



**Proposals for the Structure, Governance
and Mandate of the Appeals Tribunal under
the New Brunswick Workplace Health,
Safety and Compensation Commission Act:**

An Independent Consultant's Report

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I. Introduction and Background

New Brunswick's workers' compensation authority, WorkSafeNB, in collaboration with the provincial Department of Post-Secondary Education, Training and Labour (PETL) is engaged in a comprehensive review of the province's workers' compensation legislation. The review is being conducted according to these terms:

Objectives: The objective of the review is to ensure that the New Brunswick workers' compensation system appropriately addresses the needs and realities of current and future workplaces, and strikes the right balance between adequate compensation for injured workers and employers' fiscal interests.

Approach: The review will be a cooperative effort by WSNB and PETL, based on the value principles of fairness, rationality and inclusiveness. Legislative recommendations resulting from the review will be the subject of endorsement by WSNB and PETL.¹

The scope of the review includes, but is not limited to, an examination of the structure, governance and mandate of the Appeals Tribunal. I was requested to provide my perspective, as a lawyer practicing in the field of workers' compensation, on the need and rationale for reform of the appeals system and to make informed recommendations as to what a new appeals structure might look like.

¹ *Comprehensive Review of Workers' Compensation Legislation: Terms of Reference*, signed by Thomas Mann (Deputy Minister, PETL) and Gerard Adams (President & CEO, WorkSafeNB), June 14, 2013.

I understand that a number of concerns contribute to the desire of both WorkSafeNB and PETL to consider changes to the appeals structure. These issues include, but are not restricted to, the following:

- The volume and timeliness of appeals;
- The possible need to “modernize” the statute and consider “best practices” in Canada;
- The need to preserve and enhance natural justice, fairness and the perception of fairness;
- Improving the worker and employer experience in the appeals system, including exploring the potential for dispute resolution;
- Addressing comments made by the Court of Appeal of New Brunswick in the revelatory 2012 *Douthwright* case concerning the appeal structure and the role of Policy; and
- Determining whether structural changes might lead to a more coherent appeals system and greater collaboration between the Commission and the Appeals Tribunal in terms of the appeals *process*.

Resources and input

I was aided throughout my task by Christine Fagan, QC, the General Counsel of WorkSafeNB, who provided me with all the necessary background material and responded to my many questions about the law and practices in New Brunswick. In particular, I had reference to:

- The *2013-2016 Legislative Review of Workers’ Compensation: 2013 Discussion Paper* prepared by WorkSafeNB and PETL;
- The August 16, 2013 paper prepared by Stewart McKelvey and KPMG entitled *The New Appeals Tribunal: A Model of Fairness, Efficiency, Effectiveness and Timeliness* (the *Stewart McKelvey Report*); and
- The October 2013 *Consultants’ Report* on stakeholder consultation prepared by Ellen Barry and Brian D. Bruce (the *Barry & Bruce Report*).

Furthermore, I had the privilege of meeting with key people involved in the New Brunswick review as follows:

- September 16, 2013 – meeting with Tom Mann, Deputy Minister of PETL and Gerard Adams, CEO of WorkSafeNB, as co-sponsors of the review, as well as Christine Fagan, and Dorine Pirie, Assistant Deputy Minister of PETL; and
- October 18, 2013 – Ellen Barry and Brian Bruce, the independent consultants who conducted the stakeholder consultation.

With regard to the latter meeting, Ms. Barry and Mr. Bruce ensured that I was fully briefed on the views of stakeholders with respect to this phase of the project as well stakeholder feedback on the subject of workers' compensation in New Brunswick in general. I made the point of posing each of my five areas to inquiry (noted below) to Ms. Barry and Mr. Bruce with the view to developing a full understanding of how the stakeholders felt about those topic areas. My discussion with Ms. Barry and Mr. Bruce, as well their report, have informed my own work throughout.

How this Report was prepared

Following my review of the background material and discussions as noted above, I formulated five questions that I believed would address the overall question of the structure, mandate governance and of the appeals system in New Brunswick. The five questions are:

- A. In structuring the review and appeal system within the NB workers' compensation regime, should there be a mandatory intermediate level of review prior to a matter going to appeal and what should be the purpose of such a review? Should the intermediate review involve a form of dispute resolution?
- B. Should the Appeals Tribunal be external and independent to the Commission? If so, to whom should the Tribunal be accountable?

- C. Should Commission Policy be binding on the Appeals Tribunal, and if so, what is the proper mechanism for challenging the legality of Policy? Does the *Douthwright* case really provide any insight into this question?
- D. How should the relationship between the Commission and the Appeals Tribunal be defined in light of the Commission's "polycentric" role and the Tribunal's appellate role? In particular, what powers should the Tribunal have *vis-à-vis* the Commission?
- E. Should initial statutory appeal of Appeals Tribunal decisions occur in the Court of Queen's Bench or the Court of Appeal?

In order to address these questions, I attempted to determine the "best practices" in Canada through (a) an examination of relevant case law, (b) review of the other workers' compensation statutes in Canada, (c) review of information available on the websites of other workers' compensation bodies in Canada and the AWCBC, (d) direct consultation with other General Counsel of workers' compensation bodies, and (e) reliance of my own experience.

How my personal experience in workers' compensation informs this report

My own experience consists of having been a workers' compensation practitioner in Alberta for the last 25 years. Initially when I began my work at the Alberta WCB in 1988, the provincial government here had just instituted an appeal system that resembles in many respects the current NB system. The members of the tribunal were appointed by Order in Council and had independent decision-making authority. That authority was tempered, however, by a legislative provision that allowed the WCB Board of Directors to "supervise" the tribunal's application of legislation and Policy. Where the Board of Directors felt that the tribunal had departed from the "correct" interpretation, the Board of Directors could stay the tribunal decision and require the tribunal to rehear the matter. The tribunal chair attended Board of Directors' meetings and made monthly reports. Moreover, all of the tribunal's budget and infrastructure were directly provided by the WCB, including facilities, staff and corporate services. During these early years, I was often called upon by the tribunal to provide direct legal services.

A program review occurred in 2000-2001 which resulted in the WCB and the tribunal undergoing a legislative “divorce”. I acted as lead for the WCB with respect to the stakeholder consultation for, and the development and implementation of the amending legislation that permitted this separation of bodies to take place. Starting in 2002, the Appeals Commission for Alberta Workers’ Compensation (which is how the tribunal in Alberta styled itself) was totally independent from the WCB. The supervisory power of the Board of Directors was removed and the funding for the tribunal was provided by government with reimbursement from the WCB (by way of levy) with no questions asked. Furthermore, the WCB was given standing before both the tribunal itself on questions of law and policy and before the Courts on judicial appeal and judicial review. The tribunal began a policy of “isolationism” between itself and the WCB in order to maintain independence.

Throughout the period 2002 to 2013, I remained a workers’ compensation practitioner, often appearing before the Appeals Commission myself on behalf of the WCB, and before both levels of Court in Alberta (Queen’s Bench and the Court of Appeal)² in judicial review matters, which continues to this day. In 2013 with the appointment of a different Chair for the Appeals Commission, the relationship between the tribunal and the WCB relaxed and now the two bodies try to collaborate in improving the process aspects of the appeal system. No one questions today that the Appeals Commission is absolutely independent as far as decision-making is concerned. Thus it is fair to say that I have personally experienced much the main appeal system models that are discussed in this paper from the point of view of a practitioner in the field.

Further, I do think of myself as a student of workers’ compensation in that I have authored two editions of a textbook, *Workers’ Compensation Practice in Alberta*,³ as

² I made one trip to the Supreme Court of Canada in 1996 and will be making my second appearance in that Court on December 10 this year as Counsel for the Respondent WCB in *Martin v. Alberta (Workers’ Compensation Board)*, a case which deals with whether the WCB’s chronic stress policy (requiring an objective versus subjective test of causation) is binding for claims by federal employees under the *Government Employees Compensation Act*.

³ Second edition, Carswell, 2005, updated three times a year.

well as the *Canadian Encyclopedic Digest* title for Workers' Compensation.⁴ The latter discusses in considerable detail the workers' compensation regimes, including the review and appeal systems in BC, AB, SK and MB. Working on these publications requires me to keep updated on all Canadian law in the workers' compensation area.

For the last 25 years, I have nearly continuously attended the annual meetings of the Workers' Compensation Lawyers of Canada, the group of in-house lawyers who act as general counsel and staff the legal departments of boards and commissions across the country. These meetings have proved valuable for sharing the experiences and insights of jurisdictions all across Canada. The discussions have always been forthright and candid about what works well and not so well in each of the jurisdictions.

While at times it may seem that I favour the model in my home jurisdiction, my perspective for this report really is informed by all of my experiences in workers' compensation in Canada. Further, I have no axe to grind with anyone, and while I am employed by a workers' compensation agency, my intent in this report is to be both critical and impartial and render comments that will improve the review and appeal system for all New Brunswickers.

In all cases, I have tried to ensure that all recommendations are principled and evidence-based, accord with prevailing law, and to the extent possible, take into account the views of stakeholders as reported to me by Ms. Barry and Mr. Bruce. Of necessity, the recommendations are at a high level and do not try to discuss the detail of implementation. Where I discuss an issue but come to no particular recommendation, I indicate that the issue is an unresolved *policy* issue for the legislators.

Terminology

In this report:

- **Commission** (with a capital 'C') means the Workplace Health, Safety and Compensation Commission of New Brunswick, or WorkSafeNB;

⁴ Carswell, 2002.

- **Appeals Tribunal or Tribunal** (with capital letters) means the Appeals Tribunal constituted under the *Workplace Health, Safety and Compensation Commission Act* (which itself is referred to as the **WHSSC Act**);
- **boards and commissions** (uncapitalized) refers generically to Workers' Compensation Boards and Commissions across Canada;
- **appeals tribunal or tribunal** (uncapitalized) refers to one or more workers' compensation tribunals in Canada;
- **AWCBC** means the Association of Workers' Compensation Boards of Canada;
- **Policy** (capital 'P') refers to an enactment of Policy by the governing body of a workers' compensation authority, such as the Board of Directors of WorkSafeNB;
- **policy** (small 'p') means the decision of a government to do one thing or another based on its view of the public good; also referred to sometimes as "social policy".

Acknowledgements

In addition to the individuals mentioned above, I would like to acknowledge the contributions of others who assisted me in the completion of this project. They include: Wanda Stephens and her staff in the WCB-Alberta's Policy Development Department, who put together some of the comparative jurisdictional information; law student Greg Weber who conducted legal research, and my assistant Deborah Salo for her typing and formatting. The views expressed in this report, along with any errors, remain solely my own.

II. Discussion and Analysis

- A. In structuring the review and appeal system within the NB WC regime, should there be a mandatory intermediate level of review prior to a matter going to appeal and what should be the purpose of such a review? Should the intermediate review involve a form of dispute resolution?**

In this document, I will refer to “review” as the mandated process of internal or intermediate review by a body within the workers’ compensation board or commission. The mandate may arise by either legislation or policy. I will refer to “appeal” as the process of formal appeal to an appeals tribunal having final and binding decision-making power. In every jurisdiction in Canada except NB and SK,⁵ the appeals tribunal is an external appellate body that is independent of the workers’ compensation entity, while every jurisdiction (including SK) has an intermediate level of review of some sort. The issue for inquiry is whether NB should institute a level of intermediate review before a matter proceeds to formal appeal.

The purpose of intermediate review within a workers’ compensation system is to expedite the resolution of disputed issues between the party (usually a worker) and the board or commission. Although adjudicative models vary across the country, intermediate review typically involves less formality and may in some instances provide a measure of quality assurance over the decisions of the initial adjudicator. It seems axiomatic that fewer formal appeals are desirable in a workers’ compensation system as it would mean that more initial decisions by the board or commission are correct and acceptable to the parties involved. Fewer appeals reduce the overall stress in the system.

Looking at the NB situation, there appears to be some evidence that the lack of an intermediate review level has produced more formal appeals in a year relative to the number of claims handled in a year as well as less favourable appeal outcomes. (Note: Employer appeals on employer issues are relatively few in all jurisdictions, and while these issues are important to the employers concerned, the overall numbers do not factor significantly into this discussion.)

Appendix ‘C’ hereto is composed of two parts. The first is an extract of information from the AWCBC showing “claims reported in a year” by all jurisdictions for the years 2010-

⁵ As some will be quick to note, there is no separate appeals tribunal in SK as the three members of the administrative board also serve as the final level of appeal in that province.

2012. The second part is a compilation of appeal statistics from 10 of 12 jurisdictions in Canada prepared by one of my administrative staff based on a review of AWCBC-compiled statistics, annual reports and direct communication with boards and commissions. The appeals data has limitations in terms of comparability owing to the fact that boards and commissions do not all count the number of appeals or report them in the same way. The appeals information presented in Appendix 'C' should be viewed only as presenting a general sense of the numbers of appeals and appeal outcomes in those jurisdictions.

The number of "claims reported in a year" is used to provide a denominator for an appeal ratio. The use of this number must itself be qualified. First of all, the number includes both time-loss and no-time loss claims. Second, the actual number of claims handled by a board or commission in a year is much greater because claims from previous years figure prominently in the work of any board or commission in a given year. (Using Alberta's figures - which I know well - as an example, the 2011 and 2012 number for "claims reported in a year" is between 145,000 and 150,000 but the number of "claims handled during a year" is between 193,000 and 200,000.⁶ The number of "claims handled during a year" is probably a better denominator but most jurisdictions were unable to report such a number.

With those qualifications in mind, with reference to Appendix 'C', the ratio of appeals commenced/claims reported in a year is higher in NB than in every other province or territory of Canada and only BC is close. Here are some illustrations for the year 2012:

AB	950 / 148,566	=	.0064
BC	5,065 / 144,865	=	.0349
MB	140 / 3,890	=	.0036
NB	799 / 22,609	=	.0353
NL	335 / 14,310	=	.0234
NS	832 / 26,970	=	.0308

⁶ *Workers' Compensation Board – Alberta 2012 Annual Report*, p. 80.

NT/NU	8 / 3,764	=	.0021
PEI	17 / 3,932	=	.0043
SK	841 / 38,790	=	.0217
YT	5 / 1,812	=	.0027

The ratio of overturns (including partial overturns) compared to the numbers of appeals commenced in a year looks like this:

AB	269 / 950	=	.28
BC	1,450 / 3,742	=	.39
MB	33 / 146	=	.22
NB	339 / 799	=	.42
NL	31 / 335	=	.09
NS	291 / 832	=	.35
NT/NU	4 / 18	=	.72
SK	237 / 841	=	.28
YT	3 / 5	=	.60

YT and NT/NU show the highest ratio but the figures may be largely discounted because of the low number of appeals. NB has the next highest ratio at .42, with BC and NS relatively close at .39 and .35 respectively.

While all 10 of the reporting jurisdictions provided an overturn number, information was only obtained from BC, MB, NL and NS on the number of decisions actually released versus the number of appeals commenced. Thus, the comparison for the ratio of overturns per decisions released in 2012 is:

BC	1,450 / 3,223	=	.4498
MB	33 / 146	=	.2260
NL	31/207	=	.1497
NB	339/378	=	.8968

$$\text{NS} \quad 291 / 664 \quad = \quad .4382$$

There was no sense from any of the remaining jurisdictions that they had an overturn rate anywhere near approaching NB's 89%. Thus it appears that those jurisdictions having an intermediate level of review experience lower rates of formal appeal, and in some cases, significantly lower (although only marginally so in BC). However, even with BC's higher rate of appeal, the unfavourable appeal outcomes for the BC Board were at a significantly lower rate than NB's. There is not much variance over the three-year trend as shown in Appendix 'C'.

The overturn rate in NB means there is a nearly a 9 out of 10 chance for any prospective appellant that the appeal will be successful, which is a strong incentive for appeal. The high overturn rate also indicates that the system is under stress, with uncertainty and conflict in those areas of overturn. Accordingly, while recognizing limitations in the data, there appears to be a sense that introducing an intermediate level of review would have a salutary effect on the system overall in NB.

Some might criticize the intermediate level as a mere hurdle or a *pro forma* gesture that must be undertaken before the matter can be decided "for real" in a formal appeal. This view, in my opinion, is largely mistaken or a thing of the past as most workers' compensation systems strive to make the intermediate review a feature that adds real value for both the system and those affected by the decisions.

In order to provide value, intermediate review can perform three functions:

1. Act as a form of quality assurance over decisions made at the initial level.
2. Provide a forum for dispute resolution.
3. Where necessary (i.e. when dispute resolution fails to produce a result), make a binding decision.

