**

- At what stage(s) of the adjudication or appeal process might ADR be appropriate?
- Who should participate in the process?
- Who should conduct ADR? (should they be independent or internal? What qualifications should they possess?)
- Which cases should be selected for ADR?
- What techniques and actions should ADR experts be permitted to take?
• Should agreements reached during ADR become binding on the parties who participated? If so, at what point?
• Should ADR be mandatory or voluntary?
• Should ADR be confidential or “without prejudice”?
• What effect should ADR have on regular adjudication and appeal processes?

2. B.C. LAW AND POLICY OVERVIEW

There are no provisions in the Act or regulations and no published policies which expressly mandate the use of ADR as an alternative to formal appeals.

Last year, however, the Review Board began designing a pilot project for the use of ADR in the workers’ compensation system. The following description is found in the 1996 Review Board annual report:

We have opened discussions with a variety of stakeholders, including the Workers' Compensation Board, representatives of labour, management, the Ministry of Labour and appropriate political figures on the development of a pilot project for the use of Alternative Dispute Resolution in the Workers' Compensation system. Although this project is in the very early design stages at the moment, we expect to make considerable progress during 1997 toward outlining a methodology and measurement process.¹

The Review Board plans to assess the impact of such techniques on their case load.¹

[Note: We have requested that the Review Board send us all information on this pilot project, but have not yet heard back].

As well, there are several processes in the Act and in published policies which are similar to ADR in some respects. The description below identifies these processes and compares them to ADR:

(a) The Workers' Adviser Office and the Employers' Adviser Office

the Workers' Adviser Office and the Employers' Adviser Office have roles in this area which partially resemble an ADR process.

Under s.94 (2), a workers' adviser must:

• give assistance to a worker or a dependant having a claim, except where the adviser thinks the claim has no merit;
• on claims matters, communicate with or appear before the Board, Review Board or other tribunal established under the Act on behalf of a worker or dependant where the adviser considers assistance is required; and
• advise workers and dependants regarding the interpretation and administration of the Act or regulations.
Under s.94(3), an employers' adviser must:

- give assistance to an employer respecting the claim of a worker of that employer or dependant, except where the adviser thinks the claim has no merit;
- on claims matters, communicate with or appear before the Board, Review Board or other tribunal established under the Act on behalf of an employer where the adviser considers assistance is required; and
- advise employers regarding the interpretation and administration of the Act or regulations.

Advisers also may bring errors in the Board's determination of a case to the attention of the Board before a hearing has been initiated.⁴

The adviser approach resembles an ADR process in some respects. For example, advisers maintain a degree of independence from the WCB, they interact with workers and employers in an informal setting and have a role in helping clients avoid formal appeals.⁵

However, there are significant differences between the adviser approach and ADR:

- Advisers are advocates for workers or employers. They "represent" and appear "on behalf of" their clients. By contrast, ADR experts are neutral.⁶

- Advisers have been defined as having a "counselling function".⁷ For example, a workers' adviser is mandated to provide:
  - information to workers, dependents, and their representatives regarding WCB policies and procedures, the appeal system and other resources; and
  - advice and assistance to workers, dependents, and their representatives enabling them to resolve issues through Management Review or appeals process by providing them with our assessment of claim merit, the evidence required and applicable law and policy.⁸

The mediation function of an ADR expert places little emphasis on providing information, advice and referrals. The primary emphasis is on discovering a basis for resolving the matter in a manner which is agreeable to all parties, using various mediation techniques.⁹ As well, an ADR expert may be empowered to arrange conferences or fact-finding sessions; visit work sites; summon witnesses; invite medical and other expert opinions; make recommendations to appeal authorities; and draft agreed statements of facts or statements of issues."¹⁰

