CHAPTER IV: APPEAL STRUCTURE: INDEPENDENCE AND NUMBER OF LEVELS

A. INDEPENDENCE OF APPEAL PROCESSES

Summary of Issue

[It is] broadly recognized that, in order to retain their legitimacy, agencies (particularly those at the quasi-judicial end of the continuum) must have, and be seen to have, a degree of independence.¹

The extent to which the WCRB, the Appeal Division and the MRP Department should be independent of the WCB was a topic of much debate in submissions to the Royal Commission. The degree of independence which should be afforded to administrative tribunals has also been a longstanding subject of debate in the courts and among academics, administrative practitioners and legislators. There has been little or no dispute that independence is essential to administrative tribunals. It is in defining and articulating the extent of this independence that disagreements have arisen.²

The following related sub-issues are examined below:

a. How should the term "independence" be defined?
b. What principles support greater independence for appeal bodies?
c. How should independence be balanced with accountability to government?
d. To what extent should appeal bodies be independent of the WCB? That is, to what extent should they enjoy:

- independence from the WCB within the governance structure;
- geographic independence from the WCB;
- independence in the appointment process;
- administrative independence from the WCB; and
- independence in creating appeal policies.

[Note that the independence of the MRP Department and process has been dealt with separately in Chapter V of this report]

Law and Policy

Independence of the WCRB and Appeal Division

Synthesizing laws and policies relating to the independence of the Appeal Division and WCRB has been a difficult task, as they are scattered in a haphazard fashion among a wide variety of sources. A Canadian Bar Association task force on the independence of administrative tribunals (the "CBA Report") recently acknowledged that the law in this area is problematic. It concluded that "a more comprehensive approach must be taken to the independence of administrative [tribunals] and that "the current piecemeal approach simply leaves too many gaps and too many opportunities for abuse."³

To a large extent, the degree of independence afforded to the Appeal Division and WCRB is derived from government and WCB policies (published and unpublished). As well, the Act
contains various provisions which affect independence. Administrative law principles, as considered by the courts, have played a part in the formulation of these provisions and policies in a more general sense. These statutory provisions, policies and decisions are described separately below, as part of a discussion on the elements of independence.

As well, as noted in the CBA Report, independence is a matter of international law:

Arguably, the case for independence is not simply a matter of good policy. International standards, not to mention Canada’s international obligations, are also involved. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Clearly, independent decision-makers, both judges and tribunal members, are necessary to give effect to these obligations.

1. Defining the term "independence" in the WCB context

In the strict sense, the term "independent" means to be "free from the influence or control of others; self-governing; free from persuasion or bias; objective." It also has been defined to include the ability to act "without fear of reprisal." However, this term is also frequently used more loosely, to describe administrative tribunals or agencies that are controlled and/or situated internally to some degree. For example, the role of the Chief Appeal Commissioner of the Appeal Division has been described in the Appeal Division's 1996 Operational Status Report as "internal but independent."

A more accurate description of the Appeal Division has been offered by the WCB’s Policy and Regulation Development Bureau:

"The Appeal Division is internal to the WCB, although it is intended to operate at arms length from the WCB's policy making and administrative functions."

For the sake of clarity, in this report, the terms "independent" and "internal" have been treated as antonyms. Under this usage the Appeal Division cannot be characterized as independent.

2. Public accountability and the independence of appeal bodies

It has been asserted that the perceived independence of an appeal tribunal is a matter of public accountability. The principle of "public accountability" refers to the responsibility of government officials to be accountable to the electorate. The B.C. Civil Liberties Association has explained the concept as follows:

...central to the notion of accountability ...is the concept of democracy in which citizenry are sovereign rulers. In a democracy, elected officials and public bodies are practical instruments by which the "people" make rules for government
themselves. The legitimacy of a government in a democracy derives solely from the people’s consent. It follows that public bodies must always remain open and accountable to the public.  

The relationship between independence and public accountability was also explored in the CBA Report.

It is our view that, like judicial independence, the independence of tribunals must be jealously guarded. This independence is required, not to protect tribunal members with immunity from review or criticism, but to benefit our system of justice…

It is surprising that so little attention has been paid to the principle of the independence of administrative tribunals, agencies, boards and commissions, given the role they play in the government of our society. Tribunals and agencies are the face of justice seen by the largest number of Canadians. Faith in our legal system will be shaken if the public does not have full confidence that their powers are being exercised with fairness and impartiality.  

Vancouver lawyer Murray Rankin described the benefits of independence and public accountability, as well as the consequences of ignoring these principles:

Independence has been termed the soul of the judicial system in Canada. As with the courts, if a board or tribunal is confident of its independence and projects an independent thinking to all those participating before it, then the public will have respect for the quality of justice dispensed by that board. …

Without this legitimacy, derived from an earned reputation for independent behavior, a board that is required by statute to reach its decisions in an impartial manner will no longer be perceived as anything more than a conduit for transmitting the will of the government of the day. Such a result in one Board can come to undermine the credibility of all other boards in a given jurisdiction. As respect for the quality of administrative justice suffers, regulatory tribunals, which constitute an increasingly vital institution of our democracy is undermined.

3. Balancing independence of appeal bodies with accountability to government

Many commentaries and reports have asserted that the need for independence should also be balanced with the requirement of tribunals to be accountable to government.  

Clearly a tension exists between the need for government agencies to have sufficient independence to retain their legitimacy as decision-makers and governments desire to direct those agencies and have them be accountable to government. The question becomes one of striking an appropriate balance between these two interests.
Margo Priest, former Chair of the Council of Canadian Administrative Tribunals has listed the following limitations on independence, imposed by government on tribunals:

- “tribunals, directly or indirectly must rely on the powers of government for the financial resources that allow them to operate”;
- “tribunals, as a part of government, have a responsibility to manage their financial and other resources in a manner consistent with government practice.”
- tribunals must operate within their mandate and according to the limitations set for them by the legislators in their constituent or enabling acts.”

Most commentators on this topic would not dispute the necessity for such controls.

A recent background paper, prepared for a roundtable discussion on tribunal independence and accountability, has also listed a variety of means by which appeal tribunals have been made accountable to governments. Many of these methods appear justifiable, while others arguably amount to an excessive degree of government control and an unacceptable infringement on independence:

While a definition of accountability [of tribunals to government] has proven elusive accountability has in one form or another manifested itself in the following ways:

i) expecting agencies to conduct their work within their budgetary and legislative boundaries;
ii) keeping the agency, or indeed the responsible Ministers, away from negative press or parliamentary scandals;
iii) keeping the Minister advised of any potentially volatile issues which he/she may be faced with;
iv) forcing agency chairs to answer to the government, through parliamentary committees, explaining how certain decisions were taken;
v) causing members who engage in improper or injudicious conduct to face disciplinary proceedings;
vi) denying agency members re-appointments where their history of decision-making is inconsistent with the values and principles of the government of the day;

vii) appointing members or chairs of agencies "at pleasure" rather than during good behaviour;
viii) reducing the length of terms of agency members appointments;
ix) increasing the use of part-time members;

x) judicial review or appeal of agency decisions to the courts (although given the level of deference accorded to many tribunals, this measure of accountability may be more theoretical than real);

xi) accepting direct responsibility for decision-making of administrative agencies and consequently seeking to exercise a measure of control over their work; and

xii) instituting yearly performance evaluations of agency members.
What this smorgasbord demonstrates is the range of ways accountability [to
government] has been made evident. Add to this, the confusing variety of
decision-making bodies, from quasi-judicial to policy-making, and any clarity
these issues may have enjoyed rapidly fades. Nevertheless, it is important to
discuss and agree on the level of accountability expected by governments and
agencies. The agreed level of accountability should be disclosed to the public as
well as the governmental players.  

4. **Extent to which the Appeal Division and WCRB enjoy the elements of independence**

   a. **Independence of the Appeal Division and WCRB from the WCB within the
      Governance Structure**

   **Summary of Issue**

   It is arguable that the independence (or perceived independence) of Appeal Division and WCRB
has been compromised by their placement within the same Ministry as WCB. Attempts have been
made to promote a degree of independence through governance structures or through functional
divisions within the organization. Despite this, it has been submitted that the Appeal Division's
proximity to the WCB within the governance structure may result in undue pressures to meet
Ministry or WCB objectives which conflict with its own. The following discussion examines the
validity of such assertions.

   **Policy**

   The WCB (including the Appeal Division and MRP Department) and the WCRB fall under the
Ministry of Labour.

   **WCRB:** The WCRB and the WCB are treated as entirely separate entities in terms of functional
organization and governance within the Ministry of Labour.