Workers' compensation bodies are trending toward collaborative or cooperative dispute resolution as an internal review model. By way of example, the WorkSafeBC website describes the mandate of its internal Review Decision in these terms:

1. To provide a simplified and flexible process for obtaining within WorkSafeBC an independent review of a specific decision made under the *Act*.
2. To be part of the Board's overall strategy to develop and maintain consistent, predictable and quality decision-making, including a timely information loop between the Review Division and WorkSafeBC's senior management.
3. To provide final resolution to disputes with WorkSafeBC decisions within the required statutory time frames.⁷

In Alberta, the work of the WCB's internal Dispute Resolution and Decision Review Body is characterized in this way:

The WCB Dispute Resolution and Decision Review Body uses a process that is flexible, informal, collaborative and focused on looking for opportunities to resolve issues. As a first step, a Resolution Specialist will contact the person requesting a review to ensure there is clear understanding of the specific issues or concerns. The Resolution Specialist works with the requestor to determine the best approach to resolving the issue. There are a number of approaches available including; a documentary review, a telephone conference with the interested parties or an in-person meeting with the interested parties.⁸

The Ontario WSIB website states that the work of its internal Appeals Services Division is carried out as follows:

⁷ http://www.worksafebc.com/claims/review_and_appeals/review_division/default.asp.

⁸ *The WCB Policies and Information Manual: General Information G-4.*

Even when a formal appeal is necessary, we always encourage a positive and cooperative approach in order to reach a resolution that is fair to everyone involved... Our Appeals Services Division will resolve worker and employer objections faster, supporting better return-to-work and recovery outcomes.⁹

Most jurisdictions employ a single reviewer or hearing officer to discharge the intermediate review function. These individuals are generally senior staff members with extensive claims (or assessment) experience and well familiar with legislation and policy. Sometimes, as in BC, they may be legally trained. They would be considered experts in the administrative law sense. The single reviewer model, combined with a process of relative informality, permits greater expediency in dealing with volumes of issues as opposed to formal appeal.

Quality assurance

As experts, reviewers are positioned to provide quality assurance over initial adjudication with respect to both decision-writing and the general handling of the claim. They may spot flaws or deficiencies in the way a decision letter was written, an issue was handled, a legislative or policy provision interpreted, or the way a claimant was treated. Errors of this nature may be the source of the review issue or a less than ideal working relationship between the Commission and the claimant. The reviewer can identify these problems, whether they are isolated to a particular adjudicator or case manager, a team or unit or rather is systemic in nature. The quality assurance process would occur intuitively and naturally as the reviewer conducts the review. The idea is to allow internal oversight, provide constructive feedback, create learning moments and promote continuous improvement within the organization.

Dispute resolution

The intermediate review is also an opportunity to engage in a form of dispute resolution. Even though worker and employer are the theoretical parties in any claim dispute, the

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<http://www.wsib.on.ca/en/community/WSIB/ArticleDetail?vnextoid=870d5e03cc90c210VgnVCM100000469c710aRCRD>

reality is that the dispute exists between the worker and Commission. In an assessment matter, the dispute is invariably between an employer and the Commission. Dispute resolution at this level can occur whether the dispute is between worker and employer on a claim, or more usually, between a party (worker or employer) and the Commission.

One might ask how a dispute resolution can be carried out when the Commission is the neutral decision-maker and not a party adverse in interest to the worker or employer. This is particularly so where the Commission is required to apply legislation and Policy, which in many areas is highly prescriptive, and there is no apparent room for maneuvering. There is a two-fold response to this objection. First, the Commission has a reconsideration power – it is always able to change its mind on an individual issue. Second, there are areas of discussion and compromise that are possible without deviation from the application of mandatory law and Policy:

- the relative weight of various pieces of evidence, such as medical reports, or the interpretation of that evidence;
- changing or correcting assumptions made by the original decision-maker that may not be valid;
- new evidence that was not previously considered, particularly medical evidence;
- the interpretation of Policy and legislation and whether a Policy does or does not apply to a certain set of facts;
- where a legislative or Policy provision permits discretion, why discretion should be exercised one way or the other.

Dispute resolution is enhanced where the party is competently represented. Some workers, and even some employers, may be disadvantaged by reason of language, education, or disability. In the case of a worker, obtaining competent representation at the intermediate review is the first opportunity for that worker to have his or her position clearly and cogently articulated, with supporting evidence, law and Policy.

As such, there is need and rationale to expand the role of Workers' Advocates (and for that matter, Employers' Advocates in appropriate cases) to include dispute resolution at the intermediate level. At present, Workers' Advocates are hamstrung in that they do not become involved until the formal appeal process is engaged. Workers' Advocates could meaningfully enhance the process of resolution without formal appeal if their mandate is expanded to include dispute resolution at both the initial adjudicator/supervisor level and the intermediate review level if one is introduced.

In terms of best practice across the country, at least three jurisdictions profess to engage their Workers' Advocate equivalents in dispute resolution prior to formal appeal. The website for *WorkSafeBC* states as follows:

Workers' Advisers

Workers' Advisers can assist and advise you on WorkSafeBC benefits, policies and the interpretation of the *Workers Compensation Act*. Advisers can also provide you with direct assistance involving claim problems with WorkSafeBC, and provide representation in cases involving complex legal, medical, or policy issues.

Workers' Advisers meet with senior WorkSafeBC officials to resolve claims issues and avoid unnecessary appeals. They also make recommendations to the senior executive committee and Board of Directors on policy and practice issues.

Workers' Advisers are appointed under Section 94 of the *Workers Compensation Act*. Their clients include injured workers who have WorkSafeBC claims, their dependents, professional associations, union representatives, and injured workers' associations.¹⁰

The Worker Advisor Office of Manitoba says on its website:

¹⁰ http://www.worksafebc.com/workers/what_workers_should_know/workers_advisers/

Representation

The Worker Advisor Office may represent workers in cases where we find a reasonable argument can be made to dispute a WCB decision. Before we agree to represent you, we will review your WCB file to consider the evidence available to support an appeal. We can only get a copy of your file with your written permission.

The purpose of our review is to help us understand why the WCB has denied a benefit. We may be in contact with you or with the WCB to get more information. After our review is finished, we will talk to you about the strengths and weaknesses of your case.

There are several ways we provide representation. *We can talk to the WCB directly and attempt to resolve the issue*, write letters of appeal to the WCB on your behalf, or appear with you at an Appeal Commission hearing. In some cases, we may need to gather additional evidence to clarify or strengthen your case before we start your appeal.¹¹

The website for the WCB – Alberta states:

Office of the Appeals Advisor

You can receive help with your review at any time by contacting the Office of the Appeals Advisor. There is no charge for its services.

Appeals advisors are specialists in interpreting and applying the Workers' Compensation Act and WCB-Alberta policies. They can inform you about the review and appeals processes and can act as your representative throughout these processes.

¹¹ <http://www.gov.mb.ca/labour/wao/representation.html>

WCB-Alberta appeals advisors act independently of WCB-Alberta, when representing clients. *Whenever possible, appeals advisors try to resolve issues so that a formal appeal hearing is not necessary.*¹²

The Office of the Appeals Advisor in Alberta reiterates the point on its own website:

*The OAA's primary focus is on resolution prior to proceeding with a formal review or appeal. If a resolution cannot be made at an internal review level, the OAA will initiate a request for review on a client's behalf and act as the worker's representative throughout the review process: before the WCB, the Dispute and Decision Review Body and to the Appeals Commission.*¹³

(Emphasis added in all quotations above.)

The Office of the Appeals Advisor in Alberta maintains a performance target of resolution of 35% of new cases annually *without the need for either review or appeal.*

The desire for some form of dispute resolution is generally reflected in the stakeholder comments:

33. The comments made by stakeholders who made representation on this subject could be summarized as either wanting some type of dispute resolution mechanism or believing that establishing another bureaucratic level would be costly and unnecessary. *The majority of stakeholders recognized that the lack of some form of dispute mechanism resulted in many issues advancing to the appeal stage that might otherwise have been resolved with the help of some type of mediation between the parties.*

...

¹² http://www.wcb.ab.ca/workers/appeals_advisor.asp

¹³ <http://www.workeradvocates.ca/>

34. Those stakeholders in favour of some form of dispute resolution did refer to the creation of a fair practice office or some form of review process. Few saw the review process as an internal mechanism. Of most concern to those who supported a form of dispute resolution was the need for the structure to be impartial, independent and confidential. *Many believed that such a mechanism would need to have sufficient power to either order changes in the administration of a claim or mediate disagreements between the claimant and WSNB.* All insisted that a dispute resolution mechanism must not add delay to the appeals process.

...

35. *Stakeholders who made representation and were familiar with the appeal process, believed that a dispute resolution mechanism would be beneficial in reducing the number of low cost issues that currently proceed to a full tribunal hearing.* Many stakeholders believed that there was a need to improve communication between WSNB and claimants.¹⁴

(Emphasis added in all quotations above.)

The concern regarding introducing delay is a legitimate concern. Delay can be minimized by establishing standards or expectations for turnaround time. Also, by diverting appeals away from the Appeals Tribunal, the Tribunal should at least in theory have increased capacity to deal with appeals it does receive in a more timely fashion.

Of the 11 jurisdictions in Canada that have intermediate level of review, 7¹⁵ of them have specific legislative provisions that create and mandate the review bodies. The

¹⁴ *Barry & Bruce Report*, p. 13.

¹⁵ AB BC, MB, NT, ON, PQ & YT

remaining 4¹⁶ rely on a combination of the reconsideration power (which all boards and commissions in Canada have) and a policy enacted by the governing body to create and empower the review body. The decision of whether to make the existence of the review body explicit in the legislation or leave it to the governing body to create the intermediate review level (relying on the reconsideration power) is a policy decision to be made by government. The argument for having an explicit legislative provision is primarily one of transparency. Public laws are intended to be transparent. One should be able to read a statute and glean basic rights such as the right to decision-review by a higher-order decision-maker. Further, a specific provision would also contain requirements such as limitation periods and eliminate objections that limitation periods created by a policy are not enforceable. That is, a legal requirement such as a limitation period, where the failure to observe the requirement would result in rights being forfeited, should have grounding in the legislation itself. Finally, having the intermediate level established in the legislation would mean that the Board of Directors at a later time could not later decide to abolish the intermediate level.

Recommendations

1. There should be a mandatory intermediate level of review, that is part of the Commission, staffed by senior employees with demonstrated expertise.
2. The intermediate level of review should have a three-purpose function: to act as form of quality assurance; to facilitate and conduct dispute resolution; and, where necessary, to render a decision on the matter under review.
3. The Workers' Advocates and Employers' Advocates should have an expanded role that permits their participation in dispute resolution at the review stage or earlier.

Policy decision

1. The government will need to make a policy decision about whether the intermediate level of review should be created and governed by specific legislative provisions, or left to the Board of Directors to create through Policy.

¹⁶ NL, NS, PEI & SK

B. Should the Appeals Tribunal (AT) be external and independent to the Commission? If so, to whom should the Tribunal be accountable?

I agree with this statement from the *Stewart McKelvey Report*:

In our view, the time has come to reinforce the institutional independence of the Appeals Tribunal and to re-constitute it as an independent, external body. This would bring the Appeals Tribunal into line with the situation in virtually all other Canadian jurisdictions and would allow stakeholders to have confidence that its decisions are being made both impartially and independently.¹⁷

The NB situation is unique in Canada. The Chair and Vice-Chairs of the Appeals Tribunal are appointed by the Lieutenant Governor in Council but the panel members are appointed by the Commission's Board of Directors. The Board of Directors further purports to exercise governance authority over the Appeals Tribunal by way of Policy No. 41-010 but both the *D.W.* and *Douthwright* cases (see discussion that follows) cast considerable doubt on whether *any* Commission Policies are binding upon the Tribunal. Further, the Chair of the Appeals Tribunal sits as a non-voting member of the Board of Directors for the explicit purpose of providing input into Policy development.¹⁸

Later in this paper, I will distinguish the “polycentric” function of the Board of Directors from the strictly appellate function of the Appeals Tribunal.

The model in SK is a continuation the “old board structure” that most workers’ compensation boards and commissions had prior to the adoption of corporate governance concepts in workers’ compensation starting in the 1980s. That model has a three-person board pulling double-duty – as the governors of the workers’ compensation system in SK, *as well as* performing the role of final and binding appeals

¹⁷ *Stewart McKelvey Report*, p. 7.

¹⁸ Policy No. 41-010, p. 7.

tribunal. Policy created by the board members in their governance role is not binding on them in their appellate role, but because they are the same people, the roles can co-exist harmoniously. Even though the SK board members wearing one hat can disagree with themselves while wearing the other, no conflict or tension is created in the system because the three board members have dominion over all.

In NB, while the Appeals Tribunal is purportedly under statute accountable to the Commission's Board of Directors,¹⁹ but has no difficulty routinely overturning the Commission's decisions and even declaring a Commission Policy to be illegal. Differences of opinion in the same case are natural and expected between first-instance adjudication and appellate decisions. However, the structure of the relationship between the Board of Directors and the Appeals Tribunal creates inherent conflict, particularly in the area of accountability. The Appeals Tribunal may, on paper, be accountable to the Board of Directors but if the Policy decisions of the Board of Directors can be overturned by the Appeals Tribunal, then who is really accountable to whom?

The Court of Appeal of New Brunswick made note of the lack of structural independence of the Tribunal from the Commission in *Fundy Linen Service Inc. v. Workplace Health, Safety and Compensation Commission*, 2009 NBCA 13. That case dealt with how a government MLA being permitted by the Tribunal to attend a hearing to give evidence in support of a worker's appeal resulted in the Tribunal decision being tainted with bias. Since the government is responsible for appointing the senior members of the Tribunal, the appearance of a government member in support of a party at a hearing amounted to loss of independence in the legal sense. The Court did not overlook the fact that the enabling legislation in defining the relationship between the Commission and the Tribunal itself compromised the structural independence of the Tribunal. Because that lack of independence was created by legislation, the Court had no choice but to overlook it. However, the Court was not about to countenance other forms of compromising Tribunal independence (at para. 24):

¹⁹ S. 20(2) of the *Workplace Health, Safety and Compensation Commission Act* provides that "The Chairperson of the Appeals Tribunal is responsible to the board of directors for the operations of the Appeals Tribunal within the guidelines established by the board of directors."

No one questions the understanding that the provisions of the *WHSSC Act*, dealing with the appointment of members to the Appeals Tribunal, constitute an express ouster of any common law requirement that tribunals be structured so as to be independent of those responsible for the appointment and reappointment of their members and terms of engagement. But does this mean that the law cannot continue to impose restrictions on the right of elected officials to participate in administrative proceedings on behalf of a constituent who is seeking access to a public benefit? I think not. If the Legislature remains unwilling to accord structural independence to a tribunal (e.g., security of tenure) then it falls on the law to impose restrictions on the ability of elected officials to participate in tribunal hearings. The objective is to ensure that parties to the proceedings and members of the public are provided with appropriate assurances that tribunal decisions are not only made impartially but seen to be made impartially.

In other words, the legislation has “ousted” the common law requirement, and public expectation, that Tribunal hearings are not only impartial but seen to be so.

The Supreme Court of Canada made the statement that “independence” is not just about impartiality but also the relationship of the tribunal to other bodies:

The word 'independent' in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.²⁰

Further, whether there is true independence and impartiality lies in the perception of reasonable people:

²⁰ *Canadian Pacific v Matsqui Indian Band*, [1995] 1 SCR 3 at para. 62.

The requirements of independence and impartiality at common law are related. Both are components of the rule against bias, *nemo debet esse judex in propria sua causa*. Both seek to uphold public confidence in the fairness of administrative agencies and their decision-making procedures. It follows that the legal tests for independence and impartiality appeal to the perceptions of the reasonable, well-informed member of the public. Both tests require us to ask: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude?²¹

Here, the question for the legislators is whether reasonable people would perceive that New Brunswickers are well served by an Appeals Tribunal that is financially dependent upon, reports to and in some cases appointed by the Commission, the very body whose decision is under appeal. Most reasonable people would think that the field is tilted in favour of the Commission at the expense of the Appellant.

On the other hand, the stakeholder input gathered did not provide a definitive stakeholder opinion. Two major representative stakeholder groups strongly supported the completely external and independent approach²² while another saw the presence of the Tribunal Chair in a non-voting capacity at the Board of Directors table as a necessary check on the illegality of Policy.²³ Much of the input received consisted of experiential accounts of frustrations and delays encountered in the current appeal process.²⁴

If it is accepted that as a matter of law, and the public expectation, that the Tribunal should be both impartial in fact and seen to be impartial, the government will need to consider a number of ancillary policy questions as follows:

²¹ *Bell Canada v Canadian Telephone Employees Assn.*, 2003 SCC 36 at para. 17.

²² See comments of the Canadian Manufacturers and Exports and the New Brunswick Federation of Labour, *Barry & Bruce Report*, p. 18

²³ Comments of Unifor, *Barry & Bruce Report*, p. 18. My comments later in this paper on the risk of illegality and how to deal with questions of illegality respond somewhat to this perception.

²⁴ *Barry & Bruce Report*, pp. 16-17.