(b) Reconsideration

"Reconsideration", which is conducted by internal claims adjudicators, managers and other Board officials subsequent to claims adjudication, is another process that should not be confused with ADR. Under this process, directors and managers within the
Compensation Services Division are empowered to "modify a decision or substitute their decision for any decision."\(^{13}\) Like ADR, the purpose of "reconsideration" is to encourage the resolution of disputes without resort to more formal appeal procedures. However, the important distinction is that no neutral, independent mediator is involved.\(^{14}\)

(c) The WCB Ombudsman
The WCB Ombudsman ("WCBO") role should also not be mistaken for an appeal driven ADR process. The office of the WCBO, established in April of 1996, has been described as "an internal public complaint process."\(^{15}\) 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\(^{16}\) 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.\(^{17}\)

There are several parallels between the WCBO and an appeal driven ADR process. For example, although the WCBO is an employee of the Board\(^{18}\), he is considered to be "completely neutral" and is expected not to "side with the WCB, its employees, the complainant, or anyone else." As well, he 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 has broad "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".\(^{19}\)

However, while the WCBO may be practicing a form of mediation with respect to public complaints, this is not so with respect to appeals. 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".\(^{20}\) It appears that, when such matters are brought before it, the WCBO functions as an information, referral and counseling service.\(^{21}\)

3. SUBMISSIONS

A number of workers and employers have submitted that ADR should be made available at various stages in the process. The following examples illustrate some of the underlying issues in this area:\(^{22}\)

- A workers’ union submitted to the Royal Commission that "third party intervention or mediation" would help workers, employers and the WCB listen to each other and resolve disputes.\(^{23}\)
• Another submission recommended that mediation be offered early on in the process:

...nobody can take action until there's a decision made by WCB. Why can't we head these problems off at earlier stages? It would make sense to me and save a lot of money and time [if someone met] with every worker to mediate... to head off these problems. Why do we have to go through this big bureaucracy?  

• An injured worker submitted that workers are currently, unfairly cast in the role of mediator:

..it is important that the injured workers' adjudicator, physician, physiotherapist, employer, and the WCB back-to-work officer all confer with each other, and all parties should be informed of all decisions. The injured worker should not have to be a mediator between the above mentioned.  

• One consultant's submission proposed that ADR should be conducted by experts who are independent:

[An] alternate dispute resolution should be before an independent third party system and a knowledgeable third party.  [The] adjudicator in alternate dispute resolution must have experience in the area.  

• A professional association submitted that, if mediation were used, the result would be that workers would not "languish for a year or so" and could avoid the appeals process. "[A] mediator or arbiter could listen to the facts" to "fix an obvious wrong". An "alternate dispute [resolution] system may be a remedy to the backlog of appeals".  

• Finally, an employer pointed out the importance of early mediation "without prejudice":

...months or a year or two years [is too long to go] through an appeal process with no support. ...I think there must be a simpler way... [P]erhaps the claimant, the adjudicator, the claimant's physician and a mediator [could] get together and try to work something out that's quick and does it, without prejudicing the appeal process if things don't work out at that level.  

4. CAN A CASE BE MADE FOR USING ADR IN BC?

(a) What advantages and disadvantages might result from using ADR?

(i) Advantages
MacCauley has listed the following four benefits to ADR:
"first to save money; second to speed up the process; third to achieve greater fairness and accuracy, and fourth to enable greater public and interested party input into the resolution of disputes and the disposal of public interest issues.

A B.C. Supreme Court judge recently noted the following additional benefits:

A professionally and sensitively conducted informal resolution or ADR process may diffuse tensions, prevent the matter from escalating and avoid unnecessary, expensive and stressful formal procedures.19

Another very important benefit may be a reduction in the current backlog of appeals.30

(ii) Disadvantages
[Note: More research is required in this area. Few disadvantages have become evident so far.]

One disadvantage may be that ADR could unnecessarily prolong the process in some cases (i.e., unsuccessful ADR sessions where a subsequent appeal has not been avoided). This problem could be at least partially solved by instituting an early screening process to weed out cases that are unlikely to benefit. This approach has been adopted in at least one jurisdiction (i.e., Ontario).