   **Appeal Division:** Although the Appeal Division is part of the WCB, its placement within the WCB
governance structure promotes some degree of independence. The administrative, policy-making
and appellate functions, which had all been previously assigned to the Commissioners of the WCB,
are now assigned to different authorities: The WCB's policy-making function is carried out by the
Panel of Administrators. The President and CEO carry out the administrative functions and the
appellate functions fall to the Appeal Division. The Chief Appeal Commissioner of the Appeal
Division attends meetings of the Panel of Administrators as an *ex-officio*, non-voting member.
This structure was originally proposed in the *Munroe Report* with the intention of promoting a
degree of independence while at the same time avoiding the "significant disadvantages of a free
floating 'external' tribunal."
Submissions and Reports

Munroe Report
In 1988, in the Munroe Report, the Appeal Division's proximity to the WCB within the governance structure was justified on the grounds that the policy-making function of the WCB would be better protected:

Whether one chooses an “internal” or “external;” system, it is irrefutable that only one body should be making policy, further, that this body should be the Board of Governors with the advice and assistance of the executive side of the system. From the experience of at least one Canadian jurisdiction, and this strikes us as predictable, the establishment of a purely “external” tribunal of last resort sets up a competition as to where the general policy-making for claims really resides. This is counter-productive both to the work of the system and to its overall credibility. 23

In order to avoid such “disadvantages of a free-floating external tribunal” the Munroe Report proposed the current Appeal Division structure.24

Appeal Division
Chief Appeal Commissioner Maureen Nicholls supported the reasoning in the Munroe Report. She recently noted that the placement of the Chief Appeal Commissioner as a non-voting member was designed to "ensure that [the Board of Governors'] policies are clearly understood by the systems' most senior adjudicators" and to position the Chief Appeal Commissioner as "a useful resource as to the actual impact of those policies in specific cases."25

Winter
Winter agreed with the Munroe Report that "the establishment of a purely external tribunal of last resort sets up a competition as to where the general policy making for claims really resides." He commented that this tension is "counter-productive, both to the work of the system and to its overall credibility." 26 However, he acknowledged that the current governance structure has been weak in terms of averting competition between the Appeal Division and the WCB respecting the creation of new policy. He commented as follows:

If [policy] cannot be effectively [controlled] through the governance system and the internal system, then [having an] external [system] probably is the better way to go. But you still have the same problem... I don’t think you are going to find any difference when you go external about policy creation and implementation. I think you are going to get tough decisions through the system and I think both the Appeal Division and the Review Board do the best they can. And both – in a lot of cases – make the same decision and both in the view point of the outside communities may look at that decision and say "hey you are creating policy." ...If people are convinced at the end of the day that the internal governance system cannot control policy then I don’t think internal works; I think it has to be external.27
**Stakeholder Counsel - Steeves**

Steeves approved of the Appeal Division’s proximity to the WCB within the governance structure, for the following reasons:

*There has to be some linkage between the appeal system and the Board. And the system we have currently isn’t perfect but it’s better than the proposal for the one level of appeal because we’d be concerned about the physical separation of the Board and the appeal system and you really have two worlds going on…*  

He also commented that, while it might be possible to accomplish a similar linkage between the WCB governance structure and an independent appeal process, it would run counter to notions of independence.

**Policy and Regulation Development Bureau**

In a recent briefing paper by the WCB Policy and Regulation Development Bureau it was suggested that there may be solutions to this problem other than an external, final appeal:

*Many people who advocate an appeal mechanism to review WCB decisions consider this inevitably means an external system. An internal system is commonly seen as ineffective, being subject to WCB control. On the other hand, the idea of an external appeal may be disputed on the basis that the real problem is one of WCB accountability. The Board may appear to be remote, intimidating and indifferent to the needs of workers and employers. The solution may be to increase WCB accountability rather than to create an appeal body.*

**Stakeholders’ Submissions**

A number of submissions to the Royal Commission from workers and employers asserted that the appeal process should be further removed from the influence of the WCB and its governance structure:

**Employers:**

For example, one employer stated that the appeal process should be “independent of but bound by the law and policies of the WCB.” Another employer called for an appeal process that is “outside the influence of the WCB for the purpose of… limiting the appearance of, or actual occurrence of a conflict of interest.”

**Workers:**

One workers’ union stated that there is "a lack of an independent appeal process" and stated that "the appeal commissioner should be independent from the WCB." Another union submitted that "by keeping an arms length appeals division we can ensure a fair and honest compensation system in BC and not just a rubber stamp organization." Similarly, an injured worker submitted that "...the appeal commissioners should be made independent from the WCB and an independent appeal process be set up.”
Stakeholder Counsel -- Sayre

J. Sayre took a similar position:

The Appeal Division is seen by many workers as a part of the Board (and hence, the worker’s true adversary), even though most experienced advocates do not believe that it is unduly influenced by its internal status. Since the perception of fairness itself is crucial, however, we would prefer to see the senior appeal tribunal independent of WCB.\(^{34}\)

He submitted that appeal tribunals should be independent, for the following reasons:

Disputes between an injured worker and the Board should be resolved by independent tribunals...\(^{35}\)

An independent review process would enable a worker who feels that the Board has violated its own policies or otherwise acted improperly in administering the claim to seek additional compensation for avoidable losses, and would give Board officers a real incentive to respect workers’ rights.\(^{36}\)

The Appeal Division is seen by many workers as a part of the Board (and hence, the worker’s true adversary), even though most experienced advocates do not believe that it is unduly influenced by its internal status. Since the perception of fairness itself is crucial, however, we would prefer to see the senior appeal tribunal independent of WCB.\(^{37}\)

More importantly, both the Appeal Division and the Medical Review Panels should be fully independent of the Board. It would be quite feasible to set up a common appeal registry for all three tribunals, with common procedural rules that would simplify the process for claimants and insulate the tribunals from suspicion that they are tools of the Board.\(^{38}\)

He also took the position that, if there are two levels of appeal, both levels should be independent of the WCB.\(^{39}\)

WCRB

The WCRB has offered the following recommendation on this topic:

The Appeal Tribunal established under the Workers Compensation Act ) [should] be external to the Workers' Compensation Board.\(^{40}\)

[jurisdictional comparison in progress]
Discussion
[Note: The following discussion uses generalities when referring to levels of appeal because it is uncertain how many levels of appeal will be recommended by the Royal Commission. The question of how many levels of appeal should be recommended is addressed in more detail in Part IV of this Chapter.]

It is clear from submissions that the perceived independence of the Appeal Division is compromised by its proximity to WCB within the governance structure. It is arguable that, in order to counter this perception, any final appeal tribunal established under the Act should be more independent in this sense.

There are other strong arguments supporting the view that, at a minimum, if there is to be more than one level of appeal, the final appeal should be independent:

- The current approach is inherently illogical. A primary purpose of having an external, independent appeal is to promote public confidence in the administration of justice. The fact that the independent WCRB process is reviewable by an internal appeal tribunal means that this purpose is defeated.
- It appears that no other jurisdiction follows this approach.
- A number of submissions to the Royal Commission have taken this position.

As well, the arguments in the Munroe Report do not appear to justify maintaining the current structure. One of the chief disadvantages which the Munroe Report sought to avoid was competition between the Appeal Division and the WCB respecting the creation of new policy. However experience has shown that the internal nature of the Appeal Division has not necessarily had the effect of preventing such competition:

- As discussed in Chapter I.C. of this Report, it is arguable that the Appeal Division has, in effect, inappropriately created new WCB policy or modified existing WCB policy.
- As pointed out by Winter, "the current governance structure has been weak in terms of averting competition between the Appeal Division and the WCB respecting the creation of new policy."

If it is true that the internal governance system cannot avert or control this competition, and there is no difference between the internal and external approaches in this sense, then the reasoning in the Munroe Report carries little weight. Furthermore, solutions to this problem have been described in Chapter I.C. which do not require an internal appeal structure.

As well, Nicholls concerns about communication between the governing body and the appeal tribunal could be addressed even if the appeal process was entirely independent of the WCB governance structure. For example, it could be a requirement that the head of an independent appeal tribunal meet with the Panel of Administrators on a regular basis to ensure that policies, and their impact, are fully understood.
Recommendations/Options

It could be recommended that:

- the Appeal Division (or a final appeal body recommended by the Royal Commission) should be entirely independent of the WCB governance structure; and

- the head of any independent appeal tribunal must meet with the Panel of Administrators on a regular basis to ensure that policies and their impact are fully understood.

[Note: It is possible that the Royal Commission will recommend establishment of a first level appeal in addition to a final second level independent appeal. The question of whether such a first level appeal should be independent is addressed in Part IV of this Chapter]

b. Geographic independence

Summary of Issue
It has been submitted that the Appeal Division's geographic positioning detracts from its independence.

Policy
The Appeal Division (and MRP Department) are located within the WCB complex in Richmond, while the WCRB is situated at an entirely separate location.

Submissions and Reports
Acting Chief Appeal Commissioner, Cassandra Kobayashi, has recently acknowledged that the geographic location of the Appeal Division may add to the perception that the Appeal Division is not independent of the WCB. However, she qualified this statement with the comment the WCRB is also sometimes viewed as part of the WCB despite its geographic separation.45

Discussion
When an appeal authority is physically situated within close proximity of the compensation authority there may be a perceived threat to the appeal body's independence. That is, there is a danger that objectivity could become clouded or a conflict of interest could arise by virtue of day to day familiarity. Geographic separation of the appeal body from the workers' compensation authority would eliminate this threat and be viewed as a visible indicator of independence.

[Jurisdictional comparison in progress]

Options/Recommendations
It could be recommended that the Appeal Division, (or any new independent body or bodies recommended by the Royal Commission) should be situated at an entirely separate location from the WCB.
c. Financial independence

Summary of Issue:

Financial control over budget allocation
The degree to which an appeal body's budgeting is directed or controlled by the government or the WCB has a bearing on its independence. The WCRB enjoys the most independence in this respect, as compared to the Appeal Division and MRP Department.

Financial control through salary
The degree to which an appeal body's members are controlled through salary by the government or the WCB has a bearing on its independence. In Valente v. The Queen, "financial security" was as an essential indicator of judicial independence. Financial security entails "security of salary or other remuneration, and where appropriate, security of pension: the essence of such security being the right to salary and pension be established by law and not subject to arbitrary interference by the executive." It has been held that the Valente principles should provide guidance in considering whether administrative tribunals are sufficiently independent, but that the same objective guarantees as higher courts are not required in applying these principles.

Law and Policy

WCRB:

Financial control over budget allocation
It appears that the WCB is responsible for all costs associated with the WCRB but has no control over its budget allocation. Under s.93(1) & (2) of the Act, all money needed for the administration of the WCRB must be paid for by the government -- but the WCB must, when requested by the minister, reimburse the government for all amounts so paid by the government. The WCB is to make such payments to the Minister of Finance and Corporate Relations out of the accident fund.

( Financial control through salary
The salary for the WCRB Chair "is tied to the management grid for British Columbia public servants."

Appeal Division:

Financial control over budget allocation
It is the responsibility of the Chief Appeal Commissioner to “develop operating and capital budgets for approval of the Panel” and to consult with or seek the approval of the Panel regarding… annual budgets and plans.