- To whom should an independent Appeals Tribunal be accountable – the same Minister who has responsibility for the WHSCC or a different Minister?
- Should the Appeals Tribunal continue to have members appointed as representative of the interests of either workers or employers?
- How should an independent Appeals Tribunal be funded?
- Should the new Appeals Tribunal have a power to make its own rules?
- Should the new Appeals Tribunal have *Charter* and human rights jurisdiction?

I will comment on each of these questions and try to offer insight but not make specific recommendations, except in the case of the rule-making power. They are questions that are secondary to the concept of an external, independent Tribunal. To some extent, the questions are political in nature and better answered by those with a more innate appreciation of the particular social environment and circumstances of New Brunswick.

Same or Different Minister?

This issue is raised in the *Stewart McKelvey Report*, citing the example of Nova Scotia where the Nova Scotia WCAT reports to the Minister of Justice.²⁵ Having the Commission and the Tribunal report to different Ministers would certainly increase the separation of the two entities and the appearance of independence. On the other hand, the Commission and the Appeals Tribunal are parts of a whole, and there may be advantages to having both reporting to the same Minister. That Minister can exercise oversight over the totality of the workers' compensation system and reduce the potential for the two parts to work at cross-purposes.

Appointment of Representative Members

Several workers' compensation statutes in Canada continue to provide that tribunal members may be appointed to be representative of the interests of a constituency, either worker or employer,²⁶ while the balance of those jurisdictions having external appeals bodies have resiled from the practice. The practice appears to originate in a

²⁵ *Stewart McKelvey Report*, p8. I could not find a similar provision in any other workers' compensation statute in Canada.

²⁶ According to the AWCBC website, these jurisdictions retain this practice by statute: AB, BC, MB, PEI, YT.

labour arbitration model. Although some stakeholders favoured the model, they could not clearly articulate a reason why it is important.²⁷ The fact that so many jurisdictions have moved away from the practice suggests that there are perceptions of inconsistency with merit-based appointment (although not necessarily borne out in fact) or that it is a model that is simply outdated. The idea was that in order for panels to be fair and impartial, prejudices needed to be balanced out. As tribunals become more sophisticated, with the presence of lawyers on the panels and formal tribunal training, the desire to balance prejudices becomes less relevant. This would be particularly so in jurisdictions where panels of one are empowered to hear cases. I concur with the discussion in the *Stewart McKelvey Report* that there should be a well-defined merit-based appointment system for all Tribunal members,²⁸ but suggest this could be implemented as much by government practice as by statute. A selection of competency profiles appears as Appendix 'D'.

Funding

In six jurisdictions (AB, BC, NS, NL, QC & PEI), the external tribunal's operations are funded by the provincial government who in turn is reimbursed by the board or commission. In the remaining jurisdictions with external tribunals (MB, NT/NU, ON & YT), the tribunals are funded directly by the board or commission.²⁹ While it is largely a matter of perception, the former method creates greater separation between the two bodies and there can be no argument that the board or commission exercises control through budgeting. In either case, the costs are collected as part of the levy on employers.

Rule-Making power

Virtually every external tribunal in Canada is given control of its own procedures and processes through a statutory rule-making power.³⁰ Only in NL are such rules required to be ratified by the Lieutenant Governor in Council. In QC, the tribunal's processes and

²⁷ *Barry & Bruce Report*, p. 19.

²⁸ *Stewart McKelvey Report*, pp. 48-51.

²⁹ Information provided by the AWCBC website.

³⁰ See Appendix 'A'.

procedures are governed by the *Quebec Civil Code* with necessary modifications. It seems the best practice in Canada is to give the tribunal an unrestricted power to define its own procedures and processes. This allows the tribunal flexibility in adapting or changing its practices as needed. Rules can address such matters as when it is appropriate to have a one-person panel versus a three-person panel,³¹ when hearings will be in-person hearings versus documentary (or paper-only) hearings, and even the controlling the conduct of those appearing before the tribunal.³²

Jurisdiction of the Appeals Tribunal

Since the Supreme Court of Canada decision in *Martin and Laseur*³³ administrative tribunals in Canada have had jurisdiction to decide *Charter* issues. *Martin and Laseur* was a workers' compensation case dealing with whether Nova Scotia's Functional Restoration Regulations were contrary to the anti-discrimination provision in s. 15 of the *Charter*. Since that case, a number of provincial governments were concerned that conferring *Charter* jurisdiction on administrative tribunals, particularly where tribunal members are non-lawyers, was an untenable situation. Decisions could have far-reaching implications for a government, especially of a financial nature. Consequently, it was decided by some governments to enact legislation removing this jurisdiction from administrative tribunals and leaving it to the Courts solely. Appendix B summarizes the state of appeals tribunal jurisdiction over *Charter* issues in Canada, with some legislatures removing the jurisdiction and some taking no action.

Similarly, the Supreme Court of Canada decisions in *Tranchemontagne*³⁴ and *Figliola*³⁵ affirmed that administrative tribunals having concurrent jurisdiction, along with a provincial human rights authority, to determine questions of discrimination under the provincial human rights statutes where such a question arises in the tribunal's normal

³¹ Assuming, of course, the legislation permits the Tribunal to have one-person panels. Section 21(9)(a) of the *WHSCC Act* would have to be amended to remove the current constraints on one-person panels.

³² See, for example, the WSIAT Code of Conduct for Representatives on the WSIAT website at <http://www.wsiat.on.ca/english/pd/pdRepCode.htm>.

³³ *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54

³⁴ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14

³⁵ *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52

jurisdiction (e.g. to decide a workers' compensation claim issue). So far, only BC has removed human rights jurisdiction from its appeals tribunal.

Recommendations

4. The *WHSCC Act* should be amended to reconstitute the Appeals Tribunal as external to and separate from the Commission, reporting to a Minister of the Crown, with the Government appointing all Tribunals members by way of Order in Council.
5. The *WHSCC Act* should be amended to authorize the Appeals Tribunal to prescribe its own rules of procedure to enable it to determine, *inter alia*, the circumstances where it is appropriate to have one-person panels and documentary hearings.

Policy Issues

2. Should the Appeals Tribunal report to the same or a different Minister than does the Commission?
 3. Should the Appeals Tribunal continue to have members who are representative of the interests of either workers or employers?
 4. While the Appeals Tribunal's operations will be funded by an employer levy, should those costs flow through the provincial government (in order to create greater appearance of separation between the Tribunal and Commission) or should the Commission fund the Tribunal directly?
 5. Should the Appeals Tribunal's jurisdiction to determine questions under the *Charter* or under provincial human rights legislation be removed?
- C. Should Commission Policy be binding on the Appeals Tribunal, and if so, what is the proper mechanism for challenging the legality of Policy? Does the *Douthwright* case really provide any insight into this question?**

The confounding effect of *Douthwright*

The issue of whether or not Commission Policy should be binding on the AT is confounded by the issue of the legality of the Policy itself. This confounding effect is well illustrated in this oft-quoted passage from *Douthwright*:

[43] In *D.W. v. New Brunswick*, Robertson J.A. could not have made it much clearer when he stated as follows:

[...] the law is clear that neither this Court nor the Appeals Tribunal is bound by Commission policies (see *Green v. Workplace Health, Safety and Compensation Commission (N.B.)* (1998), 201 N.B.R. (2d) 93 (C.A.) at para. 14; *Melanson v. Workers' Compensation Board (N.B.)* (1994), 146 N.B.R. (2d) 294 (C.A.); *Dwyer v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 179 N.B.R. (2d) 348 (C.A.) and *Myles v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 181 N.B.R. (2d) 183 (C.A.)). Ultimately, it is the responsibility of this Court to interpret the provisions of the legislation in a manner that is in keeping with interpretative principles. [Emphasis added.] [para. 34]

There is no room for confusion in that statement: the Appeals Tribunal is not bound by Commission policies. The rationale for this should be self-evident: a policy directive cannot amend the *Workers' Compensation Act* and the Appeals Tribunal is bound to apply the *Act*. This was made clear in *VSL Canada Ltd. v. Workplace Health, Safety and Compensation Commission and Duguay et al.*, 2011 NBCA 76, 376 N.B.R. (2d) 292, where Drapeau C.J. N.B. pointed out as follows:

Although there is nothing inherently objectionable about Commission policies, they must be formulated, interpreted and applied in a manner that is harmonious with the *WC Act*, as

interpreted by this Court. As Mitchell, J.A. observed in *Dowling*, an administrative body such as the Commission lacks the mandate to alter the *WC Act* “by its own policy initiative”. Commission policies that “advance the aims of the legislation are permissible but the Commission cannot usurp the function of the Legislature by making policy which has the effect of altering the statute” (para. 7). Those observations fully accord with the view on point expressed in *D.W. v. Workplace Health, Safety and Compensation Commission and Via Rail Canada Inc.* at para. 25, per Robertson J.A. for the Court. [para. 48]

[44] As for whether the Appeals Tribunal is required to apply a standard of review that affords deference to the Commission and to its Policy, one would think that this, too, is answered by the statement in *D.W.* If the Appeals Tribunal is not bound by Commission policies, it follows that it is not bound by the Commission’s application of an untenable policy. ...

The passage is capable of two meanings. First, there is the statement: *There is no room for confusion in that statement: the Appeals Tribunal is not bound by Commission policies.* This rather stark pronouncement, taken on its own, could reasonably mean that no Commission Policies whatsoever bind the Appeals Tribunal. However, read contextually, the passage could also reasonably mean that in cases where the Appeals Tribunal finds that the Policy is inconsistent with the statute, the Policy is not binding. Furthermore, the Court is clear (in para. 44) that the Appeals Tribunal need not accept that interpretation of the statute urged by the Commission as the statutory basis for the Policy. In other words, on a correctness standard, the Appeals Tribunal can decide whether the Policy is properly grounded in the statute, and if the Appeals Tribunal concludes that it is not, then the Policy can be ignored.

As it stands, *at a minimum* the Appeals Tribunal is at liberty to disregard a Policy any time the Appeals Tribunal feels that the effect of the Policy in the particular case is at

odds with the Appeals Tribunal's own interpretation of the wording, nature or intent of the legislation. If certain sentences from *Douthwright* are read more literally, then no Commission Policies have any binding effect on the Appeals Tribunal.

The authority of the Board of Directors to enact Policy is not challenged, so long as the Policy (in the Appeals Tribunal's opinion) conforms with legislation. With that in mind, it is noteworthy that Policy No. 41-010, on the subject of *Governance – Board of Directors' Principles for Governing the Appeals Tribunal*, purports to direct the Appeals Tribunal to apply Commission Policy:

...

The Board of Directors is entrusted with the authority for determining the strategic direction of WorkSafeNB and for making policy decisions based on both prescriptive and discretionary authority found in the *WHSCC Act*, the *WC Act*, the *FC Act*, the *OHS Act*, and other applicable legislation. The Appeals Tribunal applies board policy to the individual merits of a case in its decision-making.

...

The Appeals Tribunal decisions are based on the individual merits of the case, and by applying both the Board's prescriptive and discretionary policy decisions. The Appeals Tribunal's mandate is to provide fair, just, and impartial rulings for all appeals.

Taking the more literal view of *Douthwright*, one could say that Policy No. 41-010 does not bind the Appeals Tribunal at all. However, even taking the more generous view, one could say that the extracts from Policy No. 41-010 quoted above are not contemplated in the legislation and are therefore in conflict with it. Either way, Policy 41-010 by itself cannot be taken as authority that Policy binds the Appeals Tribunal.

Moreover, in every other jurisdiction in Canada (with the exception of SK³⁶ and QC³⁷), the statute itself provides that Policy proclaimed by the board or commission's governing body is binding upon the appeal (see Appendix A). The absence of such a legislative provision in NB lends weight to the view that Policies do not have binding effect with the Appeals Tribunal.

What *Douthwright* does not tell us

Both sides of the debate on the question of whether Commission Policy should bind the Appeals Tribunal in New Brunswick point to the *Douthwright* case as an example of the adverse consequences that can result when Policy does or does not have binding effect. Those who argue that the Appeals Tribunal should be free from the bonds of any Policy cite how a requirement to follow Policy would have meant the continued propagation of illegal decisions at the appeal level. Those who take the opposite view, that Policy should be mandatorily followed by the Appeals Tribunal, point to how the appeal level has usurped the polycentric function by imposing its own world view on the workers' compensation system.

I would argue that *Douthwright* supports neither view to much extent owing to the fact that New Brunswick's highest Court found the Policy itself to be inconsistent with the legislation. Based on case law that will be cited below, it is clear that no appeals body in a workers' compensation system is obliged to follow a Policy that inconsistent with the statute. On the other hand, *Douthwright* cannot stand as an example of what happens when an appeals tribunal is not required by law to follow policy because of the precise fact that the Court found the Policy to be illegal. No one would argue that an appeals body ought to be obliged to apply a Policy that a Court has ruled as contrary to legislation.

In order to test my assessment that the *Douthwright* case does not provide insight into the question of whether board or commission Policy should be binding on an appeals

³⁶ As noted earlier, the board members in SK have a dual role as policy-makers and final appeal tribunal.

³⁷ In QC a series of extremely detailed regulations function in place of Policies.

body, I consulted my colleague Lori Sain, the highly respected General Counsel of the Workers' Compensation Board of Manitoba. Ms. Sain has been a workers' compensation professional for over 20 years and has held her GC position for the last 10 of those years. After reading the case, Ms. Sain reached the same conclusion as I did, namely that *Douthwright* provides no guidance one way or the other on the practical question of whether Policy should bind the appeal level for the reason that the Policy was ultimately found to be inconsistent with the statute. Therefore, while *Douthwright* does present an issue for legislators as to which other forms of a worker's income should be, on a principled basis, deducted from a worker's benefits, it provides little assistance on the decision regarding whether Commission Policy ought to be mandatorily applied by the Appeals Tribunal.

On its face, *Douthwright* at para. 44 starkly asserts that no Policies should be binding upon the Appeals Tribunal because of the possibility of the illegality. While *Douthwright* clearly articulates a *legal* reason why the former Policy 21-215 in New Brunswick should not be followed by the Appeals Tribunal, it does not provide any *small-p policy reasons* as to why legislators in any future amendment of the statute should reject out of hand the notion that Policy should bind the appeals level. Is the risk of illegality identified in *Douthwright* a sufficient reason for throwing out the Policy baby with the bathwater in New Brunswick? Moreover, is not the fact that 9 of 12 jurisdictions in Canada have legislated a provision that the Policy created by a workers' compensation system's governing body should bind the appellate body strongly suggestive that such a provision is a best practice in Canada?

Having regard to the above state of affairs, I will argue that:

- (a) It is universally accepted throughout Canada, including the 9 jurisdictions where the statute specifically provides that Policy binds the appeal body, that the board or commission governing body cannot enact Policies that are outside of or inconsistent with the legislation;

- (b) With the above qualification, having Policies bind all decision-makers within a workers' compensation system, including the appeals tribunal, makes for a more efficacious workers' compensation system, and the NB legislation should provide for such binding effect; and
- (c) There should be clear opportunities for parties to an appeal to challenge the legality of a Policy.

Policy cannot be inconsistent with statute

It is a trite statement of law that a subordinate enactment, such as a Policy, must be consistent with the enabling legislation. In the workers' compensation context, courts across Canada have made this statement.

For example, in *Yukon Territory (Workers' Compensation Appeals Tribunal) v. Yukon Territory (Workers' Compensation Health & Safety Board)* (2005), 2005 YKSC 5, 2005 CarswellYukon 8, [2005] Y.J. No. 5 (Y.T. S.C.), the court stated that a policy is binding on the appeals tribunal unless the policy exceeds its statutory authority. A policy may exceed its statutory authority when it creates conditions or requirements that are too onerous to realistically comply with, is inconsistent with the enabling legislation or fails to promote the objectives of the legislation in a balanced manner. At para. 53 the court states:

I do not wish to speculate precisely on when a policy exceeds its statutory authority except to say it must be some objective criteria. For example, when the condition or requirement is so onerous that it becomes impossible to comply with. This could occur if the policy required a legal opinion from a lawyer that was beyond the expertise that any lawyer could provide. In my view, furthermore, a policy will be inconsistent with the Act if it trenches on a specific statutory provision. It would also be sufficient to challenge a policy when it takes the objectives of the Act to an extreme or goes beyond 'the margin of manoeuvre contemplated by the legislature'.

The Court of Queen's Bench of Alberta observed as follows in *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)*, 2001 ABQB 624 at para. 81:

Later cases have given greater effect to policies authorized by statute. In *Macoon v. Alberta (Workers' Compensation Board)* 1993 ABCA 9 (CanLII), (1993), 7 Alta. L.R. (3d) 201, 135 A.R. 183 (C.A.), a decision binding on me, the Court held that the Board's policies do have legal force. The particular policy in issue was found not to contradict the *Act*, but the Court implied that if it did, it would be invalid. If a statute, a regulation and a policy conflict, the statute would prevail over the regulation, and probably the regulation would prevail over the policy.