On the other hand, it may be argued that an early screening process may unfairly preclude some candidates. In jurisdictions where that view has been adopted, ADR must be attempted once a party requests it (i.e., Quebec, New South Wales).

Another disadvantage might be that an unsophisticated, unrepresented party may agree to a settlement which is less than what he or she would have been awarded on appeal. As will be discussed, this may be avoided by instituting a mandatory ratification requirement by the appeal tribunal. This would be geared towards ensuring that the agreement is equitable and that power imbalances between the parties have not produced unfair results.

These issues are examined in more detail later in this report]

(b) Does the experience of other jurisdictions support the use of ADR?
Some aspects of B.C. workers’ compensation laws and policies are clearly geared towards early resolution of disputes and avoiding formal appeals (i.e., internal reconsideration, workers’ and employers’ advisers and the internal ombudsman). However, it is evident that other jurisdictions have gone a step further towards achieving this goal, through the use of appeal driven ADR. This is a relatively new trend which has been emerging both in Canada, and in other parts of the world.

Because there is no legislation or policy in B.C. expressly mandating the use of ADR, it becomes especially important to examine other jurisdictions which do so. At least one Canadian province and several jurisdictions around the world have implemented
express provisions requiring the use of ADR. This occurs, for example, in Quebec, Michigan, Texas, Washington, New Zealand, New South Wales and Victoria.

As well, several jurisdictions have recently implemented pilot projects in this area:

- In Ontario, new legislation includes mediation provisions. As well, a new process, termed the "Early Resolution Process" ("ONT ERP") has been introduced by the Ontario Workers' Compensation Appeals Tribunal in order to "explore ways of resolving appeals brought to the Tribunal other than by holding full oral hearings."

- In New South Wales, in January of 1997, a pilot project has also been implemented:

  [A] new independent conference-based conciliation service was introduced on a trial basis to deal with compensation disputes. Under the trial, compulsory screening or conciliation of disputes is required before a worker may lodge a complaint with the Compensation Court.

Statistics gathered in two jurisdictions demonstrate the effectiveness of ADR, indicating that ADR reduces the number of formal appeals:

- In Washington, [in 1996?], approximately 80% of appeals went to mediation. Approximately 46% of these disputes were resolved through this process.

- In New Zealand, in 1996, 54% of disputes were resolved through mediation to the satisfaction of all parties.

[Note: So far it has been difficult to obtain statistics. This may stem from the fact that the approach is a relatively new one.]

(c) **Is ADR in keeping with the historical and philosophical underpinnings of the B.C. workers' compensation system?**

In 1989, law professor T. G. Ison asserted that conciliation and negotiation are contrary to the fundamental philosophical basis upon which the Canadian workers' compensation system was founded:

**Conciliation:** It is the essence of the Canadian systems of workers compensation that all issues relating to claims and assessments should be determined by adjudication. Indeed, one of the original objectives in the system design was to escape the process of negotiation that was used in relation to claims at common law. Any negotiation would, therefore, violate the principles of the system.

I have so far been unable to pinpoint the precise origin of the conclusion that an original principal was "to escape the process of negotiation that was used in relation to claims at common law." In fact, it is arguable that the underlying basis for ADR is in keeping with historical principles. For example, Mr. Justice Sloan praised the Canadian workers'
compensation schemes of his day for substituting "slower, complicated and expensive methods" with "prompt, simple, inexpensive" procedures. 37

Angela Weltz has recently prepared a draft paper for the The Royal Commission which sheds some light on this topic. 38 In it, she examines reports of past royal commissions in B.C. and Ontario and illustrates how various underlying principles have changed over time. She attributes this shifting to "changing expectations, values, [and] social conditions which affect employment" and notes that "reformers frequently refer back to these principles to support or reject changes to programs or legislation." 39 She has pointed out that several of these founding principles have been modified in modern times.