Financial control through salary
The salary of the Chief Appeal Commissioner of the Appeal Division "was initially set in relation to the salary for the CEO of the Board."
Submissions
The WCRB has offered the following recommendations on this topic:

The Chair [should] be required to submit an annual budget to the legislature through the Minister for approval and that the costs associated with that budget be billed directly to the Accident Fund of the Board. 54

Vice Chairs and members [should] be paid at a salary established in relation to Provincial Court Judges. 55

The salary for the Chair of the Appeal Tribunal [should] be established in relation to that of the Chief Judge of the Provincial Court. 56

Discussion

Financial control over budget allocation
The fact that the Appeal Division must consult with the Panel of Administrators respecting its budget and plans is questionable. That is, the degree of control exercised by the WCB over the Appeal Division arguably detracts from its independence. The WCRB proposal appears to offer a reasonable balance between accountability to government and independence:

- The fact that the budget would be submitted to the Legislature enhances the perception of independence.
- The fact that the budget is submitted through the Minister means that a necessary communication link is maintained.
- The fact that the budget is billed directly to the accident fund promotes independence from WCB control.

(Financial control through salary
O'Brien's recommendation most closely resembles the principles outlined in Valente, Supra. As well, six of BC's independent commissioners' salaries are linked to that of the Chief Provincial Court Judge. They are: the Auditor General; the Ombudsman; the Freedom of Information Commissioner; the Chief Electoral Officer; and the Children's Commissioner. This has been done to enhance their independent stature. Attorney General Ujjal Dosanjh recently commented that the link between the commissioners' salaries the judge's salaries is "based on an independent committee, free from political interference." 57

Recommendation

It could be recommended that:

- The Chief Appeal Commissioner or the Chair of any new Appeal tribunal be required to "submit an annual budget to the Legislature through the Minister for approval and
that the costs associated with that budget the billed directly to the Accident Fund of the WCB."

- Appeal tribunal members be paid "at a salary established in relation to Provincial Court Judges."

d. Administrative independence

**Discussion**
The degree to which an appeal body's administrative functions are directed or controlled by the government or the WCB has a bearing on its independence. In *Valente v. The Queen*\(^58\), "institutional independence" was another essential indicator of judicial independence.\(^59\) As discussed, it has been held that the *Valente* principles should provide guidance in considering whether administrative tribunals are sufficiently independent, but that the same objective guarantees as higher courts are not required in applying these principles.\(^60\)

**Law and Policy**

**WCRB:** The WCRB Chair "is responsible for the general administration of the [WCRB], including establishing panels, assigning duties to and supervising members and staff, and appointing a registrar and a deputy registrar."\(^61\) The Registrar is responsible for additional related administrative matters.\(^62\)

**Appeal Division:** In Decision of the Governors #7, the Governors determined that the Chief Appeal Commissioner would have the following duties in the management and administration of the Appeal Division:

- Implements the policies of the Governors with respect to the Appeal Division.\(^63\)
- Responsible for the overall direction of the Division and its staff.
- Coordinates the activities of the Appeal Commissioners and panels...
- Establishes panels of the Appeal Division...
  [M]anages the day-to-day operations of the Division, the Commissioners and staff.\(^64\)

The Chief Appeal Commissioner also assigns files, monitors case loads and "develops and maintains an effective organization structure in order to carry out the work of the Appeal Division."\(^65\)

The Appeal Division shares WCB facilities, the mainframe computer and the union. All positions within the Appeal Division, except for Appeal Commissioners who are exempt from unionization, fall within the bargaining unit in the same manner as other WCB employees.\(^66\)
Submissions and Reports

WCRB
A lack of administrative independence affecting WCRB productivity was described as follows in the 1996 WCRB Annual Report:

The number of appeals filed with the Review Board continued to climb in 1996. The “flow through” effect of appeals filed in 1995 and scheduled for hearing in 1996, has placed a severe strain on the Review Board’s capacity to hold hearings and issue findings. This was combined with the impact of government downsizing which has inhibited the Review Board from filling vacancies within the support staff. By the end of 1996 we had five vacancies within the secretarial ranks and this severely hampered our ability to complete written findings in a timely manner. We received a government exemption in order to remedy this situation on a temporary basis and hope to have a permanent remedy in place in the near future. In the meantime the typing backlog presents an ominous challenge for our support staff.67

The fact that a government downsizing hiring freeze impeded the WCRB from hiring its own staff is questionable, given that WCRB costs are paid for out of the accident fund and not general government revenues.68

WCRB:
The WCRB has offered the following recommendations on this topic:

*The statute or regulations* ) [should] set out the Chair’s authority for:

- The general administration of the Appeal Tribunal including preparation of the annual budget, hiring and supervision of support staff and establishment of appropriate administrative systems...
- Establishing policies and procedures for both the administrative and substantive conduct of the Appeal Tribunal’s business.
- The Chair [should] be held accountable for the provision of support staff and support systems required for the efficient and effective operation of the Appeal Tribunal.
- The Chair [should] be empowered to enter into agreements with the Crown and or any other agencies or corporations for the provision of staff or services to the Appeal Tribunal.69

[Jurisdictional comparison in progress]

Discussion:

It is not clear whether the WCRB proposals would avoid the lack of administrative independence described above. Under that proposal, the Chair has authority to hire administrative support staff and prepare the annual budget, which implies greater
control. However, the proposal also states that the Chair would be empowered to enter into agreements with government for the provision of staff. Since the nature of such agreements is not specified, a similar situation as described above (i.e., government downsizing affecting WCRB ability to hire staff) could result.

**Recommendations/ Options**

It could be recommended that the head of the WCRB or Appeal Division or any new independent Appeal body, should have authority to reallocate resources from its budget to hire needed administrative staff without the prior approval of government.

e. **Independence in the appointment process**

**Summary of Issue**

The appointment process for appeal tribunal members has a bearing on the independence of the appeal body.

The following questions are sub-issues:

- Who appoints and terminates appointments?
- Are appeal body members removable at pleasure or for cause?
- What lengths are terms of appointment?
- Should panels members be appointed with equal representation from employers and workers?

**Law and Policy**

In *Valente v. The Queen*, "security of tenure" was a third essential indicator of judicial independence. Security of tenure is satisfied where a judge may "be removable only for cause, and that cause be subject to independent review and a determination by a process at which the judge affected is afforded a full opportunity to be heard." The condition's essence is "a tenure... that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner." In an administrative context, the fact that an appointment is for a fixed term may be an additional factor indicating security of tenure.

**WCRB:**

The Chair, Vice Chairs and members of the WCRB are appointed by the Lieutenant Governor in Council (LGC). The WCRB submission elaborates as follows:

[The WCRB has] established, through practice, a process whereby the Chair directs a selection procedure and makes recommendations to cabinet, through the Minister, for appointments. Over a decade of usage of this process has become
accepted by cabinet and helps to ensure both that the tribunal has competent members appointed and that the cabinet is insulated from charges of political favouritism in the appointment process.\textsuperscript{76}

The Chair appoints the Registrar and Deputy Registrar from among the members\textsuperscript{77} and establishes WCRB panels, appoints members to panels, may terminate appointments and may fill vacancies.\textsuperscript{78}

Term lengths are not specified in the Act or regulation. WCRB vice chairs and members’ terms have varied from one to ten years, with most being between three and five years.\textsuperscript{79} They are appointed at pleasure.\textsuperscript{80} New members’ terms were recently increased from one year to two years, at the suggestion of current WCRB Chair Michael O’Brien.\textsuperscript{81} His appointment is at pleasure with a five year contract respecting salary and benefits.\textsuperscript{82}

Vice Chairs are selected in equal numbers from persons having backgrounds associated with employer and worker interests.\textsuperscript{83} Conflict of interest guidelines for adjudicative and support staff of the WCRB have also been adopted by the WCRB to reduce the appearance of bias.\textsuperscript{84}

\textbf{Appeal Division:}

The Chief Appeal Commissioner of the Appeal Division is appointed on a contractual basis\textsuperscript{85} by the Panel of Administrators for a fixed term agreed on by the Chief Appeal Commissioner and the Panel of Administrators. Her current term is for one year\textsuperscript{86} and she is eligible for reappointment or for extension of her appointment.\textsuperscript{87}

The Chief Appeal Commissioner appoints the commissioners in accordance with the policies of the governors (now Panel of Administrators)\textsuperscript{88} for "an agreed upon term."\textsuperscript{89} She is also empowered to terminate a designation to a panel and may fill any vacancy on a panel.\textsuperscript{90} The Chief Appeal Commissioner and the Appeal Commissioners cannot be removed from their positions because the Governors/Panel of Administrators disagree with an Appeal Division decision, but may be removed by the Panel at any time for just cause.\textsuperscript{91} The Chief Appeal Commissioner may recommend the removal of an appeal commissioner for cause to the Panel of Administrators.\textsuperscript{92}

Three member appeal panels are comprised of both representational and non-representational members.

\textbf{Submissions}

The WCRB has recommended that Chair and Panel Member appointments to an independent appeal tribunal should include the following characteristics:

\textbf{Chair:}

A job description [should] be established for the position of Chair of the Appeal Tribunal
The vacancy, when it occurs, should be publicly advertised.

The appointment of the Chair of the Appeal Tribunal should be by order-in-council for a ten year renewable term.

The Chair should be entitled to a minimum one year notice or pay in lieu of notice of non-renewal of his order-in-council and the failure to provide such notice will automatically extend the appointment for one year.

The statute or regulations should set out the Chair’s authority for:

- The assignment of appeals and work to order-in-council appointees.
- The establishment of job descriptions and screening procedure for the recruitment of order-in-council appointees.
- Recommending appointments.
- The conduct of performance appraisal of all order-in-council appointees.
- Recommending renewal of order-in-council appointments.
- Recommending removal for cause of order in-council appointees.
- Recommending progression in the salary scale for order in council appointees.
- Appointing senior officers from amongst the ranks of order-in-council appointees.