Also note the comments of Topolniski, J. in *Alberta (Workers' Compensation Board) v. Alberta (Workers' Compensation Board Appeals Commission)* (2005), 005 ABQB 543, Alta. L.R. (4th) 98, 382 A.R. 120, 2005 CarswellAlta 1006 (Alta. Q.B.), at para. 37:

"...Moreover, while I accept that the Board made its policy taking into account those factors [legislative intent, history, the principles of "good public administration"], that does not mean that the Board can change the meaning of the statute merely by implementing a policy that redefines what the section itself says."

In *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)*, 2010 BCSC 1340, the Court stated that the Tribunal should engage in a determination of legality of Policy:

[91] Section 259 stipulates not the basis on which interest is to be paid, but that the Board must have a meaningful policy governing the payment of interest on amounts refunded. A meaningful policy, rationally grounded in s. 259, cannot effectively remove the very entitlement the section provides. This would run counter to a rational interpretation of s. 259 and cannot be said, in this context, to

fall within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.

Further, one cannot assume that a policy passed by the board of directors is appropriate. The appeals tribunal or the court should engage in an interpretative process to determine if the policy is supported by the legislation.

As found in *Campbell v. Workers' Compensation Board*, 2013 SKCA 56 the Saskatchewan WCB was not allowed to rely on a policy that in effect changed the plain grammatical meaning of an exclusion contained in the regulation. The authorities are unanimous that Policies can never be inconsistent with the enabling legislation and that tribunals have the power to inquire into and decide questions of legality.

Binding policies result in a more efficacious WC system

The governing body or board of directors of a board or commission is given the authority to determine compensation Policy and review and approve the WCB's operating Policies. This Policy-making role is in furtherance of the governing body's overall statutory responsibility for oversight and governance of the workers' compensation system in the jurisdiction.

The function of Policy is to fill in the gap between statute and action.³⁸ The workers' compensation statute in general terms sets out the benefit structure for claimants and the operating regime for employer accounts. Then Policy, by establishing criteria or requirements, allows decision-makers to take action (i.e. make decisions) by applying those criteria or requirements. In many instances, the Policy requires the decision-maker to engage in fact-finding and exercise a certain degree of discretion in order to apply the Policy.

³⁸ *Vallette Estate v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2012 ABCA 12 at para. 23: "Put another way, the WCB's ability to create policy to fill in discretionary gaps in the workers' compensation regime is acknowledged."

Policy is considered remedial in nature, which means that its purpose is to inform the interpretation and application of legislation and solve interpretive problems. Policy is created through a rational process that relies upon decades of institutional experience and expertise, evidence-based research, consultation with stakeholders and, finally, oversight and approval by the governing body.

In short, Policy supplies the necessary detail in order to allow the board or commission to make the many decisions it is required to make in a rational, comprehensive and consistent way. Using the analogy of the human body, the workers' compensation statute is akin to the framework or skeleton, while Policy functions as the organs, muscles, blood vessels, nerves and other tissues that permit the whole of the organism to operate as a human body. When the organism is skeleton only, it cannot function at all.

In 2001, a judge of the Court of Queen's Bench of Alberta listed the important functions of WCB Policies:

- Policies provide notice to the public of what the tribunal expects of them and what the public might expect of the tribunal;
- Policies encourage consistency in decisions where many public officials or employees are involved in making similar decisions;
- published policies make decision making more transparent;
- decisions consistent with Policy have a known source, while inconsistent decisions call for justification;
- policies are necessary or expedient when a large volume of decisions must be made; and
- while Policy might emerge from a series of decisions, a formally stated policy is likely to be more comprehensive, rational and accessible.³⁹

³⁹ *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*, 2001 ABQB 624 (Slatter J.), para. 25

The word “tribunal” in the workers’ compensation context means both the board or commission and the appeals tribunal. Removing the binding effect of Policies on the Appeals Tribunal would result in the above noted characteristics being eliminated from the workers’ compensation system at the appeal level. Since all adjudicative decisions made by the board or commission are subject to appeal to the Appeals Tribunal, the ousting of Policy at the appeal level potentially affects the entirety of the system.

Policies have been accorded the status of delegated legislation⁴⁰, meaning that they have binding effect in the same manner as other laws. Note these comments by Cromwell JA (then of the NS Court of Appeal, now of the Supreme Court of Canada) in *Guy v. Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2008 NSCA 1 at para 14:

The WCB is entitled by s. 183 of the *WCA* to adopt policies “consistent with” Part I of the *WCA* and the regulations. These policies are expressly by statute binding on the WCB and on WCAT, although in the case of WCAT, only to the extent that they are consistent with the *WCA* and the regulations: s. 183(5) and 183(5A). These policies are not, therefore, informal administrative guidelines. Because the WCB’s policies are specifically authorized and made binding by statute, they have more in common with subordinate legislation than with administrative policies and guidelines which are not specifically authorized or binding. In short, within the workers’ compensation system, these policies, by express statutory provision, have the force of law. The legislature could not more clearly have evidenced its intent that the WCB has the authority to make policies which are binding to the extent that they are not inconsistent with the *WCA* or the regulations under it.

The courts note, however, that if a particular Policy is found to contradict the enabling legislation, such a Policy would be invalid. In turn, if a statute, a regulation and a Policy

⁴⁰ *Macon v. Alberta (Workers’ Compensation Board)* (1993), 7 Alta. L.R. (3rd) 201 (Alta. C.A.).

conflict, the statute would prevail over the regulation and the regulation likely would prevail over the Policy.⁴¹

The Commission and the Tribunal have different roles

There is an important distinction between the role of the board or commission and that of the Appeals Tribunal in the overall workers' compensation system. The board or commission is said to occupy the "polycentric" role.⁴² This means it is the administrator of the system, is called upon to balance competing interests of different constituents, is responsible for raising and maintaining the system's financing (including, in many cases, that of the operations of the Appeals Tribunal) and ensuring the system's viability.⁴³

Polycentricity on the board or commission's part can be contrasted with the strictly appellate role of the Appeals Tribunal. There is no doubt the appellate role is important in the overall system, but it is limited in its influence or control over the system. The Appeals Tribunal is not responsible for administering the workers' compensation system. It has no power to enforce the workers' compensation statute or even implement the decisions it makes. It is not responsible for balancing the competing interests of the system's various constituents. Equally, the Appeals Tribunal is not responsible for the financing of the system or ensuring its viability into the future. The Appeals Tribunal is strictly concerned with adjudicating the rights of an appellant (and a respondent, if there is one) within the facts of a specific case.⁴⁴ By removing the binding effect of policy upon the Appeals Tribunal, the Appeals Tribunal would be free to

⁴¹ *Skyline Roofing*, para. 81

⁴² *Vallette Estate v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2012 ABCA 12 at para. 22

⁴³ The concept of "polycentricity" is expounded upon by the Supreme Court of Canada in the famous administrative law case *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at para. 36).

⁴⁴ Among the authorities stating that the appeals tribunal is adjudicative and not polycentric are *Alberta (Workers' Compensation Board) v. Alberta (Workers' Compensation Appeals Commission)*, 2005 ABCA 235 at para. 28; *St. Cyr v. Alberta (Workers' Compensation Board)*, 2011 ABQB 407 at para. 54; and *Nabors Canada LP v. Alberta (Workers' Compensation Appeals Commission)*, 2006 ABCA 371 at para. 93.

make up Policy “on the fly” in every case without regard to the critical polycentric function of the board or commission.

Stated another way, if one were to liken the workers’ compensation system to the court system it was intended to replace, the board or commission would function as the legislators and the Appeals Tribunal would function as the judiciary. Legislators develop laws for the purpose of bringing order and certainty to society. In doing so, legislators balance interests, take financing into consideration and concern themselves about the future. The judiciary adjudicates individual cases. One can imagine the social chaos that would ensue if the judiciary (the courts) were not required to follow the laws created by the legislators.

Powers of the Appeals Tribunal

That is not to say that the appeals tribunal is bound to follow the board or commission’s will. Rather, the appeals tribunal is called upon to decide disputes about *whether* and *how* Policies might apply in a given case. With respect to Policies, the appeals tribunal has the following powers:

- The appeals tribunal can decide whether a Policy applies to a given set of facts.⁴⁵
- The appeals tribunal can decide the interpretation of a particular Policy and is not bound by the board or commission’s interpretation.
- The appeals tribunal can decide whether a board or commission Policy is consistent with the workers’ compensation statute, and if it decides that the Policy is not consistent, then the appeals tribunal can decline to follow the Policy.
- The appeals tribunal can decide whether a board or commission Policy breaches the provincial human rights code and thereby refuse to apply the Policy.⁴⁶

Consequences of the absence of binding policy upon the Appeals Tribunal

⁴⁵ *Northern Transportation Co. v. Northwest Territories (Workers’ Compensation Board)*, [1998] NWTR 366 (NWTSC) and *Braden-Burry Expediting Services Ltd. v. Northwest Territories (Workers’ Compensation Board)*, 2002 NWTSC 48 (NWTSC).

⁴⁶ *Tranchemantagne v. Ontario (Disability Support Program)*, 2006 S.C.C. 14.

There are a number of possible outcomes that might result from releasing the appeals tribunal from the binding effect of board or commission policy, none of which it is suggested would benefit either the workers' compensation system or the public it serves. Included are these potential consequences:

- There would be no defined range of expectations in any given case. Basically, there would be no rules, other than the skeletal legislation. Having no defined range of expectations raises natural justice concerns as the absence of binding Policy means a party would never know the case to be met.
- Lack of policy would result in inconsistent and non-transparent decision-making.
- Appeal volumes would likely rise because there is nothing to lose when there are no rules. Recall that every decision made by the board or commission in its adjudicative capacity is subject to appeal to the appeals tribunal.
- The appeals tribunal would not be accountable for its decisions, since it is the board or commission that is required to implement and finance the decisions, and decisions contrary to Policy are not amenable to Court review if Policy is not binding.
- The costs of the workers' compensation system would become unpredictable because actuarial estimates could no longer depend on reliable and stable Policy application.
- Two workers' compensation systems operating side-by-side would be created in the jurisdiction. There would be the actual board or commission operating with rules and then the appeals tribunal which can overrule the board or commission in every case without regard to rules.

For the above reasons, every jurisdiction in Canada, except for New Brunswick and Saskatchewan, have a legislative provision that requires the appeals tribunal apply and follow policy created by the workers' compensation governing body, (while in Quebec the tribunal must follow detailed regulations).

Thus, the effect of binding Policies can be summarized as follows:

1. Policies are a form of delegated legislation and thus have the character of law.
2. The legislation itself forms the basic decision-making framework but leaves many discretionary gaps. The Courts have recognized that in a workers' compensation system, Policies function to fill in those discretionary gaps. The decision-making framework is made more detailed and complete.
3. Policies along with legislation & regulations form the "policy of insurance", as it were, upon which all taking part of the system (workers, employers and decision-makers), are entitled to rely. The Policies are published and publically available for reference and as such they set expectations about what will happen with a claim or an employer account. Policies promote a measure of certainty, predictability and consistency, which are clearly desirable characteristics in any system of administrative decision-making.

Mitigating the risk of illegality

As a form of delegated legislation, mandatory Policies are presumed to be legal. The presumption ought to be well-founded. It is expected that those given the authority to enact binding Policies, the board or commission governing body, will exercise that authority in good faith and would not deliberately enact a Policy that it knows or reasonably believes to be illegal or *ultra vires*.

The risk of illegality is controlled through a robust policy development process that always includes legal advice. I cannot speak for the origin of the original Policy No. 21-215 but I understand that, at least under the tenure of the former and current General Counsel of the NB Commission, all proposed policies are subject to legal scrutiny and advice. The job of legal counsel is to protect the governing body from making the misstep of enacting an illegal Policy. That is the reason why every workers' compensation board or commission in Canada now has at least one in-house legal counsel with specialized expertise in the field of workers' compensation, with access to external counsel if further assurance is required.

It was not always the case that specialized legal advice was readily available to assist to Policy makers but it has become norm today. Having specialized legal counsel on hand recognizes that the basic business of a workers' compensation board or commission is to administer a law – the workers' compensation statute – and therefore legal advice is central to that mandate. Furthermore, since all workers' compensation governing bodies now acknowledge that they have fiduciary duties to the system and due diligence responsibilities in their decision-making, the identification and mitigation of legal risk is a necessary step for the governing body in any Policy decision.

Having said that, I realize that a legal opinion is only an opinion and it is not a pronouncement of law like the judgment of a Court. A legal opinion provides assurance but it is not a guarantee. Lawyers will differ with one another about the correctness of a given legal position and Courts will disagree with lawyers. Given that there is always an argument, despite good faith and due diligence, that a certain Policy might be inconsistent with the statute or otherwise illegal, there must be avenues provided to challenge the legality of a Policy for anyone inclined to do so. The fact that Policies are directive, if not prescriptive, and may adversely affect the interests of those within the workers' compensation system is another reason for allowing clear paths to challenge a Policy on legal grounds.

Modes of challenging legality within the workers' compensation system

Having regard to Appendix A, it appears that there are at least three methods within a workers' compensation system in Canada to challenge the legality of a Policy:

1. A person challenging the Policy can ask the board of directors (governing body) to review the validity of the Policy in light of that person's concerns. (AB, PEI)
2. If the issue of illegality is presented to the appeals tribunal, the tribunal can ask the board of directors (governing body) to review the validity of the Policy in light of the expressed concern. (BC, NS, ON)
3. The appeals tribunal can refuse to apply a Policy if it believes that the Policy is contrary to law. (AB, BC, NB, NS) This refusal can apparently occur even if the

board of directors under Step 2 has confirmed its belief in the validity of the Policy.

There are variations of the above processes. For example in ON, the tribunal (WSIAT) can write to the board (WSIB) on the issue of legality, whereupon WSIB must accept submissions from the affected parties and then issue a ruling. Presumably this ruling is binding on WSIAT.⁴⁷

A number of jurisdictions still continue the provision whereby the board or commission governing body can stay a decision of the appeals tribunal if the former believes the latter has misapplied Policy in a case, and then require the tribunal to rehear the case in accordance with the governing body's direction. (MB, NT & YK)

In my view, the most effective avenue for a person to challenge the legal validity of a Policy is through the appeals tribunal declining to follow or apply the Policy if it concludes that the Policy is unlawful. My reasons are as follows:

- Step 1 described above is really a process step that any person should be allowed to engage in without the process being prescribed. If a governing body is to be accountable, it must be open to open to complaints and criticisms, particularly if they relate to the alleged illegality of Policy. The governing body should, likely through management, have the matter reviewed and a response sent. If the conclusion is that the complaint or criticism has merit, then one supposes the wisdom of the Policy will be revisited by the governing body. It also allows the complaint or criticism to be reviewed by subject-matter experts either before or concurrently with a formal appeal on this issue. However, it is unlikely that a governing body, after following its due diligence process in developing the Policy in the first place, will on second thought find that Policy to be illegal. While I agree this avenue should always be available, by itself it is not sufficient to answer allegations of illegality.

⁴⁷ Per email from Elizabeth Brown, Legal Counsel at WSIB, October 23, 2013.

- For much the same reason, I think that having an appeals tribunal ask the governing body to revisit the Policy on the grounds of alleged illegality (Step 2) will also not yield a meaningful remedy. It may even have the effect of further delaying proceedings while the governing body conducts its review. For example, in BC, the appeal proceedings are suspended while the Board of Directors is engaged in its review⁴⁸. The likelihood is that a governing body is not going to admit, that upon review, it acted illegally in the first place (or in the case of BC, it acted in a patently unreasonable manner in the first place).
- Step 3 empowers the appeals tribunal to directly decide the issue of illegality or *ultra vires* in an expedient manner and is therefore, in my opinion, the clearest and most desirable route for one to challenge a Policy. The Appeals Tribunal can provide a meaningful remedy to the appellant, namely refusing to apply or follow the Policy. Further, the Appeals Tribunal will deal with the Policy impartially and is not invested in the Policy as the Board Directors, as the authors of the Policy, might be. However, as I will note below, the NB Commission should be afforded standing before the Appeals Tribunal in order to be able to argue its position.

As an aside, I comment that the continuing provisions in MB, NT and YK that permit the board of directors to supervise the Policy decisions of the appeals tribunal (by declaring such decisions to be wrong and staying them) is fundamentally contrary to the notion of independence. For this reason, this type of provision was dropped from the AB legislation in 2002. Under the current legislation, the Appeals Commission in AB is bound by board of directors Policy but, although not explicit in legislation (nor does it need to be explicit), the Appeals Commission is not bound to follow or apply Policy where it concludes the Policy is unlawful. This stems from the character of Policy being subordinate legislation and therefore it must always be consistent with the enabling legislation.

Accessing the Court to Determine Legality

⁴⁸ *Workers' Compensation Act*, RSBC 1996, c. 492, s. 252.

Canadian worker's compensation law basically provides two modes of accessing the courts to determine the legality of Policy:

1. Judicial appeal or judicial review of a decision of the appeals tribunal, and
2. Stated case by the board or commission or the appeals tribunal or both.