It is especially interesting that the early B.C. commissions of inquiries, and an early legislative committee report, rejected the notion that formal appeal procedures should be created. Much of the reasoning behind these rejections relates to the view that appeals are "formal", "legalistic" "impractical", unnecessary" and "contrary to the theory of administrative decisions basic to the system". 40

The fact that formal appeal mechanisms have become a typical feature in modern workers' compensation systems is clear evidence that some of the traditional thinking has been abandoned. This fact supports the position that the Royal Commission is not bound to accept historical principles which do not fit the modern context.

On the other hand, some of this historical thinking does make sense in the current context and can be used to support the use of ADR. Appeal procedures are formal and legalistic. As was predicted by the former commissioners, the introduction of formal appeals has resulted in "slower, complicated and expensive" processes. Assuming appeal procedures are here to stay, it makes sense to minimize their formalistic effect using ADR.

(d) Is ADR in keeping with principles of natural justice and administrative fairness?

[Note: I have so far found no evidence that ADR violates the principles of natural justice or procedural fairness (as it is practiced in workers' compensation systems in other jurisdictions). More research is required.]

5. IF A CASE CAN BE MADE FOR USING ADR, HOW SHOULD SUCH A PROCESS BE STRUCTURED?

If an ADR process is to be recommended for the BC workers' compensation system, some thought must be given to its structure. The following survey of ADR processes in other jurisdictions provides a good starting point.
(a) **At what stage(s) of the process is ADR initiated? Why?**

In Ontario, Texas, Washington, Michigan and New South Wales, ADR processes are initiated after a formal appeal has been launched. The purpose is generally to avoid more formal procedures associated with appeals.\(^{41}\)

(b) **Who participates in ADR?**

Normally, the participants include ADR experts and the parties to the dispute (i.e., the worker & employer). In some jurisdictions the parties’ representatives may also be included. As well, input may be sought from witnesses, medical authorities, other individuals and institutions.\(^{42}\)

(c) **Which cases are selected for ADR?**

In Ontario, appropriate cases are selected by the Workers’ Compensation Appeals Tribunal. "Staff at the Tribunal choose cases that they feel might benefit from an early effort to obtain a settlement or agreement between the parties, or [those where] it might be possible to resolve or clarify some of the legal issues."\(^{43}\)

By contrast, in Quebec and New South Wales, ADR may be initiated at the request of any party to a dispute.\(^{44}\)

(d) **Who conducts ADR?**

*(What qualifications do ADR experts they possess? Are they external or internal?)*

Although ADR experts may be drawn from a variety of professions, specialized qualifications and training is normally a prerequisite. For example, in Ontario, specially designated and trained Appeals Resolution Officers ("AROs") help the parties to settle or clarify issues:

> Some are lawyers; others are para-legals. All AROs are trained in mediation, negotiation and other ADR techniques. They are also familiar with the Workers' Compensation Act and with how the [Workers' Compensation Appeals] Tribunal has decided various types of cases.\(^{45}\)

The neutrality of the ADR expert has also been articulated in Ontario:

> The ARO is neutral as far as the parties are concerned. However, he or she must be satisfied that anything recommended to the [Workers' Compensation Appeals] Tribunal not only has the informed consent of the parties but also is, in his or her judgement, consistent with law and policy and consistent with findings of fact that might reasonably be made by a panel of the Tribunal.\(^{46}\)

ADR experts have a degree of independence in most jurisdictions.

For example, in Victoria, Australia, a "Conciliation Officer" under "Conciliation Services" is part of the "WorkCover" scheme. However, "Conciliation Officers are not subject to
the control or direction of WorkCover and WorkCover may not interfere with or overrule any decision of an Officer. Conciliation Officers are nominated by the Minister." This approach may be classified as internal, but with a significant degree of independence for ADR experts.