Panel Members

- Job descriptions should be established by the Chair for the positions of Vice Chair and Member.

- There should be public notice of vacancies for vice Chairs.

- The appropriate interest groups should be notified when vacancies exist for Members.

- A selection procedure be developed and published.

- Initial appointments for Members and Vice Chairs be for three years with subsequent appointments of five years, renewable.

- Members and Vice Chairs be entitled to a minimum six months notice or any in lieu of notice of non-renewal of their order-in-council and that failure to provide such notice will automatically extend the appointment for six months.
- The statute or regulations [should] set out the Chair’s authority for... hiring and supervision of support staff...

[Jurisdictional comparison in progress]

Discussion

The current WCRB appointment process is clearly more independent from the WCB than that of the Appeal Division. The Chair, Vice Chairs and members of the WCRB are appointed by the Lieutenant Governor in Council. By contrast the Chief Appeal Commissioner is appointed and can be removed by the Panel of Administrators.

The detailed recommendations offered by the WCRB regarding appointment terms, renewals, removal and performance appraisal appear to offer a reasonable degree of independence. However, as there are no other detailed submissions on this topic, and the jurisdictional comparison has not yet been received, there is little basis for comparison.

Recommendations/Options

[Pending jurisdictional comparison]

f. Independence in creating appeal policies

Summary of Issue

The independence of an appeal body may be compromised where the workers’ compensation authority is involved in creating appeal bodies' procedures and practices.

Law and Policy

In BC the WCRB enjoys a higher degree of independence in this regard, as compared to the Appeal Division (or MRP Department): WCRB:

The WCB does not have authority under the Act to create or superintend WCRB policies (although the WCB appears to have create at least one such policy despite this fact). Under s.89(5), it is the LGC who is empowered to make regulations respecting the practice and procedure on appeals to the WCRB, the terms and conditions under
which WCRB panels operate and any other matter related to the WCRB’s administration and efficient operation. Under s.89(6) the WCRB has the power to conduct appeals “in the manner it considers necessary,” subject to regulations made by the LGC. The LGC has set out a number of WCRB procedures in the *Workers Compensation Act (Review Board) Regulation* BC Reg 32/86. The WCRB has outlined many additional procedures in its *WCRB Policies and Procedures Manual*.99

**Appeal Division:**

Under s.85.1, the Chief Appeal Commissioner of the Appeal Division is empowered to determine practice and procedure for the conduct of Appeal Division appeals. However, this authority is subject to any policies, by-laws or enacted resolutions of the Governors (Panel of Administrators). The Chief Appeal Commissioner must "consult with or seek the approval of the Panel regarding the determination of the practice and procedures for the conduct of appeals by the Appeal Division."100

As well, under s.85(7), the Chief Appeal Commissioner of the Appeal Division is deemed responsible to the Governors for the general operation of the Appeal Division, and must "implement the policies of the Governors with respect to the administration of the Appeal Division." This has resulted in published policies, issued by the Governors, dealing with "the administration, practice and procedure of the Appeal Division" (e.g. Decision #75 of the Governors).101

**Submissions**

**WCRB**

The WCRB has recommended that "the Appeal Tribunal [should] have full authority to establish its own policies and procedures relating to the conduct of an appeal."102

**Appeal Division - Acting Chief Appeal Commissioner**

Acting Chief Appeal Commissioner Kobayashi was asked whether she had observed any problems with the fact that authority has been given to Governors/Panel of Administrators set of practice and procedure for the Appeal Division. She responded that "there haven’t been any points that come to mind as to where we have had a problem. Our working relationship is good between the Appeal Division and the panel of administrators."103

**[Jurisdictional comparison in progress]**

**Discussion**

The WCRB clearly enjoys a greater degree of independence in this regard, as compared to the Appeal Division. While the WCRB is subject only to the regulation-making powers of the Lieutenant Governor and Council, The Appeal Division consults with the Panel of Administrators and must implement its policies concerning the Appeal
Division. The WCRB’s proposal appears to be a reasonable suggestion for furthering the independence of the appeal process

**Recommendations/ Options**

It could be recommended that the Appeal Division (or any new, independent appeal body or bodies recommended by the Royal Commission) should have "have full authority to establish its own policies and procedures relating to the conduct of an appeal."
B. NUMBER OF APPEAL LEVELS

Summary of Issue

The appropriate number of appeal levels was a frequent topic of debate in submissions and at hearings before the Royal Commission.

While employers, WCB Compensation Services staff and the WCRB submitted that there should be fewer levels of appeal, submissions from workers recommended maintaining the current number of appeals, or adding an extra level.

Law and Policy

The following chart illustrates the number of levels in current appeal structure:

There are two internal informal mechanisms for reviewing the adjudication of claims, which may be undertaken as an alternative to a formal appeal. These are the "manager's review" and the "employer protest." Initiation of these informal mechanisms does not preclude subsequent formal appeals.  

There are three formal levels of appeal respecting compensation claims adjudication, being the WCRB, the Appeal Division and the MRP. The WCRB appeal is followed by an appeal to the Appeal Division, an internal body. As well, the MRP process which
exists as an entirely separate level of review, may be initiated at various stages of the process (i.e., immediately after initial claims adjudication, subsequent to a WCRB appeal or after an appeal to the Appeal Division).
The MRP process is often referred to as the third and final level of appeal, since its decisions are conclusive and not open to review under s.65 of the Act.\textsuperscript{105} [The MRP process is discussed as a separate topic in Chapter V of this Report].

Although the WCRB appeal is the most independent of the formal appeals, it is not the final level of appeal. The WCRB appeal is followed by an appeal to the Appeal Division, an internal body.

Note that the initial claims "adjudication" has sometimes been compared to a level of appeal. However, this is a misnomer. The term "adjudicator" is normally used to refer to a person who makes judgements in a quasi-judicial capacity. That is, a person who acts in a role similar to a judge in the context of an administrative hearing or appeal. Under those circumstances, the full range of procedural protections are available to claimants, according to the principles of administrative law -- including the principles of natural justice and procedural fairness.\textsuperscript{106}

Under the BC model, the usage of the term "adjudication" is somewhat misleading. The function of WCB adjudicators is actually more akin to that of an insurance adjuster. Procedural protections afforded by natural justice and procedural fairness are available only to a limited degree. It is only at the first level of "appeal" to the WCRB that a hearing requiring full procedural protections takes place.

\textbf{Submissions}

1. \textbf{Submissions advocating a multi-level integrated approach within one appeal body}

\textbf{WCRB}
The WCRB offered the following recommendations on this topic:

- A single appeal body (the Appeal Tribunal) \textbf{[should]} be established as the only formally structured appeal level within the workers’ compensation system in British Columbia.
- The Appeal Tribunal \textbf{[should]} have multiple process options available to it \textbf{in order to} match the complexity of issues \textbf{with an appropriate process}.\textsuperscript{107}

2. \textbf{Submissions advocating the same number of levels}

\textbf{Workers' Submissions}
While submissions from workers also expressed concern about delays, they did not recommend eliminating any of the levels of appeal as a solution to the problem. On the contrary, one workers’ union commented that what employers are trying to do in suggesting that there be only one level of appeal is to "lessen the chances of an appeal
being accepted.” Furthermore, the union argued that having only one level of appeal would give employers an “unfair advantage”:

[It] would not be a "level playing field" because "employers seem to be able to discuss matters with the Board more easily than other advocates are. If that injured worker is not represented [he or she] has an even more difficult time. [I] can’t see how you can delay those three levels without taking something away.108

Stakeholder Counsel - Steeves

J. Steeves made the following submission on behalf of the BC Federation of Labour:

We support the current appeal structure. We believe that two de novo appeals and one appeal on medical issues is an appropriate appeal system for workers’ compensation matters.

Our reasons for this position are as follows:

1. The issues that come up in workers’ compensation appeals are often extremely important. Whether an injury arose in the course of employment or whether a disease was caused by the work can be issues fundamental to the well being of workers and their families. Similarly, entitlement to a pension or its amount can be of vital importance to workers. The rights and responsibilities that arise from workers’ compensation legislation are of such significance that they need full and complete protection through more than one level of appeal to ensure a just and fair result.

2. There is a role for an initial level of appeal that hears large numbers of appeals in a relatively informal manner and then other levels make decisions in a different way. The emphasis at this first level is on getting through a large volume of appeals rather than crafting decisions so they will be immune from judicial review. The approach should be more of an inquiry than an adversarial proceeding. This first level requires the jurisdiction to make findings of fact, law and policy as well as the authority to consider expert evidence in areas such as medicine and other scientific areas. Some physical separation from the Board is desirable although being separate from the Board does not mean to workers that an organization is independent of the Board.

3. Having more than one level of appeal provides for a process of refinement of issues and facts. Much like the court system or other appeal systems there is value in having a first appeal decision which (apart from making a decision that is acceptable to the parties which may not be appealed further) focuses issues and facts so that the work of second and third level appeals is more efficient. This applies to all issues in the system but for very complicated cases there is refinement that permits subsequent levels of appeal and perhaps the courts to deal with the large and important issues.

4. When there is more than one level of appeal the perception of the parties is that they will be receiving an independent second appeal of their case. An internal
reconsideration does not provide the clear perception that a second level of appeal is independent.

...In his submission to the Commission Mr. O'Brien set out a detailed proposal for a one level appeal system.

The B.C. Federation of Labour opposes this proposal for the following reasons:

1. There would be no savings in cost by moving to this system (O'Brien 70-71).

2. One level of appeal is held out as a way of getting decisions faster (O'Brien 71). If this is the objective, and we agree it is an important one, then it can be accomplished by a statutory requirement to get decisions out within 90 days.