In the first case, judicial appeal arises where the statute specifically provides for an appeal to the Court for questions of law or jurisdiction that arise in appeals tribunal decisions. Judicial review is a remedy whereby, in the absence of a specific statutory appeal mechanism, the decision of the appeals tribunal is reviewed on legal grounds under the inherent jurisdiction of the superior court or as specified in the *Rules of Court*.

Where the appeals tribunal has the ability to refuse to apply a Policy for the reason of illegality or inconsistency with the enabling statute, that decision to refuse or not to refuse, is subject to judicial appeal or judicial review. Whether a Policy is *ultra vires* or otherwise unlawful will most certainly always be a question of law amenable to either judicial appeal or judicial review, depending on the judicial remedy available in that jurisdiction. There are many examples in the jurisprudence where this avenue has been taken:

- *Sciberras v. Workers' Compensation Board (Man.)*, 2011 MBCA 30 – whether the WCB's Policy concerning “apprenticeship” is *ultra vires*;
- *United Messenger Co-op Ltd. et al. v. Workers' Compensation Board (Man.)* (1994), 96 Man.R. (2d) 17 (QB) – whether a WCB Policy defining “worker” is *ultra vires*;
- *Winnipeg (City of) v. Workers Compensation Board Of Manitoba (the) et al*, [1998] 3 WWR 378; 123 Man R (2d) 118 (CA) – whether the WCB's “bunkhouse rule” Policy is *ultra vires*;
- *Vallette Estate v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2012 ABCA 12 - issue of the legality of the WCB's “age 65” Policy;

- *Parada v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2011 ABCA 44 – consistency of the WCB's "cost of living adjustment" Policy with legislation;
- *Nabors Canada Ltd. v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2010 ABCA 243 – whether the WCB's "travel" Policy is authorized by legislation.

Indeed, *Johnson v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 255 even prescribes the process for challenging a Policy. The Court indicates that first the appeals tribunal must deal with the issue of illegality so that there is a decision to be reviewed and a proper record with factual context before the Court. At that point, the Tribunal's decision may be judicially reviewed by the Court.

The stated case method, although available in a number of jurisdictions (AB, BC, NS, PEI, NL) is not often resorted to. One reason is that boards, commissions and tribunals are reluctant (and rightly so) to treat the Courts as if they are the private legal counsel of those bodies, ready and available to give legal opinions whenever called upon. Even though it is a proceeding that is resorted to sparingly, nonetheless there is a clear rationale for having it available. In clear cases where a Court has greater expertise than a board, commission or tribunal, such as in *Charter* or other constitutional issues and where the issue at hand involves areas of general law or areas not typically encountered in workers' compensation (for example, aboriginal law), the proceedings ought to be available. The drawback is that a stated case must be requested by a board, commission or tribunal and cannot be initiated by a party (worker or employer).

I submit that both modes of accessing the Court should be made available in cases where the legality of workers' compensation Policy is called into question. In the judicial appeal and judicial review mode, the parties (as well as the Commission) control access to the Courts and the proceeding takes place after the Appeals Tribunal has made its decision. Access is controlled because one or more of the parties or the Commission must take the initiative to commence legal proceedings. In the stated case mode, the

Commission or the Appeals Tribunal only, and not the parties, invokes the process at its discretion and the matter is generally dealt with by the Court before the Appeals Tribunal decides the question. The Tribunal then applies the stated case opinion in its own decision.

Unlike the authors of *Stewart McKelvey Report*,⁴⁹ I do not have a view one way or the other whether the Commission ought to retain its ability to bring a stated case application to Court per s, 23(7) of the *WHSCC Act*.⁵⁰ As stated elsewhere, I believe that if the Commission engages in strong due diligence with appropriate legal advice at the front end, there should be a presumption that the Policy (as a legal enactment) is valid. It remains a policy decision for the legislators to determine if a stated case provision for the Commission is still required.

Recommendations

6. The *WHSSC Act* should be amended to provide that Policy enacted by the Commission's Board of Directors shall be binding on the Appeals Tribunal. It is a given that no such Policy can be inconsistent with or *ultra vires* either the *WHSSC Act* or the *Workers' Compensation Act*.
7. Notwithstanding the above recommendation, any person wishing to challenge the legality of a Policy on grounds of legislative inconsistency or *ultra vires* should be entitled to do so by raising the issue at the Appeals Tribunal. The Appeals Tribunal shall then be obliged to determine the issue.
8. A decision of the Appeals Tribunal on an issue of Policy legality may be the subject of judicial appeal in the Courts, at the instance of either a party to the appeal or the Commission.
9. In the alternative, prior to the Appeals Tribunal determining an issue of Policy legality, the Appeals Tribunal has the option of referring the issue to the Court by way of stated case.

⁴⁹ *Stewart McKelvey Report*, p. 41.

⁵⁰ "23(7) The Commission may of its own motion state a case in writing for the opinion of the Court of Appeal upon any question that in the opinion of the Commission is a question as to its jurisdiction or a question of law."

Policy Issue

6. In view of the above processes and the due diligence exercised by the Board of Directors in the Policy Development process, it remains a policy issue to be decided by the legislators as to whether the Commission needs to retain an ability take a stated case to the Court.

D. How should the relationship between the Commission and the Appeals Tribunal be defined in light of the Commission’s “polycentric” role and the Tribunal’s appellate role? In particular, what powers should the Tribunal have *vis-à-vis* the Commission?

If accepted that the Appeals Tribunal ought to be external to and separate from the Commission, the question of how the relationship between the entities should be defined, in both statute and practice, needs to be addressed. As stated, the two are parts of a whole in the overall enterprise of workers’ compensation in the province. While having separate and discreet functions from one another, they must of necessity interact and co-exist as they respectively discharge their statutory responsibilities. One hopes that such interaction and co-existence, at least in terms of the *process* of handling appeals, would be harmonious if not collaborative. It would not be expected that the two bodies would agree on the *content* of an appeal matter since the Tribunal can and will overturn the Commission’s decisions on content.

With regard to the *process* of dealing with appeals, I propose to comment on three areas, the first two of which are statutory in nature and third being practice:

- the standing of the Commission before the Appeals Tribunal;
- the powers of the Appeals Tribunal *vis-à-vis* the Commission; and
- ongoing communication between the two bodies.

My consideration of the first two areas will necessitate a discussion of the controversial s. 21(1) of the *WHSCC Act*, which states that a decision of the Tribunal is a decision of

the Commission, and how that section might be interpreted or changed to retain its purport but give effect to the proposed statutory relationships.

Standing

Elsewhere in this paper, I describe the “polycentric” nature of the Commission’s role in the WC system and how policy-making fulfills that role. Policy is intended to support the statute by informing statutory decision-making on a principled basis. Policy is necessary in light of the sheer numbers of claim and other decisions that come before the Commission each year and need for consistent and expedient decision-making. In all cases, the workers’ compensation statute along with the Policies work in concert to comprise an interconnected, and at times, complex system of benefits and obligations. As noted, for all intents and purposes, the statute and the Policies function together as the “policy of insurance” by which the expectations for workers, employers and the general public are established.

The polycentric role must be separated from the adjudicative role which deals with the individual merits of a claim or assessment decision. Once adjudicative decisions of the Commission are final, the role of the Commission in the decision is at an end. That final decision must speak for itself as to the merits, even if it is appealed. However, the Commission’s polycentric role does not end.

On an appeal to the Appeals Tribunal, the Commission really has nothing more to say about the merits. However, if the interpretation or applicability of a Policy or legislative question is put in issue, then the Commission’s polycentric role is engaged on the appeal. In developing the Policy, the Commission (through its Board of Directors) is responsible for balancing the interests within the system and ensuring its sustainability. An adverse appeal decision on the interpretation or applicability of a Policy or legislative provision could upset the balance and sustainability that the Board of Directors has so delicately constructed. For that reason, the Commission should be given standing before the Appeals Tribunal to deal with the interpretation and applicability of Policy and

legislation. In doing so, the Commission's role to defend its position with respect to how the Policy or legislative provision should be interpreted or applied.

It may be argued that the Appeals Tribunal is not bound to follow precedent and therefore what one panel may decide about a Policy or section of the legislation should not matter because the next panel may decide differently. Specifically, s. 21(9) of the *WHSSC Act* provides:

21(9) Any decision of the Appeals Tribunal shall be upon the real merits of the case, and the Appeals Tribunal is not bound to follow precedent.

While it is true in theory that the Tribunal is not required to strictly adhere to precedent, in practical terms the Tribunal will strive for a measure of internal consistency as a matter of good public administration. Indeed, as the *Douthwright* situation amply illustrates, some 200 similar cases were decided by the Appeals Tribunal concerning the interplay between s. 38.11 (9) and former Policy No. 21-215, using the same reasoning with the same outcome, before the matter was finally determined by the Court of Appeal.⁵¹ What one panel decides on an interpretive issue provides value and guidance for future panels, may become entrenched as a favoured interpretation and thus can have systemic effect. As such, s. 21(9) by itself does not dispense with the need for the Commission to have standing before the Tribunal.

As the *Stewart McKelvey Report* indicates, s. 21(8) of the *WHSCC Act* has been interpreted by the New Brunswick Court of Appeal in *D.W.* as conferring a right on the Commission to be represented as a interested party where a Policy is at issue.⁵² The *Stewart McKelvey Report* strongly argues in favour of maintaining this status whenever Policy is impugned at the Appeals Tribunal.

⁵¹ Information received from Gerard Adams, September 16, 2013.

⁵² *Stewart McKelvey Report*, p. 39.

My position is that the matter of the Commission's standing before the Tribunal should be specifically codified in the NB statute and extend to any time an issue of interpretation is raised, not just when a policy is impugned for illegality. Since the standing is in furtherance of the Commission's polycentric role and for the purpose of protecting the integrity of Policy, it should be limited as such and not encompass cases where only the factual merits are in dispute. On other words, the Commission should pick its cases carefully and not abuse its welcome. The wording from Alberta's statute provides a model for securing the WCB's presence in appropriate cases before Alberta's Appeals Commission:

13.2(6) In the hearing of an appeal under this section, the Appeals Commission

...

- d. shall permit the Board to make representations, in the form and manner that the Appeals Commission directs, as to the proper application of policy determined by the board of directors or of the provisions of this Act or the regulations that are applicable to the matter under appeal ...

This section was enacted in 2002 as a response to judicial comment. In *Skyline*, the validity of a Policy was challenged by an employer. That Policy provided clarity to the statutory principle that parties cannot contract out of the workers' compensation regime. Slatter J. (as he then was) remarked at paras. 29-30:

Counsel for the Appeals Commission advised me that not only does the Commission take the view that the Board has no interest in the matter, the Commission routinely denies the Board any standing on the appeals before it. This position seems remarkably artificial. It is the decision of the Board, and the policy of the Board, that is being challenged. The party with the real interest in this matter is the Board. If Ross and Skyline were the real litigants, there would be no dispute, because the two of them agreed on how their arrangement would be structured. The whole dispute has arisen because the Board will not allow them to characterize their relationship in the way they want. This is a manifestation of the

rule contained in s. 134 of the *Act* that parties cannot contract out of the workers' compensation regime. Underlying this whole dispute is the fact that Skyline has attempted to arrange its affairs so that it will not be the employer of Schemenauer, and the Board is not prepared to go along with that. For the Appeals Commission to suggest that the Board has no standing in this matter is not only artificial, but it would appear to be quite counterproductive.

This case amply illustrates that the role of the workers' compensation board or commission before the tribunal is to uphold the integrity of its Policy for the good of the entire system. This is a much needed perspective in some cases before the tribunal. The tribunal's role is to decide individual cases, not concern itself with the system's sustainability.

I submit that the board or commission's standing before the tribunal in a polycentric capacity is a best practice in Canada or at least reflects preponderant practice. Five jurisdictions confer standing as of right by statute (AB, NT/NU, NS, QC and YK) and one (PEI) by Policy. In two jurisdictions, standing is granted by the tribunal on a discretionary basis (MB and NL). In ON and BC there is no special mention of standing but in the latter, the WCB must provide Policy advice to WCAT. The issue does not arise in SK since the WCB and the tribunal are one and the same.⁵³

Notably in Alberta, the WCB's right to appear before the tribunal on legal and Policy issues includes the ability to call evidence in order to provide factual context for the Policy (e.g. the purpose of the Policy, how the Policy was developed, what specific terms in the Policy mean, how the Policy is applied in practice etc.).⁵⁴

As the *Stewart McKelvey Report* notes, the Commission's standing before the Tribunal would mean that it would have standing before the Court to itself challenge decisions of

⁵³ See Appendix 'A'.

⁵⁴ *Thompson Brothers (Construction) Ltd. v Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2012 ABCA 78 at paras. 27-36.

the Tribunal concerning Policy.⁵⁵ For the reasons given above, standing before the Court is equally justifiable on the basis of the Commission's polycentric function. From a review of the case law, jurisdictions including BC, AB, MB and QC have routinely challenged their respective appeals tribunals by way of judicial appeal or judicial review (or both in the case of AB). Since NB is a judicial appeal jurisdiction, I suggest that the Commission's right to itself appeal an Appeals Tribunal decision in the Courts be codified in the legislation, in addition to the right be heard by the Court when *someone else* appeals an Appeals Tribunal decision.⁵⁶ In practice, the Commission needs to pick the cases it takes to Court itself carefully, so as to remain within its correct polycentric parameters and not make the appeal system appear dysfunctional to the Courts. The Commission must discipline itself to "let go" of cases where there is simple factual or evidentiary disagreement between the Commission and the Tribunal.

The glowering presence of s. 21(11), which the *Stewart McKelvey Report* notes was interpreted by the Court of Appeal in *Sanford*,⁵⁷ and again in *Douthwright*,⁵⁸ as imposing an insurmountable impediment for the Commission to disagree in Court with the Tribunal, will be discussed in the next section.

Powers of the Appeals Tribunal vis-à-vis the Commission

The intent of this section is to set out the nature of the powers the Tribunal may exercise in respect of the Commission as part of the inevitable (but one hopes) harmonious interaction between the Commission and the Tribunal. The first matter is that of the enforceability of the Tribunal's decision. The current s. 21(11), which is intended as a provision that makes the Tribunal's decision binding upon the Commission, is interpreted in an unyielding way by the province's highest Court. It effectively prevents the Commission from having a separate voice than the Tribunal in

⁵⁵ *Stewart McKelvey Report*, p. 40.

⁵⁶ Currently, s. 26 does not specify the Commission itself is entitled to initiate judicial appeal although it is entitled to be heard on a judicial appeal brought by another party.

⁵⁷ *Stewart McKelvey Report*, p. 40.

⁵⁸ At para. 48, Richard JA for the Court pointedly remarks: "This provision [s. 21(11)] highlights the absurdity of the Commission's position on this appeal. As the final administrative determination of the issue, the decision of the Appeals Tribunal is the "decision [of] the Commission", yet the Commission supports the Appellant's position. The Commission is arguing against its own decision."

Court. The section should therefore be amended to retain the binding force of a Tribunal Commission upon the Commission yet permit the Commission to advocate a different position than the Tribunal in judicial appeal. Most jurisdictions provide that tribunal decisions are “final and binding” but those words are more in the nature of a privative clause aimed at constraining judicial intervention as opposed to directing the board or commission to implement.⁵⁹ Three jurisdictions (BC, AB and YK) address the issue by simply stating in the legislation that the tribunal’s decision is specifically binding on the board or commission and in two instances (AB and YK) specifically directs that the decision *must be implemented within 30 days*.⁶⁰ This amendment would preserve the binding and enforceable effect of the current s. 21(11) yet not hamstring the Commission in its efforts to challenge a decision in Court. Furthermore, should a party believe that the Commission has failed to implement the decision as required, the remedy would not be to complain to the Tribunal but rather to apply to Court for what was formerly known as *mandamus* but has now been subsumed under the generic title of judicial review.

Issues about whether a board of commission has properly implemented a tribunal decision often involve questions about the interpretation of the decision. Rather than force a party to seek a *mandamus*-type remedy in Court to resolve an interpretive dispute as the meaning of the decision, both the parties to the appeal and the Commission itself should be afforded the right to seek a clarification of the Tribunal decision and the Tribunal should be empowered to issue that clarification or supplement reasons if necessary.⁶¹ Note this would be distinct from a reconsideration as contemplated in *WHSCC Act*, s. 22. Absent a reconsideration request, the suggested provision would negate the common law concept of *functus officio* which generally prevents an administrative tribunal from saying more about a decision already made.

⁵⁹ See AWCBC website: *External Appeal Body – Summary of Review/Process*.

⁶⁰ Alberta’s s.13.3(2) provides that 30 days is the default unless a shorter or longer time is prescribed in the decision.

⁶¹ The precedent is Alberta section 13.2(7): “At the request of an affected person or the Board, the Appeals Commission may clarify the any directions given in respect of a decision.”