Similar structures are found in Quebec and Michigan.48

In Ontario, the degree of independence is even greater. An ADR panel (the "Early Resolution Panel") is appointed by the Workers' Compensation Appeals Tribunal -- which is a statutory body, independent of the Workers' Compensation Board. The Tribunal is the final level of appeal for employers and workers with disputes about workers compensation matters. ADR officers ("AROs") are selected in consultation with General Counsel, the Chair of the ADR panel and one or more Tribunal Counsel Office members. The ADR panel has a tripartite composition.49

(e) **What techniques are used and actions are taken by ADR experts?**
A variety of techniques may be employed during ADR. For example, in Ontario the following practices are followed:

> Various ADR techniques, such as mediation and negotiation may be used to try and resolve an appeal. [The ARO is mandated to ] discover a basis for resolving an appeal in a manner that is agreeable to all parties, and which the ARO is himself or herself satisfied to recommend. [The ARO may]: arrange telephone calls and tele-conferences; visit work places; conduct mediation session and caucuses; summon witnesses to attend fact-finding sessions; seek input from medical authorities, the WCB and other individuals and institutions; assist the parties and representatives in drafting recommendations to the Tribunal, agreed statements of facts and statements of issues.50

(f) **Are agreements reached during ADR binding on the parties who participated? If so, at what point?**
Agreements reached during ADR may become binding once all parties have agreed to the terms of the resolution. For example, in Ontario, nothing will happen to which the parties do not consent. The parties are free to "take the appeal out of the Early Resolution Process at any time and have it returned to the [Workers' Compensation Appeals] Tribunal's traditional process." Decisions of the Early Resolution Panel are considered to be final and binding decisions of the Tribunal.51

In Quebec, a conciliation agreement must be ratified by the internal review body, to ensure its conformity with the law. Once ratified, it is final and binding on all parties. "[SJS: more details required]52

[Note Karen's concern that an unsophisticated, unrepresented party may agree to a settlement which is less than what he or she deserves. Ratification by the appeal tribunal should be geared towards more than ensuring conformity with the law. It
should also be for the purpose of ensuring that the agreement is equitable (e.g., that power imbalances between the parties have not produced unfair results]).

(g) **Is ADR mandatory or voluntary?**

   In Ontario, Quebec, New South Wales and Victoria, ADR is voluntary.\(^51\) As well, in Ontario, cases will qualify only if all parties and representatives sign and return a consent form.\(^54\)

   By contrast, under the New South Wales pilot project, ADR is mandatory. Compulsory screening or conciliation is required in a conference-based format before a worker is permitted to appeal.\(^55\)

   As well, informal resolution may be a mandatory requirement required at an earlier stage, prior to ADR. For example, in Washington, informal resolution with another internal adjudicator is a mandatory step before an appeal and mediation will be made available.\(^56\)

(h) **Is ADR confidential and/or "without prejudice"?**

   The guarantee of confidentiality may be used during ADR to foster openness. For example, in Ontario, all disclosures and communications made during the process are considered confidential and are made "without prejudice, ...only for the purpose of achieving an early resolution of an appeal."\(^57\) Such communications do not form part of the record; are not to be shared with another party or representative in the appeal without consent of the party who made the communication; and are not to be used "in any other proceeding or elsewhere."

   However, the confidentiality rule is not absolute:

   The confidentiality rule does not apply to:

   - disclosures, admissions or other communications where the party making the communication consents to its inclusion in the record or to its other use;
   - medical information or medical opinions obtained with the consent of the party involved.
     This information shall become part of the WCB records;
   - disclosures, admissions or other communications that may evidence criminal activity.\(^58\)

(i) **What effect does ADR have on regular adjudication and appeal processes?**

   Generally, where ADR is unsuccessful, the matter is sent back to be dealt with through the traditional, formal appeal process.\(^59\)

   Where ADR is partially successful, a less formal process may be used. For example, in Ontario, where the ADR process is partially successful, the parties may agree to have outstanding issues resolved by way of an oral hearing before an Early Resolution Panel.
6. CONCLUSION