3. The proposal is not really a one level appeal but 4 or 5 levels in one: mediation, adjudication, health care advisory board, reconsideration and a right in the Board to make a referral to court. It is not clear why an appeal that went through all of these steps would take less time than currently.

3. Submission advocating a greater number of levels, including a final appeal to court

Stakeholder Counsel - Sayre

J. Sayre recommended that none of the levels of appeal should be eliminated, for the following reasons:

No system involving so many difficult decisions can be expect to get them all right the first time around. The most recent issue of the Reporter series, Volume 14, Number 1, consists of ten decisions of the Appeal Division concerning applications to reconsider their own previous decision because of an error of law going to jurisdiction. Over half of those applications were successful. If a generally respected tribunal which usually has the benefit of a Review Board decision to clarify the facts and issues still makes acknowledged serious errors, how can it be seriously suggested that a person whose family income for life may depend on the outcome should only have one level of appeal? The Employment Insurance system allows three appeals (including a judicial review as of right by the Federal Court of Appeal), and that decision usually involves less than ten months of benefits. The Canada Pension Plan also allows three levels of appeal for disability and other pension decisions, two of which are conducted as full "de novo" hearings. We submit that rather than restricting the current appeal options, workers should be granted a final right of appeal to the courts.

On behalf of injured workers, we totally oppose the suggestion that one or more of the current levels of appeal be abolished (or combined) in order to save costs and reduce the overall length of the appeal process. Achieving a fair outcome is of such vital importance to the worker and his or her family that one level of appeal is simply not acceptable. CPP, EI, and BC Benefits, social benefit
legislation which may have less impact on a person’s welfare than a compensation appeal, all allow two or three levels of appeals and reviews. In considering the position of the employers’ groups and the Review Board that there should only be one level of appeal, it is important to beware of false economies. The Appeal Division would not have been able to achieve the high level of worker satisfaction it now enjoys if the Review Board did not resolve the majority of appeals, and if it did not produce a focused decision and record in the cases that do go on. A single new tribunal will not have these advantages, and will require more time to determine the same number of appeals that are now coming before the Review Board.

In our view, the work performed by the existing tribunals will reappear before any new tribunal, perhaps in new forms, and will require nearly as many resources. For example, the Review Board’s submission acknowledges that a mechanism will be needed to allow parties to seek reconsideration of a decision which is believed to be based on an error of law or jurisdiction. It will not be possible to maintain a neat line between such “legalistic” proceedings and applications relying in part on new evidence. Whatever the Act might say, workers and their advocates will feel compelled to bring deserving cases before the reconsideration panel, in the hope that it will find a way to reach a fair decision on the merits. Like many tribunals faced with such pressures, the reconsideration panel may “push the envelope” further and further in order to find ways to give relief in cases where the formal appeal decision now seems unfair. Whether it does so or not, much time will be occupied deciding applications by workers who realize only after their appeal is rejected that they did not present their best evidence and arguments.111

Sayre also submitted that, in addition to the existing levels of appeal, "there should be a final right of appeal de novo to the courts respecting issues with important consequences to injured workers."112 His explanation was as follows:

For many injured workers, the only tribunal in which they would have that level of confidence is the regular court system. The Commission heard from many workers who said that they wanted their day in court. Sometimes this was described as wanting to sue the Board, sometimes as wanting to appeal, and sometimes as wanting the courts to administer benefits. However the individual workers put it, what they wanted was the ability to have a judge, whom they perceive to be truly independent of the Board’s influences, determine their dispute.

Because of the overriding importance which workers’ compensation has in the lives of significantly disabled workers, we recommend that a special form of appeal to the court be added to the existing appeal structure. In proposing this, it is only fair to point out that there is a fairly strong sentiment in the worker advocacy community opposing such a step, because of fears that appeals to the court would necessarily be complex, expensive, and time-consuming, and that they would lead to much greater involvement of lawyers in the system. The latter may be inevitable anyway, if workers are to receive the level of representation they need in resolving disputes over the most significant legal disputes they may ever face in their lives.113
...As for appeals to the Court necessarily being expensive, complex, legalistic, and time-consuming, that will depend on the procedures and rules which are developed. Courts can operate quite informally, if the legislation indicates that they should do so. Procedures can also be informal. Quite a few years ago the Supreme Court of Canada ruled that Family Court judges could not issue injunctions to enforce custody orders. This led to development of the Supreme Court’s "Interim Family Rules" which expressly overrode the general rules of court and established a very informal, free process for bringing such issues to the Court. Typically, hearing in Chambers are quite informal, and a separate time could be set aside to enable the Court to hear compensation appeals separately from other cases. The judges assigned to hear such cases could be limited to a modest number (as needed in light of the workload) who would develop expertise as they hear more and more cases.\footnote{114}

**WCB - Bates**

Bates, on behalf of the WCB, opposed Sayre's proposal for an additional, final appeal to Court, for the following reason:

*If we go back to the original concept that the WCB system was based on you will recall that Meredith talked about getting rid of the nuisance of litigation…You will recall that he was a Supreme Court judge and that he had extensive experience in the court system, however, his opinion was that notwithstanding the expertise of the courts the system could be better served by an administrative tribunal wherein expertise could be developed and brought to bear in an inquiry system. That is the system that he recommended and that is the system that has been implemented in Canada*.\footnote{115}

4. **Submissions advocating fewer levels**

**Stakeholder Counsel - Winter**

Winter also rejected Sayre's proposal for an additional, final appeal to Court, for the following reasons:

- It would compound the problems already existing with multiple levels;
- Courts "would be most unhappy about having things thrust at them when they already have scarce resources and scarce time."
- It would probably result in time delays.
- it would contribute to litigiousness "because when people hear court people think law and lawyers."
- "Mr. Sayre also made the comment that if you are going to get rid of a level then give us court. If you accept that there is a problem with multiple levels a trade off with court is not doing anything for us – it just leaves the same problem."\footnote{116}
He also made the following comments about employers views on the subject:

One of the higher – if not the highest - priority issues for employers when we come to the issue of appeals... is the issue of how many levels of [formal] appeal there should be in the system. ... [Employers] seem to be ...in support of combining all three, current, formal levels into one formal appeal tribunal. What there is not unanimity on within the employer community is whether it should be an internal or an external appeal tribunal.\textsuperscript{117}

He listed the following concerns which employers have with the multiple levels of the appeal system:

- delays and inefficiencies
- lack of finality
- the "treadmill" effect;
- inconsistencies in decision-making between multiple levels of appeal;
- inconsistencies resulting from the fact that each level has its own procedures and administrative rules;
- appeal levels taking different views of their jurisdiction to hear appeals (i.e., the WCRB will hear appeals relating to any matter in the WCB decision letter, while the Appeal Division takes a broader view);
- complexity and resulting confusion;
- dual appeal lines (e.g., where the worker appeals to the WCRB and the employer appeals to the Appeal Division at the same time);

He concluded that there should only be one level of appeal.\textsuperscript{118}

**Employers' Submissions**

Many employers submitted that there should be fewer levels of appeal in order to reduce delays, backlogs, complexity, frustration, costs and the "treadmill" effect.\textsuperscript{119} The following submissions to the Royal Commission elaborate:\textsuperscript{120}

A significant amount of time and effort is expended on the part of employers in preparing for and participating in the appeal process at each level. (This is compounded when a subsequent round of appeals is undertaken with the same claim). There is a significant amount of time and effort expended by the Board as well, with substantial duplication of effort and process which results in cost increases ultimately born by employers.\textsuperscript{121}

The current appeal system is perceived as being unwieldy, unfair, lacking accountability, and a system where appeals are not addressed in a timely manner or with finality.\textsuperscript{122}

File movement through three appeal mechanisms must look like a Los Angeles highway interchange.\textsuperscript{123}

...Given these three formal appeal procedures, there is a need to develop a more streamlined and cost-effective model that also ensures some greater degree of finality.\textsuperscript{124}
A number of employers proposed that there be only one level of appeal,\textsuperscript{125} while another recommended that "there [should] be two opportunities to state your case."\textsuperscript{126} Several employers called for the MRP process to be "rolled into" one of the existing levels of appeal.\textsuperscript{127} Another suggested that the current structure encourages appeals because ". . . with an average allow rate of 30%, it is in the worker's best interest to proceed until all avenues of appeal are exhausted."\textsuperscript{128}

**WCB Compensation Services Staff**
WCB Compensation Services staff have submitted that "[There is a] need to streamline the number of appeal avenues." And that "Multiple levels of appeal do not bring any sense of timeliness or finality to the process."\textsuperscript{129}

**[Jurisdictional Comparison in progress ]**
(some incomplete jurisdictional information was available - it has been incorporated below)

The following Jurisdictional comparison on the topic was offered in a WCB briefing paper by the Policy and Regulation Development Bureau:

*The 1991 Administrative Inventory commented that it was "difficult to conceive of a system that permits more levels of appeal than [the B.C. system]." Its review was primarily directed at the pre-1991 system. However, the system in effect since 1991 is no less complex....*\textsuperscript{130}

*In 10 of the 11 other Canadian jurisdictions, there is at least one level of external appeal. There appears to be a consensus that an external appeal is needed to provide a safeguard against possible abuse of power by WCBs, and to preserve openness and procedural fairness.*

*No other multi-level appeal system in Canada provides access to a medical review panel as a separate level of appeal. Five jurisdictions provide access to independent medical advisors to resolve bona fide medical disputes, but their findings do not bind the appeal tribunals. Aside from medical appeal bodies, most of the Canadian acts provide 2 or 3 levels of appeal. They can be roughly grouped as follows:*

<table>
<thead>
<tr>
<th>System</th>
<th>Provinces</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal review and external appeal body</td>
<td>Nova Scotia and Quebec</td>
</tr>
<tr>
<td>Internal review body, external appeal body, and potential review by governing body on policy issues</td>
<td>Alberta, North West Territories and the Yukon</td>
</tr>
<tr>
<td>External appeal body, with potential review by governing body on policy issues</td>
<td>Manitoba, Ontario and Prince Edward Island</td>
</tr>
<tr>
<td>External appeal, with an appeal to the court</td>
<td>New Brunswick (Also allows review by governing body) and Newfoundland</td>
</tr>
</tbody>
</table>
None of the other provinces is similar to B.C. in having an external body with a further internal appeal outside the Board’s governing body. Where 3 levels exist, the first is generally an internal review system, roughly equivalent to the administrative review procedures in B.C. Otherwise, the systems largely comprise an external appeal body, with an additional mechanism for review on policy or legal grounds.