Further, in addition to a clarification power, the Appeals Tribunal in the exercise of its inquisitorial powers should have the ability to direct the Commission to perform certain tasks to complete the evidentiary record where it might be seen by the Tribunal as deficient.⁶² For example, the Tribunal might require the Commission to order an independent medical examination (IME), a functional capacity evaluation (FCE) or conduct an investigation. These are tasks that go beyond merely compelling existing evidence, which the Tribunal already has the power to do. The direction to do a task can take place at any time before the decision is rendered, subject to natural justice requirements. Since the Commission is performing the tasks, the costs of doing so would form part of the costs of the claim and not charged to the Tribunal.

These relatively minor enhancements to the administrative process of handling appeals should, I submit, improve the timeliness and quality of Appeals Tribunal decisions.

Communication

As separate entities thrown together by statutory circumstance, the Commission and the Appeals Tribunal should work cooperatively to ensure that the process of dealing with appeals is as efficient and effective as possible. After all, both are in the service of the workers' compensation system and, by extension, the people of New Brunswick. Therefore the objectives of both entities, so far as the appeals process is concerned, should be the same.

As common experience tells us, participating in a joint enterprise requires good communication in order to be successful. At a minimum, I suggest that the Commission and the independent Tribunal engage in the following:

- Establishing mutually satisfactory protocols and processes for preparation of a matter for appeal;

⁶² See Alberta s. 13.2(6)(f) for a precedent that provides that the tribunal “may refer any matter back to ... the Board ... for further action or decision, with or without directions.”

- Establishing an understanding of when and how the Commission will participate in a hearing;
- Having leaders from both organizations meet regularly to raise, discuss and resolve process issues, and having both sides open to the other's suggestions for quality improvement;
- Exploring the possibility of electronic file transfer from the Commission to the Tribunal, subject to privacy laws;
- Having the Commission offer educational sessions, not for the purpose of co-opting Tribunal members, but rather to create greater awareness of Commission Policies and practices. (For example, do Tribunal members have a clear understanding of the rationale for and application of the *Canadian Guideline for Safe and Effective Use of Opioids for Chronic Non-Cancer Pain*? If not, it might make sense to be aware of this information before approving payment of opioid medication.)

The *Barry & Bruce Report* noted that many appellants, in describing their experiences in the appeal system, expressed concern about delay and frustration in dealing with even relatively minor issues.⁶³ When those whom we are supposed to be serving observe two parts of a system to be at odds with one another, it leaves an overall negative impression. My suggestion about communication and collaboration is not meant to impinge upon the separation of the two entities and the independence of the Tribunal. The Commission and the Tribunal can respectfully disagree on the facts, Policy and law of a given case but there should be no disagreement that people are better served when the two parts work collaboratively to improve the timeliness, effectiveness and quality of the appeals process.

My remarks are not meant to reflect on the nature of the current relationship between the Commission and the Tribunal in New Brunswick. I have no direct knowledge of it other than what I have heard anecdotally. Rather, I am speaking more from my own experience where I have encountered both types of regimes, where the WCB and the

⁶³ *Barry & Bruce Report*, pp. 16-17.

Appeals Commission were isolated from one another for fear of compromising mutual independence, and where the relationship has been more collaborative. I have no sense that the latter approach has resulted in any loss of independence of decision-making by the Appeals Commission, as I think can be borne out in the decisions that I read emanating from that body.

Recommendations

10. In furtherance of its polycentric role, the Commission's standing before the Appeals Tribunal should be formally recognize in a legislative amendment to that effect to permit the Commission to make submissions on issues of legislative and Policy interpretation and application.
11. The Commission should have standing before the Court in judicial appeal matters and should itself have the ability to commence judicial appeal of the Appeals Tribunal, all of which should be codified by amendment to the *WHSCC Act*.
12. To enable Recommendation 2 above, s. 21(11) of the *WHSCC Act* should be repealed and replaced with a section providing that a decision of the Appeals Tribunal is binding upon the Commission and must be implemented within 30 days unless otherwise specified by the Tribunal.
13. The Tribunal, by amendment to the *WHSCC Act*, should be given a specific power to (a) issue clarifications of a decision, and (b) direct the Commission to perform certain evidentiary tasks, which in the discretion of the Tribunal, are required to be done before, during or after the hearing of an appeal.
14. Without impinging on the independence of the Tribunal in decision-making, the Commission and the Tribunal should maintain open communication.

E. Should initial statutory appeal of Appeals Tribunal decisions occur in the Court of Queen's Bench or the Court of Appeal?

Section 23 of the *WHSCC Act* provides for an appeal of a decision of the Appeals Tribunal to the Court of Appeal of New Brunswick. The appeal is not restricted to a

particular range of questions.⁶⁴ Nova Scotia is the only other jurisdiction in Canada that has a direct appeal (but with leave) to the Court of Appeal. In all other cases, either the statutory appeal or the judicial review of an appeals tribunal decision is to the superior court of that province or territory.⁶⁵ The issue is whether NB should retain the tradition of having appellate review of Appeals Tribunal decisions in the Court of Appeal, or fall in line with the other 10 jurisdictions by transferring the function to the trial level of superior court.

There are three reasons why the NB Legislature should consider amending the *WHSCC Act* to have initial appellate review of the Appeals Tribunal devolve to the trial division. First, the distinction in modern law between appellate review of tribunal decisions under statute on the one hand, and judicial review of those decisions (which is derivative of the former prerogative writs in our common law and now expressed in provincial *Rules of Court*)⁶⁶ on the other, has been more or less eradicated for legal purposes. The Chief Justice of Canada said in the seminal administrative law case *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 119 at para. 21:

The term “judicial review” embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal. In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach. In *Pushpanathan*, this Court unequivocally accepted the primacy of the pragmatic and functional approach to determining the standard of judicial review of administrative decisions.

⁶⁴ For example, in Nova Scotia, an appeal of an Appeals Tribunal decision may be taken to the Court of Appeal on any question of jurisdiction or law, but not of fact. In Alberta, statutory judicial appeal is permitted on questions of law or jurisdiction only, but judicial review under the *Rules of Court* is available for other questions (i.e. fact or mixed fact and law).

⁶⁵ See AWCBC website – *Comparison of Workers’ Compensation Legislation and Policy*.

⁶⁶ For example, Rule 69.01 of the NB *Rules of Court* states: “Notwithstanding any Act, remedies formerly obtained by way of certiorari, mandamus, prohibition, quo warranto or notice of motion to set aside or remit an award, may be obtained only on an application for judicial review made under this rule.”

Of course the “pragmatic and functional approach” described in *Pushpanathan* has now been renamed and streamlined as the “standard of review analysis” as stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9; nonetheless, Courts must use the same analytic approach whether dealing with statutory judicial appeal or judicial review under the *Rules of Court*.

The second point is that since judicial appeal and judicial review have merged as far as the analytical approach is concerned, the trial courts of New Brunswick are just as well positioned to deal with statutory judicial appeal in workers’ compensation cases because of their experience with judicial review. Rule 69 of the New Brunswick *Rules of Court* provides that judicial review cases are heard by the Court of Queen’s Bench and in certain circumstances by the Court of Appeal.

Third, the direct avenue to the Court of Appeal effectively deprives a litigant of a level of appeal. A decision of the Court of Queen’s Bench is appealed to the Court of Appeal, but a decision of the Court of Appeal can only be appealed to the Supreme Court of Canada, and only with leave. The Supreme Court of Canada grants leave sparingly and only in cases of national importance. Furthermore, trips to the Supreme Court of Canada are extremely costly and beyond the means of the average litigant who is an individual. Moving the initial judicial appeal of a workers’ compensation matter in New Brunswick from the Court of Appeal to the Court of Queen’s Bench gives the litigant access to an appeal at the Court of Appeal (which, although likely also costly, is not as costly as an appeal to Canada’s highest Court).

Most court cases in workers’ compensation involve workers. Transferring initial appellate review to the Court of Queen’s Bench would be seen as way of leveling the playing field somewhat between an individual worker and a large institution with considerable resources. It would also be a more efficient use of judicial resources.

Recommendation

15. It is recommended that the Legislature amend the *WHSCC Act* by moving the jurisdiction for initial appellate review of Appeals Tribunal decisions from the Court of Appeal to the Court of Queen's Bench.

Concluding Remarks

It has been my privilege to work on this project and to provide this report to WorkSafeNB and the Government of New Brunswick through PETL. It is my hope that it is useful during the review. I commend both WorkSafeNB and PETL for their continuing commitment to improve the workers' compensation system in the province, which is undeniably critical to the people and economy of New Brunswick.

All of which is respectfully submitted.

Douglas R. Mah, QC

Edmonton, Alberta

October 28, 2013

III. Index of Recommendations and Policy Issues

No.	Recommendation	Page
1.	There should be a mandatory intermediate level of review that is part of the Commission, staffed by senior employees with demonstrated expertise.	19
2.	The intermediate level of review should have a three-purpose function: to act as form of quality assurance; to facilitate and conduct dispute resolution; and, where necessary, to render a decision on the matter under review.	19
3.	The Workers' Advocates and Employers' Advocates should have an expanded role that permits their participation in dispute resolution at the review stage or earlier.	19
4.	The <i>WHSCC Act</i> should be amended to reconstitute the Appeals Tribunal as external to and separate from the Commission, reporting to a Minister of the Crown, with the Government appointing all Tribunals members by way of Order in Council.	27
5.	The <i>WHSCC Act</i> should be amended to authorize the Appeals Tribunal to prescribe its own rules of procedure to enable it to determine, <i>inter alia</i> , the circumstances where it is appropriate to have one-person panels and documentary hearings.	27
6.	The <i>WHSSC Act</i> should be amended to provide that Policy enacted by the Commission's Board of Directors shall be binding on the Appeals Tribunal. It is a given that no such Policy can be inconsistent with or <i>ultra vires</i> either the <i>WHSSC Act</i> or the <i>Workers' Compensation Act</i> .	47
7.	Notwithstanding the above recommendation, any person wishing to challenge the legality of a Policy on grounds of legislative inconsistency or <i>ultra vires</i> should be entitled to do so by raising the issue at the Appeals Tribunal. The Appeals Tribunal shall then be obliged to determine the issue.	47
8.	A decision of the Appeals Tribunal on an issue of Policy legality may be the subject of judicial appeal in the Courts, at the instance of either a party to the appeal or the Commission.	47
9.	In the alternative, prior to the Appeals Tribunal determining an issue of Policy legality, the Appeals Tribunal has the option of referring the issue to the Court by way of stated case.	47
10.	In furtherance of its polycentric role, the Commission's standing before the Appeals Tribunal should be formally recognize in a legislative amendment to that effect to permit the Commission to make submissions on issues of legislative and Policy interpretation and application.	56
11.	The Commission should have standing before the Court in judicial appeal matters and should itself have the ability to commence judicial appeal of the Appeals Tribunal, all of which should be codified by amendment to the <i>WHSCC Act</i> .	57

12.	To enable Recommendation 2 above, s. 21(11) of the <i>WHSSC Act</i> should be repealed and replaced with a section providing that a decision of the Appeals Tribunal is binding upon the Commission and must be implemented within 30 days unless otherwise specified by the Tribunal.	57
13.	The Tribunal, by amendment to the <i>WHSCC Act</i> , should be given a specific power to (a) issue clarifications of a decision, and (b) direct the Commission to perform certain evidentiary tasks, which in the discretion of the Tribunal, are required to be done before, during or after the hearing of an appeal.	57
14.	Without impinging on the independence of the Tribunal in decision-making, the Commission and the Tribunal should maintain open communication.	57
15.	It is recommended that the Legislature amend the <i>WHSCC Act</i> by moving the jurisdiction for initial appellate review of Appeals Tribunal decisions from the Court of Appeal to the Court of Queen's Bench.	59

No.	Policy Issues	Page
1.	The government will need to make a policy decision about whether the intermediate level of review should be created and governed by specific legislative provisions, or left to the Board of Directors through Policy.	19
2.	Should the Appeals Tribunal report to the same or a different Minister than does the Commission?	27
3.	Should the Appeals Tribunal continue to have members who are representative of the interests of either workers or employers?	27
4.	While the Appeals Tribunal's operations will be funded by an employer levy, should those costs flow through the provincial government (in order to create greater appearance of separation between the Tribunal and Commission) or should the Commission fund the Tribunal directly?	27
5.	Should the Appeals Tribunal's jurisdiction to determine questions under the <i>Charter</i> or under provincial human rights legislation be removed?	27
6.	In view of the above processes and the due diligence exercised by the Board of Directors in the Policy Development process, it remains a policy issue to be decided by the legislators as to whether the Commission needs to retain an ability take a stated case to the Court.	47

APPENDIX A

Jurisdictional Comparison of Key Features

ALBERTA: Workers' Compensation Board	
<i>Workers' Compensation Act, RSA 2000, c W-15</i>	
Appeal Processes	
Administrative Structure	<ol style="list-style-type: none"> 1. WCB Decision: General Information G-2 Review and Appeal Process <ul style="list-style-type: none"> • Makes decisions regarding claims and employer accounts 2. Formal Review by DRDRB (Internal): General Information G-2 Review and Appeal Process <ul style="list-style-type: none"> • If you are a person with a direct interest in an adjudicative decision on a claim, or an employer account decision, you may request an internal review of the decision by the WCB Dispute Resolution and Decision Review Body: <i>Workers' Compensation Act</i> s 46, s 120 • As a first step, a Resolution Specialist will contact the person requesting a review to ensure there is clear understanding of the specific issues or concerns. The Resolution Specialist works with the requestor to determine the best approach to resolving the issue. There are a number of approaches available including: a documentary review, a telephone conference with the interested parties or an in-person meeting with the interested parties 3. External Review by Appeals Commission: General Information G-2 Review and Appeal Process <ul style="list-style-type: none"> • The <i>Act</i> establishes the Appeals Commission as a separate appeal body with exclusive jurisdiction to hear appeals on decisions concerning claims issues or employer accounts made by the WCB Dispute Resolution and Decision Review Body as well as determinations of the Board • If you are a person with a direct interest in an adjudicative decision on a claim, or an employer account decision, you may appeal a decision of the WCB Dispute Resolution and Decision Review Body to the Appeals Commission: <i>Workers' Compensation Act</i> s 13.2 • Subject to sections 13.2(11) and 13.4, the Appeals Commission has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under the <i>Workers' Compensation Act</i> and its regulations in respect of (a) appeals from decisions under section 46 made by a review body appointed under section 45, (b) appeals from decisions under section 120 made by a review body appointed under section 119, (c) appeals from determinations of the Board under section 21(3), and (d) any other matters assigned to it under this or any other Act or the regulations under this or any other Act, and the decision of the Appeals Commission on the appeal or other matter is final and conclusive and is not open to question or review in any court: <i>Workers' Compensation Act</i> s 13.1

	<ul style="list-style-type: none"> • Exceptions to jurisdiction of the Appeals Commission: may ask the Court of Queen’s Bench for an opinion on a question of law or jurisdiction; the WCB and any person with a direct interest in a decision of the Appeals Commission may appeal that decision to the Court of Queen’s Bench on a question of law or jurisdiction; have no jurisdiction to decide questions of law involving the <i>Canadian Charter of Rights And Freedoms</i>, but may decide questions of constitutional law arising from the federal or provincial distribution of powers: Appeals Commission Practice Guideline #1 • The Appeals Commission may confirm, reverse or vary the decision or determination appealed: <i>Workers’ Compensation Act</i> s 13.2(6) • The Board is bound by a decision of the Appeals Commission: <i>Workers Compensation Act</i> s 13.3(1)
Limitation Periods	<ul style="list-style-type: none"> • There is a one year limitation period from the date a WCB decision to request in writing an internal review by the WCB Dispute Resolution and Decision Review Body: General Information G-2 Review and Appeal Process. • There is a one year limitation period from the date of a decision of the WCB Dispute Resolution and Decision Review Body to file in writing an appeal with the Appeals Commission: General Information G-2 Review and Appeals Process. • A reconsideration application to the Appeals Commission must be made within 6 months of the original decision: Appeals Commission Practice Guideline #5 • An application for appeal of a decision of the Appeals Commission to the Court of Queen’s Bench must be filed with the Court and served on the Appeals Commission and other parties to the appeal, within 6 months after the date of the decision being appealed: <i>Workers’ Compensation Act</i> s 13.4(4)
Reconsideration Powers	<ul style="list-style-type: none"> • The Board has authority to reconsider any matter that it has dealt with and to rescind or amend any decision or order previously made by it: <i>Workers’ Compensation Act</i> s 17(3) • The Appeals Commission, at its discretion on the application of a person with a direct interest in the matter, or on its own motion, may reconsider any matter that it has dealt with and may confirm, rescind or amend any decision or order previously made by it: <i>Workers’ Compensation Act</i> s 13.1(7) • For the Appeals Commission, the standard of review which must be met in the reconsideration process is high. The Appeals Commission must be satisfied that an otherwise final decision should be re-opened due to an error: Appeals Commission Practice Guideline #5
Rule Making Powers	<ul style="list-style-type: none"> • The Board of Directors shall determine the Board’s compensation policy and review and approve the programs and operating policies of the Board: <i>Workers’ Compensation Act</i> s 6(a) • The Appeals Commission may make rules governing the practice and procedure applicable to proceedings before it: <i>Workers’ Compensation Act</i> s 13.1(3)