- there is a serious backlog problem at all levels of appeal;¹¹
- arguments have been made that ADR would relieve the backlog, save money, promote speed and accuracy, help alleviate the stress, complexity, and formality associated with appeals, and would reduce the number of formal appeals in future;
- ADR is being used in a number of jurisdictions for these reasons, and appears to have met with some success;
- ADR does not appear to violate any principles of natural justice or procedural fairness;
- the argument that ADR would conflict with philosophical underpinnings of the workers' compensation system is questionable;
- even if ADR does conflict with philosophical underpinnings, the commissioners are not bound to adhere to historical principles which do not fit within the modern context; and
- ADR is in keeping with the historical principle that "prompt, simple, inexpensive" processes are preferable to "slower, complicated and expensive" appeal procedures.

Based on the above factors, it is my preliminary conclusion that ADR should be given serious consideration as an option for the BC workers' compensation system. The survey of ADR processes in other jurisdictions could serve as a starting point in the development of a pilot project.

[Note: More information is needed before a final conclusion can be drawn]
ENDNOTES

1 MaCaulay, R.W., "Practice and Procedure before Administrative Tribunals" 1996, Release #5, Carswell, p. 30-19 (This section was written in 1989).
3 "Until the results of the Alternative Dispute Resolution pilot project are known and we can predict with accuracy what the impact of such techniques will be on the case load at the Review Board, the single person panel alternative is being enhanced. More single person panel hearings will be held throughout the province in 1997 in order to expand the number of hearings available to meet the increased case load." Ibid.
4 Perrin, Thorau & Associates Ltd., "Comparative Review of Workers' Compensation Systems and Governance Models", May 23, 1997 (Hereafter "Perrin & Thorau") Tab "B.C.", p.7. Advisers also "identify and analyze problem areas affecting the proper functioning of the Workers' Compensation system and actively press for needed improvements." They also "provide training and advice to others on how they can best assist, advise and represent workers and their dependents." -- -- Ministry of Labour, "Workers' Advisers Office" (information sheet).
5 Advisers may "provide advice to a claimant or employer that confirms the Board's decision and thus avert a potential appeal." [SJS: Ask Kim where this statement comes from] Perrin & Thorau, Tab "B.C.", p.7.
6 E.g., Workers' advisers "represent those clients for whom we believe that the system is not working where we consider that assistance is required." -- Ministry of Labour, "Workers' Advisers Office" (information sheet sent to Royal Commission).
8 Ministry of Labour, "Workers' Advisers Office" (information sheet sent to Royal Commission)
9 E.g., see "Questions and Answers About the Early Resolution Process", http://www.wcat.on.ca/-wcat/earlyres.htm. (Hereafter "ONT ERP")
10 This issue is discussed in more detail later in this report.
11 Authorized under See s.96(2) of the Act and described in the "Rehabilitation Services & Claims Manual" ("RSCM").
12 An application for reconsideration must cite new evidence not available at the time of original adjudication, or a mistake of evidence or law. [RSCM, p.14-4 & 14-5, AI, p.46.] Managers consider whether there may have been an error of law, or policy, possible fraud or misrepresentation. Board officers other than managers may correct errors on claims which do not involve in excess of 3 months retroactive reduction or cancellation of benefits, with consultation of their manager." [RSCM, p.14-6 to 14-8, AI, p.46, PLTC, p.24].
13 It is noteworthy that a professional association has submitted that mediation should be conducted internally, early on in the process, perhaps as an alternative to a manager's review. It was proposed that those conducting mediation could be:
14 ...
16 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").
The WCBO is appointed by the WCB senior executive committee and reports directly to the president. O. Darcovich, "The Ombudsman", Building Safely, 1997, p.19.

WCBO Brochure. See WCBO Information Sheet for more details regarding access to information.

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.