These features appear to reflect two major interests:

- the need for openness to prevent abuse of power by the Board; and
- the need for the WCB to be able to ensure that its policies are applied in the adjudication of individual matters.

The former need is generally met through an external tribunal, the latter by an internal tribunal. There are obvious disadvantages in creating multiple levels of appeal. The appeal bodies use resources that might be employed in other areas of the system, add complexity and tend to delay the final resolution of issues. One way of reducing this may be to have different criteria of access to the various levels. 131

The following chart depicts Perrin and Thorau's initial survey of appeal levels and their independence in Canadian provinces. Note that it differs from the Policy and Regulation Development Bureau chart.

The following points should be noted:

- The focus is on claims adjudication only, not employer assessments.
- Normal judicial review to the courts has not been counted as a level of appeal. However, where it appears that a process similar to judicial review has been specifically mandated under the workers compensation statute it is included.
- Clarification is needed regarding the degree of "independence" of appeals -- i.e. Is the "independent" or "external" or "separate" appeal body entirely separate entity in terms of functional organization and placement within the governance structure of the ministry?

<table>
<thead>
<tr>
<th>Independent Appeal?</th>
<th>Internal Appeal?</th>
<th>Informal?</th>
</tr>
</thead>
<tbody>
<tr>
<td>BC</td>
<td>- 1st level, WCRB, to independent agency under Ministry of Labour, all members appointed by LGC. A separate entity in terms of functional organization and placement within the governance structure of the ministry.</td>
<td>2nd level (Appeal Division) is internal to WCB, also under Ministry of Labour</td>
</tr>
<tr>
<td></td>
<td>2nd level (Appeal Division)</td>
<td>MRP (usually 3rd level) MRP dept is internal but uses independent doctors</td>
</tr>
<tr>
<td>Province</td>
<td>1&lt;sup&gt;st&lt;/sup&gt; level, &quot;appeal to an internal review process&quot;</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; level, &quot;independent Appeals Commission&quot;</td>
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<td>----------</td>
<td>-------------------------------------------------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>Alta</td>
<td>?</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; level, &quot;independent Appeals Commission&quot; Members appointed by LGC</td>
</tr>
<tr>
<td>Man</td>
<td>?</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; level, &quot;independent Appeal Commission&quot;</td>
</tr>
<tr>
<td>NB</td>
<td>No</td>
<td>1&lt;sup&gt;st&lt;/sup&gt; level, new system- used to be internal. Now &quot;Appeals Tribunal is a separate body.&quot; Chair of Appeal Tribunal is directly responsible to the board of directors of the WHSCC for operations of the tribunal</td>
</tr>
<tr>
<td>Nfld</td>
<td>?</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; level, &quot;external review body&quot;, Appointed by the LGC.</td>
</tr>
<tr>
<td>NWT</td>
<td>?</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; level, &quot;separate Appeals Tribunal,&quot; appointed by the Minister (is this independent of the WCB?) 3&lt;sup&gt;rd&lt;/sup&gt; level appeal to the courts where there is a denial of natural justice or an excess of the WCB's jurisdiction (is this just normal judicial review)</td>
</tr>
<tr>
<td>NS</td>
<td>?</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; level, WCAT, &quot;independent&quot; appeal agency. Funding provided by the WCB. 3&lt;sup&gt;rd&lt;/sup&gt; level, appeal to the courts with leave. (on what basis? Which court?)</td>
</tr>
<tr>
<td>Ont</td>
<td>?</td>
<td>3&lt;sup&gt;rd&lt;/sup&gt; level, &quot;statutory external appeal process.&quot; &quot;Independent of the Board (Chair of Appeals Tribunal is a non voting member of the Board of Directors of the WCB)&quot; Soon to be WSHIAT (any changes in the board?)</td>
</tr>
<tr>
<td>Province</td>
<td>Review Process Details</td>
<td>Statute Details</td>
</tr>
<tr>
<td>----------</td>
<td>------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>PEI</td>
<td>2nd level, to &quot;Appeals Tribunal&quot;, independent of the WCB</td>
<td>1st level, to Director of Client Services</td>
</tr>
<tr>
<td>Que</td>
<td>New. Proclaimed yet? &quot;review or appeal process is moved outside the CSST&quot;</td>
<td>&quot;No longer any internal appeal process for decisions, just an administrative review&quot;</td>
</tr>
<tr>
<td>Sask</td>
<td>Only MRP is independent. Chair is appointed by the Board in consultation with the Sask Medical Assoc. 2 additional members are selected by the person requesting the review from a list of names provided by the Board.</td>
<td>1st level, &quot;referral to an Appeals Committee 2nd level, &quot;referral to the Board of Directors&quot; Both levels require new information or mistake in judgment</td>
</tr>
<tr>
<td>Yukon</td>
<td>No</td>
<td>1st level, &quot;internal review by 3 senior staff members&quot; (is this informal? 2nd level, &quot;panel of members of the board of directors&quot;</td>
</tr>
</tbody>
</table>

**Discussion**

Three components of the following analysis have more obvious, less controversial answers.

Firstly, it would be reasonable to conclude that there should be at least one external appeal for the following reasons:

- As noted in the jurisdictional comparisons, 10 of the 11 other Canadian jurisdictions have at least one external appeal
- No submissions have asserted that there should not be an external appeal.
"There appears to be a consensus that an external appeal is needed to provide a safeguard against possible abuse of power by the WCB, and to preserve openness and procedural fairness."  

Secondly, as discussed, it would be reasonable to conclude that if there is more than one level of appeal, the final appeal should be independent for the following reasons:

- A number of submissions to the Royal Commission supported this view.  
- The current approach is inherently illogical. A primary purpose of having an external, independent appeal is to promote public confidence in the administration of justice. The fact that the independent WCRB process is reviewable by an internal appeal tribunal means that this purpose is defeated.  
- It appears that no other jurisdiction follows this approach.

Thirdly, strong arguments have been presented in Chapter V in support of the view that the MRP process should be integrated with the final appeal process.

More difficult questions are:

- whether there should be a second, third or fourth level of formal appeal;  
- if so, whether any of these appeals should be limited in scope; and  
- whether there should be a single appeal with multiple options (i.e. the WCRB proposal of 4 or 5 levels in one appeal body, including mediation, adjudication, a Health Care Advisory Board, reconsideration and a right of the WCB to referral a matter to court);

Arguments supporting a single level of appeal, fewer levels of appeal, and appeals which are limited in scope are as follows:

- an underlying purpose of workers in suggesting that there be multiple levels of de novo appeals is to increase the chances of an appeal being accepted ("more kicks at the can");  
- reducing the number of appeal levels (or reducing the scope of appeals) would reduce delays, backlogs, complexity, frustration, costs and the "treadmill" effect; jurisdical disputes between appeal levels would be eliminated;  
- consistency of results may be enhanced;  
- administrative duplication may be avoided;  
- multiple levels of appeal do not bring any sense of finality to the process;

Arguments supporting several levels of appeal are as follows:

- An underlying purpose of employers in suggesting that there be only one level of appeal is to lessen the chances of an appeal being accepted;  
- having only one level of appeal would give employers an unfair advantage;  
"achieving a fair outcome is of such vital importance to the worker and his or her family that one level of appeal is simply not acceptable";
"The rights and responsibilities that arise from workers' compensation legislation are of such significance that they need full and complete protection through more than one level of appeal to ensure a just and fair result"138; It is appropriate that different levels assume different roles (e.g. an initial less formal, appeal level, a higher level that crafts decisions to be immune from judicial review); having several levels of appeal promotes refinement and focusing of issues; the reconsideration process under a single appeal would gradually take on the characteristics of an appeal process; an internal reconsideration under a single level of appeal does not promote the perception that the second level of appeal is independent. "An internal reconsideration creates the perception that there is no independence to the reconsideration function. In some cases this may be a real problem since it is sometimes more difficult to overturn colleagues' decisions."139 If an objective in having on level of appeal is to promote the speedy resolution of appeals, this can be accomplished though other means (e.g. mandatory time limits); and The WCRB proposal for one level is actually for 4 or 5 levels in one and would not save time (although it might eliminate jurisdictional disputes between levels).

Clearly there are very strong arguments on both sides of this issue. The view that there is no right or wrong answer to this question is supported by the wide range of solutions adopted in different jurisdictions. It appears (so far) from the Royal Commission's jurisdictional comparisons that:

- One jurisdiction has no external appeal.
- At least 9 Canadian jurisdictions have at least two levels of appeal, with the first being internal, and the second being external.
- Five Canadian jurisdictions have a third level independent appeal, usually on limited grounds.
- New Brunswick has three independent levels (the second to court, the third to court on limited grounds) and no internal appeals.
- New Brunswick and Quebec no longer have internal appeals (unclear how many levels in Quebec).

Sayre's proposal appears extreme, in terms of recommending an increase in appeal levels because he has proposed three independent, de novo levels of appeal. It would arguably be unreasonable to add an additional de novo appeal to court without eliminating any levels of the current appeal structure, for the following reasons:

- It appears that no other Canadian jurisdiction has three, external de novo appeals [confirmation required].
- Most jurisdictions with a third appeal to court have limited grounds (e.g., questions of law or new evidence) [verification required].
- The current structure already arguably has too many levels of appeal. Adding an additional one would compound already serious problems of backlogs and delays.
- Involving the courts in a full hearing runs counter to the inquiry model.
Options/ Recommendations

Based on a balancing of the above considerations, it could be recommended that the following model be adopted:

An integrated two level system could be administered by one appeal body, with an integrated MRP process (as described in Chapter V) which enjoys all of the elements of independence (as described in Part A of this chapter):

- independence from the WCB within the governance structure;
- geographic independence from the WCB;
- independence in the appointment process;
- administrative independence from the WCB; and
- independence in creating appeal policies.