How to get to Superior Court	<ul style="list-style-type: none"> The Board and any person who has a direct interest in a decision of the Appeals Commission may appeal the decision to the Court of Queen's Bench on a question of law or jurisdiction: <i>Workers' Compensation Act</i> s 13.4 An appeal must be commenced by application which includes a concise statement of (a) the grounds on which the decision is being appealed, and (b) the nature of the relief claimed: <i>Workers' Compensation Act</i> s 13.4.
Policy	
Binding on Tribunal?	<ul style="list-style-type: none"> Appeals Commission is bound by the Board of Directors' policy relating to the matter under appeal: <i>Workers Compensation Act</i> s 13.2(6) However, that policy is not binding on the Appeals Commission if it is inconsistent with the Act or regulations under the Act: <i>Appeals Rules 2013</i> s 4.14(2)
How is policy challenged?	<ul style="list-style-type: none"> Individuals can request copies of policy from the WCB. If, after receiving the information, one thinks the policy should be changed, he or she can send a written request for policy review. In this review, one should include specific areas of concern, why the policy should be changed and suggestions for review: General Information G-F Requests for Policy Review The Appeals Commission can decline to apply a policy if it finds that it is inconsistent with the Act or regulations under the Act (s 4.14(2) of <i>Appeals Rules</i>). The Appeals Commission decision can then be judicially reviewed or appealed.
WCB Standing Before Tribunal	Parties to an appeal include the Board with rights set out in section 13.2(6)(c) of the <i>Workers' Compensation Act</i> . <i>Appeal Rules</i> s 2.11(b)
Other	The Office of the Appeals provides advice, assistance and advocacy services for injured workers or their dependants with respect to decisions that are under review or appeal: Policy 01-07 Part I and Policy 01-07 Part II

BRITISH COLUMBIA: WorkSafeBC

Workers Compensation Act, RSBC 1996, C 492

Appeal Processes	
Administrative Structure	<ol style="list-style-type: none"> Review Division: ss96(6), 96.2-96.5 <ul style="list-style-type: none"> Division of WorkSafeBC but independent from other divisions Workers' Compensation Appeal Tribunal (WCAT): Part 4 – ss231-260 <ul style="list-style-type: none"> Independent tribunal Final level of appeal Can hear Review Division decisions unless the matter is listed in s239(2). See also Review Division Practices & Procedures, A5.3.
Limitation Periods	Review Division: s96(4)-(5); s96.2(3) & 113(2) <ul style="list-style-type: none"> 90 days from the date of the decision

	<ul style="list-style-type: none"> • 75 days for reconsideration from the date of the decision for reconsiderations <p>WCAT: Review Division Practices & Procedures, A5.3; s234(2)(d)(i); s243</p> <ul style="list-style-type: none"> • 30 days from Review Division's decision • 90 days from WorkSafeBC's decision for decisions that can be appealed directly to the WCAT (e.g. issues of discrimination or applications to reopen claims) • No limitation period for reconsideration decisions but it can only be requested once • Judicial review must be requested within 60 days of the date decision is issued
Reconsideration Powers	<p>WorkSafeBC : s24; ss96(4)-(5); s113(2); Review Division Practices & Procedures, A2.1.2.</p> <ul style="list-style-type: none"> • General reconsideration powers within 75 days of a decision <p>Review Division: s96.5</p> <ul style="list-style-type: none"> • Can reconsider on the Chief Review Officer's initiative • Or on application by a party when <ul style="list-style-type: none"> ○ the decision in question is not reviewable by the WCAT ○ new evidence has become available or been discovered that is substantial and material to the decision ○ there has been no prior request for reconsideration • See also WCAT Manual of Rules of Practice and Procedure, 3.1.6, 20.2. <p>WCAT: s256</p> <ul style="list-style-type: none"> • if there is new evidence that was not available when vice chair was making the decision • if there was a jurisdictional error • Reconsideration decisions and requests for judicial review can happen simultaneously
Rule Making Powers	<p>Review Division: s96(8)</p> <ul style="list-style-type: none"> • Board is able to create rules of practice and procedure which are found on WorkSafeBC's website <p>WCAT: s234(2)(d); s246</p> <ul style="list-style-type: none"> • WCAT has power to establish forms, practices and procedures • These powers expressly include the power to set limitation periods for certain steps
How to get to Superior Court	<p>All decisions are final (there is no statutory right of judicial appeal) and, therefore, are only subject to judicial review:</p> <ul style="list-style-type: none"> • WorksSafeBC privative clause: s96(1) • WCAT privative clause: s255 • See also Policy C13-102.00

Policy	
Binding on Tribunal?	<p>Review Division: s99</p> <ul style="list-style-type: none"> • Review Division must apply relevant Board policy • See also Policy #2.20 <p>WCAT: s 250(2)</p> <ul style="list-style-type: none"> • WCAT is bound by policy unless the policy is completely inconsistent with the <i>WCA</i>
How is policy challenged?	<p>Review Division: Review Division – Practices and Procedures, A4.2.1</p> <ul style="list-style-type: none"> • If a constitutional challenge is successful with respect to legislation, regulation or policy in the opinion of the Review Division, the impugned section will not be applied by the Review Division and the matter is referred to the Board or provincial government (as the case may be) to consider if changes should be made <p>WCAT: s251</p> <ul style="list-style-type: none"> • WCAT may refuse to apply a policy if it is patently unreasonable in light of the <i>WCA</i> and Regulations • WCAT must then refer the matter to the chair and proceedings are suspended • If chair agrees with The panel, then notice must be given to the Board of Directors who must then review the policy after receiving submissions from those involved in the appeal • Once the Board of Directors decides the policy issue, the matter is remitted back to the WCAT to be decided accordingly
WCB Standing Before Tribunal	<p>Review Division: Review Division – Practices and Procedures, A3.10.</p> <ul style="list-style-type: none"> • A Board Officer may be requested to come give evidence <p>WCAT: s245(4)</p> <ul style="list-style-type: none"> • The Board must advise the WCAT regarding the application of policy on request • Board does not appear to have independent standing before the WCAT
Other	<p>The WCAT is bound by the <i>Administrative Tribunals Act</i>, SBC 2004, c-45 which prescribes patent unreasonableness as the standard of review on judicial review</p> <p>The WCAT is also bound by its prior decisions unless the decision involves a different set of circumstances</p> <p>There is a special process under s257 where the WCAT may be asked by a court to determine certain workers compensation issues for other court proceeds, such as, for example, whether or not an attempted lawsuit is barred by the <i>WCA</i>; the WCAT will issue a “section 257 certificate” on these issues.</p> <p>Section 94.1 specifically allows for lay advocates while excluding them from section 15 of the <i>Legal Profession Act</i>.</p>

MANITOBA*Workers Compensation Act, CCSM, c W200*

Appeal Processes	
Administrative Structure	<p>1. Review Office and Assessment Committee: s.60.1(2)</p> <ul style="list-style-type: none"> • Bodies internal to the WCB • Review Office reconsiders decisions related to compensation or other benefits: Policy 21.00 • Assessment Committee reconsiders only assessment related decisions: Policy 21.05.10 • Documentary review <p>2. Appeal Commission: s.60.1(5)</p> <ul style="list-style-type: none"> • Independent body • Final level of appeal <p>3. Board of Directors: s.60.9(1)</p> <ul style="list-style-type: none"> • The Board of Directors may stay a decision of the Appeal Commission pending a rehearing of the matter where there has been an error in applying the Act, Regulations or WCB policy • The Board of Directors may request a rehearing by <ul style="list-style-type: none"> • a new panel of the Appeals Commission, • the Board of Directors, or • a committee of the Board of Directors • This is not a further level of appeal: s.60.9(2)
Limitation Periods	<p>Review Office and Assessment Committee: Policy 21.00; Policy 21.05.10</p> <ul style="list-style-type: none"> • There is no limitation period <p>Appeal Commission: See Appeal Commission website <http://appeal.mb.ca/faqs.aspx></p> <ul style="list-style-type: none"> • there is no limitation period for requesting an appeal
Reconsideration Powers	<p>WCB: s.60(3)</p> <ul style="list-style-type: none"> • General powers of reconsideration <p>Review Office and Assessment Committee: Policy 21.00; Policy 21.05.10</p> <ul style="list-style-type: none"> • May reconsider own decisions on the basis of new evidence <p>Appeal Commission:</p> <ul style="list-style-type: none"> • May reconsider on the grounds that new evidence has been discovered since the hearing: s.60.10(2) • May correct clerical or typographical errors in any of its decisions (s.60.10(5)) • No general powers of reconsideration: s.60.10(4)
Rule Making Powers	<p>Review Office and Assessment Committee: s. 60.1(3)</p> <ul style="list-style-type: none"> • Rules and procedure for reconsideration are created by the Board of Directors <p>Appeal Commission: s.60.7</p> <ul style="list-style-type: none"> • has power to determine practice and procedure of the Appeal Commission subject to any policies, by-laws or resolutions of the

	Board of Directors
How to get to Superior Court	There is no statutory right of Judicial Appeal. A privative clause indicates that judicial review is the only course to Superior Court: s.60
Policy	
Binding on Tribunal?	The Appeal Commission is bound by the policies of the Board of Directors: s.60.8(6). Further, if the Board of Directors considers that the Appeal Commission has not properly applied the Act, regulations or a policy of the Board of Directors, the Board of Directors may stay the decision of the appeal commission pending a rehearing by either a new panel of the Appeal Commission or a committee of the Board of Directors: s. 60.9(1)
How is policy challenged?	There are no special procedures, guidelines or rules governing the challenge of Board policy.
WCB Standing Before Tribunal	The board may be a party before the Appeal Commission where the chief executive officer requests standing: Appeal Commission Rules of Procedures s. 1(e) (see Appeal Commission website < http://appeal.mb.ca/appeal_commission_rules_of_procedure.aspx >)
Other	

NEWFOUNDLAND & LABRADOR	
<i>Workplace Health, Safety and Compensation Act, RSNL 1990, c W-11 [WHSC Act]</i>	
Appeal Processes	
Administrative Structure	<ol style="list-style-type: none"> 1. Commission Decision <ul style="list-style-type: none"> • The Commission has exclusive jurisdiction to examine, hear and determine matters and questions arising under this Act and a matter or thing in respect of which a power, authority or distinction is conferred upon the commission: s 19(1) • The decisions of the commission are made on the real merits and justice of the case and it is not bound to follow strict legal precedent: s 19(4) 2. Workplace Health, Safety & Compensation Commission (WHSCC) Internal Review Division: Policy AP-01 Internal Review <ul style="list-style-type: none"> • The Review Specialist conducts an analysis to ensure that all relevant information has been considered and that the decision complies with the Act, regulations and policies: AP-01 Internal Review • The Review Specialist will normally only conduct paper reviews, although interviews, meetings and requests for further details may be taken: AP-01 Internal Review • No hearing will be heard at this stage: Internal Review Brochure 3. Workplace Health, Safety and Compensation Review Division (WHSCRD) (External): http://www.gov.nl.ca/whscrd/index.html The Lieutenant Governor in Council shall on the recommendation of the minister appoint to the review division a panel of persons to act as

	<p>review commissioners: <i>WHSC Act s 22</i></p> <p>The review commissioner may review a decision of the commission to determine if the commission, in making that decision, acted in accordance with the <i>Act</i>: <i>WHSC Act s 26(1)</i></p> <ul style="list-style-type: none"> The Review Commissioner will consider: did the WHSCC make an error in processing the claim; did the WHSCC correctly apply the applicable sections of the <i>Act</i>; has the WHSCC correctly: http://www.gov.nl.ca/whscrd/faq.html <p>An order or decision of a review commissioner is final and conclusive and is not open to question or review in a court of law and proceedings by or before a review commissioner shall not be restrained by injunction, prohibition or other process or proceedings in a court of law or be removable by <i>certiorari</i> or otherwise in a court of law: <i>WHSC Act s 26(2)</i></p> <p>A hearing process will be engaged during the external review process: Review Process Brochure</p>
Limitation Periods	<ul style="list-style-type: none"> A person who objects to a claim that has been filed with the commission shall file with the commission a written notice within 10 days after the date the claim was reported: <i>WHSC Act s 63(1)</i> An appeal to the Workplace, Health, Safety and Compensation Review Division (external) must be made within 30 days of the date of the decision of the Internal Division: http://www.gov.nl.ca/whscrd/faq.html An application for reconsideration of a decision of a review commissioner shall be made within 30 days of receipt of the decision that is subject to reconsideration: <i>WHSC Act s 28.1(3)</i>
Reconsideration Powers	<ul style="list-style-type: none"> The commission may reopen, rehear, redetermine, review or readjust a claim, decision or adjustment, where (a) an injury has proven more serious or less serious than it was considered to be; (b) new evidence relating to the claim, decision or adjustment has been presented to it; (c) a change has occurred in the condition of an injured worker or in the number, circumstances or condition of dependents or otherwise; or (d) a worker is not following medically prescribed treatment: <i>WHSC Act s 64</i> A worker, dependent, employer or the commission may apply, in writing, to the chief review commissioner for a reconsideration of a decision of a review commissioner: <i>WHSC Act s 28.1(1)</i>
Rule Making Powers	<ul style="list-style-type: none"> The Board of Directors establishes policies and programs consistent with the <i>Workplace Health, Safety and Compensation Act</i> and regulations: <i>WHSC Act s 5</i> The commission, subject to approval of the Lieutenant-Governor in Council, may make regulations to give effect to Part I of the <i>Workplace Health, Safety and Compensation Act</i>: <i>WHSC Act s 20.6</i> The review division may, subject to approval of the Lieutenant-Governor in Council, in relation to the review of decisions, prescribe rules of procedure and evidence and may order the type and nature of information to be provided by a person to a review commissioner before or during a review and that person shall provide the information to the review commissioner: <i>WHSC Act s</i>

	27(1)
How to get to Superior Court	Commission on its own motion (or on application by a party) can state a question of law to the Trial Division: <i>WHSC Act</i> s 35; otherwise privative clause applicable to Review Division [s. 26(2)] indicates that judicial review is available.
Policy	
Binding on Tribunal?	<ul style="list-style-type: none"> Where there is no written policy, where the intent of policy is uncertain, or where clarification of a policy issue is required the Review Specialist may request assistance from the Department Director. The Department Director may advise that a decision be provided concerning the real merits and justice of the case, or that the decision be delayed until the policy issues relevant to the claim are addressed by the Management Committee or Board of Directors: Policy AP-01 A review commissioner is bound by the Act, regulations and policy: <i>WHSC Act</i> s 26.1
How is policy challenged?	No information available on how to challenge policy, if challenges are allowed at all.
WCB Standing Before Tribunal	<ul style="list-style-type: none"> The commission has standing and may be heard and make representations itself or through an agent acting on its behalf on a matter being reviewed by a review commissioner and at further proceedings arising out of that matter: <i>WHSC Act</i> s 28(3)
Other	Expenses incurred in the administration of the review division, including those under section 24, shall be paid out of the Consolidated Revenue Fund and that fund shall be reimbursed by money from the injury fund: <i>WHSC Act</i> s 25.