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]

All submissions cited in this memo are not necessarily exact quotes. They are excerpted from Commission summaries collected as of August 7, 1997.

V-UNI-021 v.doc., p.3. (Mona Sykes, BCGEU, (written submission to follow, not yet received])

Durano - v.doc, p.5.
D-CON-004v.doc.

It was also recommended that the ADR system be situated in the rehabilitation centre -- D-PAS-016v.doc., p.2.

Y-IEM-020v.doc, p.3. Another submission recommended ADR respecting employer appeals of costs. See D-CON-004v.doc.


[SJS: Most current stats needed here. See annual reports]

[SJS: verify, was it introduced in July, 1997?]

"A key provision included in the new legislation is a provision granting the Board authority to introduce mediation services -- this is consistent with the new vision of the Board and its role which is to guide and facilitate; it will provide workplace parties with resources and support to resolve disagreements themselves rather than relying on formal administrative appeal processes."
Perrin & Thorau, at Tab "Ontario", p.6. [SJS verify! Find new act, date of introduction].

ONT ERP.
Perrin & Thorau.
Perrin & Thorau. Tab "Washington", p.4, [SJS: More info needed! In what year? Do stats show whether ADR takes less time than appeals? verify that this is the correct interpretation of the stats]

Perrin & Thorau, Tab "New Zealand", p.6, footnote #8. [SJS: Talk to Kim. I am unsure whether this statistic should be included. Are appeals (resulting from unsuccessful complaint resolution) re claims adjudication or are they service and policy type complaints?].

T. G. Ison, LL.D., Professor of Law, Osgoode Hall Law School, "Workers' Compensation Law in Canada," Butterworths, Toronto. p.200. Ison also noted as follows: (However, at the final level of appeal, Quebec now provides that by the consent of the parties, the Appeals tribunal may give an assessor the responsibility of meeting them and attempting to reach an agreement). It is different in rehabilitation matters. Here it is generally appropriate for a board to engage in a discussion with the worker, and commonly also the employer, with a view to reaching an agreement."

Perhaps Professor Ison was referring to the following comments about the "historic compromise", by B.C. Chief Justice Sloan, made as part of his second inquiry in 1952: "As I pointed out in 1942, the adoption of a workmen's compensation scheme was done with the deliberate purpose of abandoning common-law duties, rights, obligations and remedies. Other rights different in concept and exclusive in operation were substituted. Both workmen and employers forgo common-law rights in a compromise for a common good"). [Sloan, Mr. Justice Gordon McG, "Report of the Commission Relating to the Workmens' Compensation Act", Victoria, Queen's Printer, 1952, p.162].

However, it must be remembered that an important justification for abandoning "common-law duties, rights, obligations and remedies" was to "avoid the emphasis on legal technicalities in the determination of awards. [Sloan, 1942, p.189] A. Weltz, "Principles and Definitions: An historical Dialectic of Public Policy Goals ", DRAFT, July 23, 1997.


ONT ERP:
ADR may be attempted once an appeal has been initiated.
QUE:
"Conciliation" is the first step in an internal review process and is initiated once a request for a review is received by the Commission de la santé et de la sécurité du Québec (CSST) (the CSST administers the workers' compensation system in Quebec). MICHIGAN:
Mediation is initiated in some cases as an attempt to avoid the appeal process.
TEXAS:
An "informal Benefit Review Conference" is the first step before binding arbitration may proceed.
WASHINGON:
Protested claims must first be referred to another adjudicator before they can be appealed. Once an appeal has been initiated, "formal mediation" is available.
NEW SOUTH WALES:
Conciliation is the first step in resolving disputes which would otherwise be resolved by the "Compensation Court".

[41] [ONT ERP, Perrin & Thorau, Tab "Michigan", p.3; Tab "Que.", p.6.; Tab "Texas", p.5; Tab "Washington.", p.4; Tab "NWS", p.10].