The first level appeal within this body could have a wide scope, including

- a hearing de novo based on the inquiry model;
- no restriction of final appeals to questions of law;
- not restricted to hearing matters raised in the decision letter and notice of appeal; and
- a substitutional role.

The composition of appeal panels could be tripartite.

On reviewing the notice of appeal, an appeals officer of the independent appeal authority could choose from the following options (as proposed in the WCRB submission)\textsuperscript{140}:

- "investigate and clarify the nature of the appeal through telephone, fax, e-mail, letter or personal contact with the appellant";\textsuperscript{141}
- initiate ADR [this option may require further research];
- refer the issue back to the WCB for readjudication "where there is significant new evidence that will likely change the decision or where there is an error on the face of the decision"\textsuperscript{142};
- "facilitate resolution of the appeal by providing additional information to the appellant where appropriate"\textsuperscript{143};
- refer the matter for an appeal hearing where ADR has either failed or appears to be inappropriate.\textsuperscript{144}

A second level appeal to a different division of the same independent appeal authority could have a similarly wide scope -- except that it could be on the record. It could be a requirement that the appeal be heard by a panel other than that which originally heard the matter. The second level division could be geographically separated from the first level.
A final appeal to court could be made available on limited grounds (e.g. error of law).

[Note: The above proposed model attempts to balance the following aims:

- the proposed degree of independence ensures public accountability without compromising accountability to government;
- integration of the MRP process eliminates administrative inefficiencies and duplications, promotes independence and brings a greater sense of finality to the process;
- integration of two appeal levels under one appeal authority eliminate jurisdictional disputes between levels and administrative duplication and promotes consistency;
- a wide scope first level appeal ensures full and complete consideration of the matter and reaffirms that the inquiry approach is preferable in the WCB context;
- a second level appeal is slightly narrower, while still promoting refinement and focusing of issues;
- the fact that the second level appeal is on the record promotes quicker resolution;
- the requirements that the appeal be heard by a panel other than that which originally heard the matter and that the second level division be geographically separated from the first level address concerns that the second level appeal is merely a reconsideration function with little independence from the first level.]
The question which then must be asked is, what is the appropriate degree of independence for various tribunals and agencies? In turn, what protections should exist in law to establish that degree of independence? Where independence is guaranteed and accountability to the government is reduced, how is accountability to the Canadian public to be maintained."

--Submission by the Worker's Compensation Review Board to the Royal Commission on Workers' Compensation, Jan 31, 1998 at p.13.

Note: After consulting with numerous "heads and members of federal tribunals and agencies, as with administrative practitioners, academics and others" a Canadian Bar Association task force on the independence of administrative tribunals ("the CBA Report") identified following issues in this area:

"The issue of independence of administrative tribunals has been the subject of much study, debate and discussion in Canada since the establishment of the first administrative tribunal in 1903 under the Canada Railway Act. Universally, commentators, theorists, practitioners, legislators and the courts have agreed that administrative tribunals in the larger sense, and the members of those tribunals in the narrower sense, must be independent. The issue that remains open to debate is what constitutes independence and what constitutes mere trappings of independence."


Such principles may be imprecise and have been subject to varying interpretations. For example, in Valente v. The Queen [1985] 2 SCR 673; 24 DLR 4th 161, the Supreme Court of Canada considered the meaning of the word "independent" in relation to a provincial court judge and isolated three essential indicators of judicial independence -- security of tenure; financial security; and institutional independence. A number of subsequent cases held that the Valente principles should provide guidance in considering whether administrative tribunals are sufficiently independent. However, it was held that such tribunals do not necessarily have to provide "the same objective guarantees as higher courts" in applying these principles. As a result, it is difficult to pinpoint with precision the degree to which these principles are applicable.

Resolution No. 217 A (III) (10 Dec. 1948).


As well, the appeal body may be subsumed into the ministry's broader operations. The WCRB has recently offered the following commentary on this topic:

“The experience of many tribunal administrators and Chairs has been one of frustration and conflict in attempting to manage the tribunal’s activities as part of a ministry. Ministry officials tend to treat tribunals as simply another "branch" without regard for the independent nature of the tribunal. As most tribunals are relatively small, when compared to operating branches of a ministry, their administrative needs in areas such as information services and personnel are often viewed as being secondary. The same problems will hold true with those tribunals which are internal to the Workers’ Compensation Board. On the other hand, it is almost axiomatic that tribunals must have fiscal and administrative accountability within the framework of government. ... Although the operations of an appeal body cannot be subsumed into the operation of a larger ministry of the Crown without impinging on the appeal body’s independence to make unfettered decisions, tribunals cannot expect to operate in a vacuum. There must be some method of recognizing the tribunal’s fiscal accountability and the legislature’s overriding interest to ensure that the rights of citizens are properly protected.”

--Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998 at p.31.

[SJS: and administrative links? to be investigated i.e. re typing pool and hiring freeze. See s. 1.c.(iii) of this paper.]

"Report and Recommendations to the Minister of Labour and Consumer Services by the Advisory Committee on the Structure of the Workers’ Compensation System of British Columbia," (1988), WCR 231 ("The Munroe Report")

Confidential memorandum from Maureen Nichols to the Panel of Administrators, entitled "Role of the Chief Appeal Commissioner and Appeal Division", dated August 26, 1996 at p.3.

"Report and Recommendations to the Minister of Labour and Consumer Services by the Advisory Committee on the Structures of the Workers’ compensation System of British Columbia (1988), 8 WCR 231 (the "Munroe report") at p.240.

Ibid.

A confidential memorandum from Maureen Nichols to the Panel of Administrators, entitled "Role of the Chief Appeal Commissioner and Appeal Division ," dated August 26, 1996 at p.4.


"Royal Commission on Workers’ Compensation in BC Submission Summary," 2nd Phase Hearings, Stakeholder Counsel, Notetaker: Steven Noble, April 15 AM, 1998, at p.32.


"Royal Commission on Workers’ Compensation in BC Submission Summary," 2nd Phase Hearings, Stakeholder Counsel, Notetaker: Steven Noble, April 15 AM, 1998, at p.3.


Y-IEM-028.txt at p.3.

UNBC.doc at p.9.
D-INJ-319. doc at p.2.


J. Sayer, "Royal Commission on Workers’ Compensation: Presentation on Behalf of Injured Workers" 1998 at p.3


"Royal Commission on Workers’ Compensation in BC Submission Summary," 2nd Phase Hearings, Stakeholder Counsel, Notetaker: Steven Noble, April 15 PM, 1998, at p.28.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.

In Valente v. The Queen, [1985] DLR 4th 161 at p.172 it was held that it is fundamental to public confidence in the administration of justice that a tribunal be perceived as independent.

For example, the WCRB recommended that a single "Appeal Tribunal established under the Workers Compensation Act ) [should] be external to the Workers’ Compensation Board. --Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998. Sayre took a similar position: "Since the perception of fairness itself is crucial... we would prefer to see the senior appeal tribunal independent of WCB].

Confidential: Internal memos from Maureen Nicholls, Chief Appeal Commissioner to Corporate Development and Planning concerning legal and procedural matters/ areas of dispute between the WCRB and the Appeal Division.

Confidential: Internal memo, “re Appeal Division Decisions” from Michael Karton to WCRB members, undated ('92 or post '-92). Stamped "personal & confidential. See also Karton, M, Law Policy and Adjudication at the Workers Compensation Board of B.C. December 1997, p.23-34.

“Royal Commission on Workers’ Compensation in BC Submission Summary,” 2nd Phase Hearings, Stakeholder Counsel, Notetaker: Steven Noble, April 15 AM, 1998, at p.32.

From March 6, 1998 presentation by WCB on appeal processes. My notes, p.11.


Summary of Valente excerpted from CIAJ Background Paper at p.4.

Regie des Alcools, [1996] SCJ No.112. (flexibility is expected in applying the principles).

[SJS: Find source, confirm with O’Brien].

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998 at p.28.


Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998 at p.28.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.


Summary of Valente excerpted from CIAJ Background Paper at p.4.

Regie des Alcools, [1996] SCJ No.112. (flexibility is expected in applying the principles).


Ibid.

Under section 82(a)(i) of the Act, the Governors (Panel of Administrators) are empowered to select and define the functions of the Chief Appeal commissioner. Section 85.1 of the Act provides that, subject to any policies of the Governors (Panel of Administrators) and any bylaws or resolutions, the Chief Appeal Commissioner may determine the practice and procedure for the conduct of appeals by the Appeal division.


Presentation notes of Appeal Division Chief Appeal Commissioner Cassandra Kobayashi, from March 6, 1998 presentation by WCB on appeal processes, at p.2.


Under s.93(1) & (2) of the Act, all money needed for the administration of the WCRB must be paid for by the government – but the WCB must, when requested by the minister, reimburse the government for all amounts so paid by the government. The WCB is to make such payments to the Minister of Finance and Corporate Relations out of the accident fund.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.


Summary of Valente excerpted from CIAJ Background Paper at p.4.


Ibid.


Act, s.89.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998 at p.27.

Reg. s.2. WCRB submission, ibid. [SJS: For further discussion re independence and appointments see WCRB submission, p.27 to p.31.]

Reg.s.3.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998 at p.29.

Royal Commission meeting with WCRB members, Feb.9, 1998.


Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998 at p.28. [SJS: See p.28 of the WCRB submission for recommendations on this topic.]