ONT ERP: the "Appeals Resolution Officer", "an "Early Resolution Panel", all parties to the appeal, representatives, (input may be sought from witnesses, medical authorities, other individuals and institutions).
QUE: A "conciliator", the parties to the review, [SJS: who else?]
MICHIGAN: Mediators, the parties.
TEXAS: "Benefit Review Officers", the parties.
NEW SOUTH WALES:
The Conciliation Officer, any party to a dispute, the employee, the employer, the insurer.
VICTORIA: Conciliation Officers, workers, employers, insurers."

[42] [ONT ERP, Perrin & Thorau. Tab "Que.", p.6; Tab "Michigan", p.3; Texas", p.5; Tab "NWS", p.10; Tab "Victoria", p.7.]

ONT ERP.

QUE:
Conciliation will be attempted in all cases where a review has been requested. [SJS: verify]
NEW SOUTH WALES:
"Any party to a dispute, the employee, the employer, the insurer can refer an issue to conciliation."
[Perrin & Thorau, Tab "Que.", p.6; Tab "NWS", p.10].

ONT ERP.

Perrin & Thorau. Tab "Victoria", p.7

QUE:
The CCST appoints a "conciliator", who is responsible for contacting the parties "to help them reach an amicable agreement." [SJS: How independent is CCST?] Assessors" also have a role in mediating disputes during the appeals process. [SJS: more details]

MICHIGAN:
A mediator. The Mediation process is part of the Bureau of Workers' Disability Compensation, a government department.
[Perrin & Thorau. Tab "Que.", p.6; Tab "Michigan", p.3].

"The Chair of the [Workers' Compensation Appeals] Tribunal has appointed an Early Resolution Panel ("ER Panel") consisting of worker and employer side members and a neutral Vice Chair. The Chair of the Appeals Tribunal is a non-voting member of the board of directors of the WCB."
"The ER Panel will review any settlement arrangement agreed to by the parties and recommended by the ARO and, where the Panel is satisfied with the recommendation, release a decision incorporating the arrangement. The ER Panel will also conduct oral or written hearings on particular issues referred to it by the ARO with the consent of the parties. " [Q & A, ONT ERP].

ONT ERP.

QUE:
"The conciliator has no authority to make the decision; they are simply a neutral third party whose role is to try to reconcile the parties. " [SJS: more info required]

VICTORIA:
"[The] Conciliation Service facilitates the resolution of workers' compensation disputes by involving all the parties in the settlement process to achieve a fair and mutually acceptable agreement, but discourages legal involvement.".
Perrin & Thorau. Tab "Que.", p.6; Tab "Victoria", p.7.

ONT ERP.

Perrin & Thorau. Tab "Que.", p.6.

ONT ERP, Perrin & Thorau, Tab "Victoria" p.7; Tab "Que.", p.6; Tab "NWS", p.10.

Q & A, ONT ERP.

ONT ERP.

Perrin & Thorau, Tab "Washington.", p.4;

ONT ERP.

ONT ERP. Note: in Texas, mediation is "off the record". Perrin & Thorau. Tab "Texas", p.5.

ONT ERP.

"If the [ADR] process is not successful in achieving a resolution of the appeal, the case may be transferred to another panel of the [Workers' Compensation Appeals] Tribunal for a hearing in the ordinary course."

QUE:
"If no decision is reached through conciliation, the process continues through the internal review process and is put forward for consideration by the appropriate review board."

TEXAS:
"If an issue is not resolved through mediation, the parties may elect to submit to binding arbitration."

VICTORIA:
If a Conciliation Officer is unable to bring parties to an agreement, the Officer may issue a direction (limited in nature and in relation to weekly payments only), or a certificate that a genuine disagreement exists. The worker may then proceed through the court system if he or she chooses.

[ONT ERP. Perrin & Thorau. Tab "Victoria", p.7; Tab "Que.", p.6.; Tab "Texas", p.5.]

[See annual reports for most recent stats on this?].