Reg., s.3(2)(a)

WCRB Manual, ch.O.

Ibid.

WCRB press release announcing appointment.

Act, s.85(4).

Act, s.85(1)(b).

Confidential memorandum from Maureen Nichols to the Panel of Administrators, entitled "Role of the Chief Appeal Commissioner and Appeal Division", dated August 26, 1996 at p.2.

Act, s.85.2, Decision of the Governors #7, p.28..
Act, s.85(3),(4) & (5).


Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.

Note re tripartite composition of panels:
The tripartite approach has a lengthy history in the BC WCB context. As well none of the stakeholder counsel advocated doing away with this approach. Advocates of this approach argue that equal representation promotes balance, fairness and objectivity. Critics assert that it is a recipe for conflict and argument. Analysis pending jurisdictional comparison. Perrin & Thorau:  jurisdictional comparison so far indicates that the independent appeal panels in New Brunswick, NWT and Ontario, and the 2nd level internal appeals in the Yukon, have panel members who represent both employer and worker interests. The comparison is silent on this issue for other provinces.

This issue has not been addressed in the MRP section of this report:
The Act, as well as published policies and non-published policies developed by the WCB, set out various MRP and MRP Dept procedures. These relate, for example, to: entitlement to an examination by an MRP; appointment of MRP chairs; appointment of specialists; entitlement of the MRP to request additional medical information; arrangement of the MRP examination; review of the WCB records relating to the examination; decision to prepare a statement of non-medical facts; and certification as to the condition or disability of the worker. However, under s.61(5) of the Act, "the panel must determine its own procedure." The LGC has elected not to draft regulations respecting MRPs, despite the fact that the Act permits it under s.66.

In May, 1997, then Registrar David Martin sought a legal opinion regarding the extent of the WCB’s authority to create policies which define the jurisdiction of MRP panels. The WCB’s current approach in this area was described as follows:

[The WCB’s] current policy is that it cannot instruct the panel regarding the panel’s procedure but that the Board can define the scope of jurisdiction of the panel (that is, interpret the Act and tell the panel the limits of its jurisdiction according to the Act.

The response given was that this approach would withstand judicial review, for the following reason:

Section 61(5) provides that the Panel shall determine its own procedure. However, pursuant to section 96 of the Act, the Board has the exclusive jurisdiction to interpret Part I of the Act. This is exactly what the Board is doing when it sets the policy that the panel can only certify as to medical findings. Section 61(1) sets out matters which must be certified by the panel in any given case. Whether the Board’s interpretation of section 61(1) is rational depends on the characterization of the phrase medical findings”. The Board’s interpretation of section 61(1) cannot be said to be irrational as long as all matters listed in subsections 61(1)(a) through (e) fall within the Board’s definition of “medical findings.”

Memo entitled "Interpretation of Sections 58 through 65", to David Martin from Laurel Courtney, Barrister & Solicitor, Legal Services, dated May 7, 1997, at pp.4 &5.
The WCRB's ability to review the Boards' exercise of discretion has been limited by Board policy in #102.24 of the RSCM. Various "views commonly taken of the role of an appellate tribunal" are noted in the policy. That is, one view holds that the tribunal should have a "substitutional role". On this view "the role of the tribunal is to substitute its judgement for that of the person making the decision." On the second view, the role of the tribunal is merely "supervisory. It does not substitute its judgement for that of the initial adjudicator, but rather, ensures that "when the discretion is exercised by an officer of the Board, it is properly exercised." The policies adopt the second, more restrictive view with respect to discretionary decisions. Furthermore, they set out guidelines for the appellate tribunal regarding when it may send a decision of an adjudicator back for reconsideration of discretion. Michael O'Brien, Chair of the WCRB, expressed surprise that the RSCM contained this policy and commented that no one at the WCRB pays attention to it. Meeting with S. Samuels, K. Ryan, Sept.26, 1997.

As well, Don Cott, Chair of the panel of Administrators, told the Royal Commission that the WCRB is accountable to the government regarding program delivery. For example, the WCRB was required to seek government approval for its alternate dispute resolution (ADR) pilot project. -- Meeting with Don Cott, Chair of the Panel of Administrators and Louise Logan, Director General of the Policy Regulation and Development Bureau, March 24, 1998, Notes, p.7. Don Cott said that WCRB Chair Michael O'Brien approached Don Cott, (who was ADM at the time) with the ADR proposal, who brought the issue before the Minister for approval. Note that a recent WCRB submission recommended that: "The Appeal Tribunal [should] have full authority to establish its own policies and procedures relating to the conduct of an appeal....[and] the Appeal Tribunal [should] be required to publish its policies and procedures and make them generally available to the public."-- Submission by the Worker's Compensation Review Board to the Royal Commission on Workers' Compensation, Jan 31, 1998 at p.24.

Statement of the Duties of the Panel of Administrators, adopted as a resolution of the Panel of Administrators, Jan. 14/97 at Tab 6, p.5.

Acting Chief Appeal Commissioner, Cassandra Kobayashi, has recently stated that she takes no issue with this arrangement. From March 6, 1998 presentation by WCB on appeal processes.

Submission by the Worker's Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.

"Royal Commission on Workers' Compensation in BC," 2nd Phase Hearings, March 6, 1998 at pp.55-56. Re-adjudication by the WCB, authorized under s.96(2) of the Act, is also known as a "manager's review." The WCB has empowered directors and managers within the Compensation Services Division to "modify a decision or substitute their decision for any decision." 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. Note that re-adjudication may also occur where an MRP refers the matter back. See Chart #4, Note 14.] 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]

An employer may protest a claim which has been allowed. The adjudicator must investigate the matter and give the employee opportunity to respond. RSCM, p.12-48.

Panel certificates are binding under s.65 of the Act Judicial review may be available under limited circumstances.

i.e., the duty to give a person affected by an administrative decision a reasonable opportunity to present his or her case, the duty to fairly listen to both sides and to reach a decision untainted by bias.
Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.

K-UNI-056v.doc. at p.3.

J. Steeves, “Argument on behalf of the BC Federation of Labour”, Volume 1, April 6-9, 1998 (Disk version) at pp.167-169.


"Royal Commission on Workers’ Compensation in BC Submission Summary," 2nd Phase Hearings, Stakeholder Counsel, Notetaker: Steven Noble, April 15 PM, 1998, at p.34.

"Royal Commission on Workers’ Compensation in BC Submission Summary," 2nd Phase Hearings, Stakeholder Counsel, Notetaker: Steven Noble, April 15 PM, 1998, at p.44.


V-EMA-014v.doc at p. 4 & 6; K-IEM-062.doc. at p.6;

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

K-IEM-061.doc. at p.9. Another employer submitted that “it is common for an appeal body decision to be referred back to adjudication for implementation and it will result in a new appealable decision...” (i.e. the ‘treadmill’). K-IEM-137v. doc. at p.4.

P-EMA-020.doc.

D-IEM-073.doc.

K-IEM-141.doc at p.7.

V-EMA-014v.doc at p.6; K-IEM-061.doc. at p.9; P-IEM-039V.doc.

V-EMA-030v.doc. at p.2.

V-EMA-014v.doc at p.6; K-IEM-061.doc. at p.9; V-EMA-030v.doc. at p.2.

Y-IEM-028.txt. at p.3.

WCB Compensation Services staff were asked to identify any issues or recommendations they felt should be considered by the Royal Commission. These issues are summarized in a document entitled “Summary of Staff Issues identified for the Royal Commission Appeals” dated April 14, 1998, at p.3.


For example, the WCRB recommended that a single "Appeal Tribunal established under the Workers Compensation Act ) [should] be external to the Workers’ Compensation Board. --Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998. Sayre took a similar position: "Since the perception of fairness itself is crucial... we
would prefer to see the senior appeal tribunal independent of WCB. Sayer, "Royal Commission on Workers’ Compensation: Presentation on Behalf of Injured Workers’ 1998 at p.8. In Valente v. The Queen, [1985] DLR 4th 161 at p.172 it was held that it is fundamental to public confidence in the administration of justice that a tribunal be perceived as independent. [SJS: Verification is required on this point].

It has been asserted that conflicts between the Appeal Division and the WCRB would be eliminated by having only one level of appeal or by integrating appeal levels within one appeal body. The following commentary of the Policy and Regulation Development Bureau illustrates how these conflicts have arisen:

The Review Board sometimes rejects an appeal without considering the merits of the case because procedural requirements in the Act are not met. For example, an appeal may be received outside the 90 day period allowed for appealing, and the Review Board may decide there are insufficient grounds to grant an extension. The Appeal Division has found it has jurisdiction to consider an appeal against such a decision. The Appeal Division would originally refer a case back to the Review Board to consider the merits when it allowed an appeal in this situation. However, the Review Board did not accept the Appeal Division’s authority. Therefore, the current practice is for the Appeal Division to deal with the appeal on the merits if it reverses the Review Board on a procedural issue.

Another situation occurs where the Appeal Division makes legal or policy interpretations that the Review Board declines to follow. An example is the Appeal Division decisions that the age criteria in Section 17 of the Act are contrary to the Canadian Charter of Rights and Freedoms. As the 1996 Administrative Inventory has pointed out:

...There is little to be done to ensure that the Review Board does not continue to follow the practice in question. In such cases, the standoff is unlikely to end without judicial or legislative intervention.

It may not be surprising that there are conflicts between the Review Board and the Appeal Division when the appeal provisions in the Act do not clearly define their roles relative to each other. These conflicts occur in few situations but, when they occur, can result in a multiplicity of appeals.


Steeves, “Argument on behalf of the BC Federation of Labour”, Volume 1, April 6-9, 1998 (Disk version) at pp.167-169.

Steeves, "Royal Commission on Workers' Compensation in BC Submission Summary," 2nd Phase Hearings, Stakeholder Counsel, Notetaker: Steven Noble, April 15 AM, 1998, at p.5.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998, at p.22.

Ibid.