NEW BRUNSWICK: WorkSafeNB (Workplace Health, Safety and Compensation Commission)

Workers' Compensation Act, RSNB 1973, c W-13 [*WCA*]

Firefighter's Compensation Act, SNB 2009, c F-12.5 [*FCA*]

Occupational Health and Safety Act, SNB 1983, c O-0.2 [*OHSA*]

Workplace Health, Safety and Compensation Commission Act [*WHSCCA*]

Appeal Processes	
Administrative Structure	<p>There is one level of appeal for matters under the <i>FCA</i> or <i>WCA</i>: the Appeals Tribunal: Policy 41-010;</p> <ul style="list-style-type: none"> Appeals Tribunal is not independent, but internal to the Board The Tribunal is established by the <i>WHSCCA</i> and given jurisdiction over the <i>WCA</i>, <i>OHSA</i>, and <i>FCA</i> <p>If the matter concerns the <i>OHSA</i>, the structure is as follows:</p> <ol style="list-style-type: none"> Appeal to the Chief Compliance Officer Appeals Tribunal
Limitation Periods	<p>1 year from decision for decisions made under the <i>WCA</i> or <i>FCA</i>: <i>WHSCCA</i>, s21(1.1)</p> <p>If it is a decision made pursuant to the <i>OHSA</i></p>

	<ul style="list-style-type: none"> • 14 days to appeal to the Chief Compliance Officer: <i>OHSA</i>, s37 • 7 days to appeal to the Appeals Tribunal: <i>WHSCCA</i>, s21(2)
Reconsideration Powers	Yes, if new, substantial information is submitted <ul style="list-style-type: none"> • See Appeals Tribunal Guidelines, 28 • <i>WHSCCA</i>, s22
Rule Making Powers	No; Board of Directors establishes guidelines for the tribunal: Policy 41-010; <i>WHSCCA</i> , s25(b)
How to get to Superior Court	Statutory right of appeal directly to the New Brunswick Court of Appeal for questions of law: <i>Workplace Health, Safety and Compensation Act</i> , ss 21(12), 23. <i>FCA</i> , s49 contains the privative clause for decisions made pursuant to the <i>FCA</i> <i>WCA</i> , s34 contains the privative clause for decisions made pursuant to the <i>WCA</i>
Policy	
Binding on Tribunal?	While Policy 41-010 purports to require Appeals Tribunal to apply Commission policy, NBCA case law (<i>D.W.</i> and <i>Douthwright</i>) indicates that Commission policy is not binding on the Appeals Tribunal.
How is policy challenged?	There are no established guidelines for challenging policy.
WCB Standing Before Tribunal	Attendance not restricted and the Board could apply to attend if interest in the case: <i>WHSCCA</i> , s21(8)
Other	N/A

NORTHWEST TERRITORIES & NUNIVUT

Workers' Compensation Act, SNWT 2007, c21

Workers' Compensation Act, SNU 2007, c15

Appeal Processes	
Administrative Structure	<ol style="list-style-type: none"> 1. Review Committee: ss.112, 113 and 114; Policy 08.01 <ul style="list-style-type: none"> • Internal to the Workers Safety and Compensation Commission (WSCC) • May review decision of the WSCC on request of a claimant or employer • May exercise any of the powers of the WSCC when making the decision under review • Conducts a documentary review unless an oral hearing is requested 2. Appeals Tribunal: ss.117 and 128 <ul style="list-style-type: none"> • Independent from the WSCC • May review decisions of RC upon appeal in writing from claimant or employer
Limitation Periods	Review Committee: s.115 <ul style="list-style-type: none"> • 3 years after the day of the WSCC's decision,

	<p>unless the Review Committee considers there is a justifiable reason for the delay necessitating an extension</p> <p>Appeals Tribunal: s.128(2)</p> <ul style="list-style-type: none"> • 3 years after the day of the RC's decision
Reconsideration Powers	<p>WSCC: s.91(4)</p> <ul style="list-style-type: none"> • The WSCC has the power to reconsider any matter previously dealt with it <p>Review Committee: Policy 08.01</p> <ul style="list-style-type: none"> • May confirm, reverse or vary the original decision <p>Appeals Tribunal: ss.131(1), 132</p> <ul style="list-style-type: none"> • May vary its own decision and may rehear an appeal or application on its own initiative • May be directed to rehear a matter by the Governance Council
Rule Making Powers	<p>WSCC/Review Committee: s.83(2)(c)</p> <ul style="list-style-type: none"> • The Governance Council is responsible for reviewing and approving the programs and operating procedures of the WSCC <p>AT: s.119(b)</p> <ul style="list-style-type: none"> • May make rules respecting its procedure and the conduct of its business
How to get to Superior Court	<p>There is no statutory right of Judicial Appeal. Therefore, the Appeal Tribunal's decisions are only subject to judicial review: s.133; Policy 08.01</p>
Policy	
Binding on Tribunal?	<p>The Appeals Tribunal is bound by policy of the Governance Council: s.130(2). In addition, the Governance Council may, within 6 months of the day after the Appeals Tribunal's decision, direct the Appeals Tribunal to rehear an appeal if the Governance Council considers that the Appeals Tribunal has failed to apply WSCC policy or failed to comply with the <i>Workers' Compensation Act</i>: s.131(1) and (3); Policy 08.02</p>
How is policy challenged?	<p>Review Committee: s.112(5)</p> <ul style="list-style-type: none"> • No decision or policy of the Governance Council is subject to review <p>Appeals Tribunal: s.126(4)</p> <ul style="list-style-type: none"> • No decision or policy of the Governance Council is subject to appeal
WCB Standing Before Tribunal	<p>The Appeals Tribunal is required to give the WSCC an opportunity to be heard and to present evidence: s.130(1)</p>
Other	

NOVA SCOTIA: Workers' Compensation Board

Workers' Compensation Act, SNS 1994-95, c10

Appeal Processes	
Administrative Structure	<p>1. Internal Appeals Department: Policy 8.1.3R2, 8.1.6, 8.2.2; ss185, 197-206</p> <ul style="list-style-type: none"> • Board decisions are first appealed to a Hearing Officer • The WCB has discretion to seek advice from the Medical Review Commission, which then would issue a non-binding opinion • The Hearing Officer has discretion to make an interim award <p>2. Workers' Compensation Appeal Tribunal (WCAT): s238-255A</p> <ul style="list-style-type: none"> • This is an independent tribunal
Limitation Periods	30 days for all stages of appeal: ss197(2), 243, 256(3)(a)
Reconsideration Powers	<p>Reconsideration decisions of the Board (Including the Hearing Officer): Policy 8.1.7R1; WCA s185(2)</p> <ul style="list-style-type: none"> • New evidence must be submitted that could not have been presented at the time of the original decision <p>The WCAT does not have reconsideration powers: s 252(2)</p>
Rule Making Powers	<p>Internal Appeals Department</p> <ul style="list-style-type: none"> • No; rules are found in the Policies enacted by the Board of Directors <p>WCAT: s240(1)</p> <ul style="list-style-type: none"> • Yes
How to get to Superior Court	<p>Statutory right of appeal to Court of Appeal on questions of jurisdiction or law with permission from the court to be applied for within 30 days of decision: s256</p> <p>Section 10F has a limited privative clause for the WCAT</p>
Policy	
Binding on Tribunal?	Yes, it is binding on both the Hearing Officer and the WCAT: ss183(5), 186
How is policy challenged?	<p>Policy 8.2.1; WCAT Procedural Manual, 2.14; ss 183, 199-201, 247, 249</p> <ul style="list-style-type: none"> • Hearing Officer or WCAT adjourns and refers the matter to the Chair of the Board of Directors who then refers the matter to the Board of Directors • WCAT may refuse to apply the policy if it determines it is inconsistent with the WCA or Regulations. • In the event that WCAT determines that policy may be inconsistent with the Act, it will hear submissions from all participants – presumably this includes the Board • S183(8) also allows a direct appeal from the Hearing Officer to the Court of Appeal on the ground that the policy underlying an Officer's decision is inconsistent with the Act or Regulations.
WCB Standing Before	The Board is a participant in all appeals before the WCAT: s245

Tribunal	
Other	<p>Section 29 gives the WCAT the exclusive jurisdiction to determine if a worker may sue his/her employer</p> <p>Notice must be given to the relevant Attorney Generals on questions of constitutional validity: WCAT Procedural Manual 3.30</p> <p>Both the Board and WCAT may state a question of law for the Court of Appeal: s206(1)</p> <p>Section 255 gives the Appeals Tribunal the ability to make Regulations with the approval of the Governor in Council</p> <p>Sections 260 – 274 establishes a Workers Advisers Program to assist workers in the process as well as the specific power to make regulations governing non-lawyer advisors</p>

ONTARIO: Workplace, Safety and Insurance Board (WSIB)

Workplace Safety and Insurance Act, 1997, SO 1997, c-16

Appeal Processes	
Administrative Structure	<p>1. Appeals Services Division (ASD): ss118-122</p> <ul style="list-style-type: none"> • Internal division of the Board <p>2. Workplace Safety and Insurance Appeals Tribunal (WSIAT): ss123-134, 173-75</p> <ul style="list-style-type: none"> • A fully independent tribunal
Limitation Periods	<p>ASD: Practice & Procedures; s120</p> <ul style="list-style-type: none"> • 30 days concerning Return to Work or Labour Market Re-entry decisions • 6 months for all other issues • 2 years for reconsideration decisions <ul style="list-style-type: none"> ○ Note: this is not a statutory limitation as s121 expressly allows for reconsiderations at any time. <p>WSIAT: Practice Direction, Page 12; s125</p> <ul style="list-style-type: none"> • 6 months, subject to successful application for extension
Reconsideration Powers	<p>ASD may reconsider a decision: ASD Practice & Procedures, Pages 43-45; s120</p> <ul style="list-style-type: none"> • If substantive defect in the decision or decision-making process that may reasonably affect the outcome • If failure to properly apply Act or WSIB Policy • If significant new evidence is submitted not available at the time the decision was made • If a typographical error was made impacting the decision <p>WSIAT: WSIAT Practice Direction, Pages 49-50, 93-99; s129</p> <ul style="list-style-type: none"> • If significant new evidence discovered not available at the time of the original decision that would likely change the

	<p>outcome</p> <ul style="list-style-type: none"> • If original decision overlooked an important piece of evidence • If there was a clear error of law • If there was a jurisdictional error
Rule Making Powers	<p>The ASD makes its own rules of practice and procedure pursuant to the WSIB's general power to do the same: ASD Practice & Procedures, Page 3; s131(1)</p> <p>The WSIAT also makes its own rules for practice and procedure: s131(2)</p>
How to get to Superior Court	<p>There is no statutory right of appeal and, consequently, judicial review is the only avenue to a superior court.</p> <p>Privative clauses: s118(3); 123</p>
Policy	
Binding on Tribunal?	<p>The ASD, is bound by policy but may depart from policy in exceptional circumstances if the result would lead to an absurdity: Policy 11-01-03; s119</p> <p>The WSIAT is also bound by WSIB policy: s126</p>
How is policy challenged?	<p>If the WSIAT feels that a policy is inconsistent with the WSIAT it refers the policy to the Board for review, which will then issue a direction after receiving written submissions: s126(4), (6)-(8)</p>
WCB Standing Before Tribunal	<p>WCB has no special or unique standing before the WSIAT</p>
Other	<p>Ontario has a Fair Practices Commission which serves as an ombudsman for the WSIB</p> <p>As of February 1, 2013, a new appeals process came into effect for the WSIB, which was largely the result of a consultation report, which can be found here: http://www.wsib.on.ca/files/Content/AppealsAppealsModernizationConsultationreport/ConsultationReportAppealsModernization.pdf</p> <p>Representatives are generally not able to appear before the WSIB or WSIAT unless they are a friend or family member or licenced (or excused) by the Law Society of Upper Canada. If a worker is going to be represented, notice must be given: ASD Practice & Procedures, Page 9; WSIAT Practice Direction, Page 7.</p> <p>Both the ASD and WSIAT adopt the concept of "Whole Person Adjudication" which can be contrasted by fragmenting analysis according to issue or body part: http://www.wsiat.on.ca/english/appeal/whole.htm.</p> <p>WSIAT has the jurisdiction to determine if a party may sue: WSIAT Practice Direction, Page 44.</p>

PEI <i>Workers Compensation Act, RSPEI 1988, c W-7.1</i>	
Appeal Processes	
Administrative Structure	<p>1. Decision made by the Board</p> <p>2. Internal Reconsideration Officer: POL-48</p> <ul style="list-style-type: none"> • The Internal Reconsideration Officer will complete a preliminary review of the notice to ensure requirements met: POL-48 • Internal Reconsideration Officer will respond to the applicant in writing indicating whether requirements for review have been met and identify the issue in dispute: POL-48 • Applicant has 30 days to notify the Internal Reconsideration Officer if the issue identified in the letter is incorrect. If there is no response, the issue will be deemed as identified: POL-48 • The Internal Reconsideration Officer will conduct a paper file review, but they have the discretion to discuss the file with the parties: POL-48 • Internal Reconsideration Officer will provide a written decision: POL-48 • The Internal Reconsideration Officer's decision is the final decision of the WCB for the issue: POL-48 • Decision not final and binding: POL-48 • The WCB will not compensate for lost wages, travel costs, legal fees or other costs associated with the internal reconsideration process: Guide to Internal Reconsideration <p>3. Workers Compensation Appeal Tribunal (WCAT) (External): POL-88</p> <ul style="list-style-type: none"> • Independent, quasi-judicial administrative tribunal • Following reconsideration, a person who has direct interest in a matter may appeal the decision to the Appeal Tribunal: <i>Workers' Compensation Act</i> s 56(6) • WCAT decisions are final and binding • The Tribunal cannot hear any evidence not already considered by the Internal Reconsideration Officer. The Board decides whether material is new or not, not the Tribunal. Anything not included in the Board's Appeal Record must be returned to the Board for a determination: WCAT Website http://www.gov.pe.ca/labour • The Appeal Tribunal decision will not be implemented until 30 days from the date of the decision, to allow for appeal. Where leave to appeal is filed, the WCB will not implement the Appeal Tribunal decision until the CA decision is given: POL-88.
Limitation Periods	<ul style="list-style-type: none"> • A reconsideration by the Internal Reconsideration Officer will only be made if a written request of a person with a direct interest in the decision made no later than 90 days from the date of notification of the decision: <i>Workers' Compensation Act</i> s 56(1) • A Notice of Appeal must be filed to the Workers Compensation Appeal Tribunal within 30 days of the decision by the Workers

	<p>Compensation Board: <i>Appeals Regulations</i> s 1</p> <ul style="list-style-type: none"> • Leave to appeal will not be granted by the Court of Appeal unless application is made within 30 days of the date of the decision of the Appeal Tribunal: <i>Workers' Compensation Act</i> s 56.2(3)
Reconsideration Powers	The Board will not reconsider a decision except on the written request of a person with a direct interest in the decision made no later than 90 days from the date of notification of the decision: <i>Workers' Compensation Act</i> s 56(1)
Rule Making Powers	<ul style="list-style-type: none"> • The directors shall enact bylaws, policies and practices for the good conduct of the business and affairs of the Board: <i>Workers' Compensation Act</i> s 30(2) • The procedure for reconsideration of a decision is determined by the Board: <i>Workers' Compensation Act</i> s 56(4) • The Appeal Body can make its own rules, subject to any policies, bylaws or resolutions of the Board: <i>Workers' Compensation Act</i> s 56(19)
How to get to Superior Court	<ul style="list-style-type: none"> • Subject to sections 56 and 56.1, the Board has exclusive jurisdiction to examine into, hear and determine all matters and questions arising under the <i>Workers Compensation Act</i>. The decision of the Board is final and not open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction: <i>Workers' Compensation Act</i> s 32 • Statutory right of appeal to CA with leave on question of law: <i>Workers' Compensation Act</i> s 56.2, POL-88 Workers Compensation Appeal Tribunal Decision Implementation
Policy	
Binding on Tribunal?	<ul style="list-style-type: none"> • The Internal Reconsideration Officer is bound by the <i>Workers' Compensation Act</i> and WCB Policy: POL - 48 • The Appeal Tribunal is bound by the policies of the Board: <i>Workers' Compensation Act</i> s 56(17)
How is policy challenged?	<ul style="list-style-type: none"> • Policies are monitored on a regular basis and reviewed at least every 5 years. • Individuals can provide input into the WCB policies under review as well as review draft policies and provide feedback before they are approved • The feedback is considered during policy development and prior to the approval of new policy or changes to existing policy http://www.wcb.pe.ca/Information/PolicyConsultation
WCB Standing Before Tribunal	Persons with a direct interest who can be heard in front of the Board and Appeal Tribunal includes the Workers Compensation Board: POL 48 and 88
Other	An employer advisor and worker advisor are available to assist in the appeal process at no charge to the employer or worker. Services provided include preparing submissions to the Internal Reconsideration Officer and WCAT. These bodies operate independently from the WCB.

QUEBEC: CCST*Act Respecting Industrial Accidents and Occupational Diseases, CQLR, c A-3.001*

Appeal Processes	
Administrative Structure	<p>1. Administrative Review Department (ARD): ss349ff</p> <ul style="list-style-type: none"> • Internal to the Commission <p>2. Commission des lésions professionnelles (CLP): ss367ff</p> <ul style="list-style-type: none"> • Independent tribunal
Limitation Periods	<p>ARD: s358</p> <ul style="list-style-type: none"> • 30 days from notification of the decision • 10 days if the decision is made pursuant to the <i>Act Respecting Occupational Health and Safety</i> <p>CLP: s359, 359.1</p> <ul style="list-style-type: none"> • 45 days from ARD decision
Reconsideration Powers	<p>ARD: s365; 429.56</p> <ul style="list-style-type: none"> • if not appealed, if a new essential fact became known, a decision may be reconsidered within 90 days of the discovery of the fact <p>CLP: unable to determine</p>
Rule Making Powers	<p>ARD: Procedural rules in the statute (ss429.13ff), but the President shall establish a code of ethics (s426) and the board may make any rules where the statutory rules are lacking (s429.20)</p> <p>CLP: the Code of Civil Procedure applies with necessary modifications</p>
How to get to Superior Court	<p>A judge of the Court of Appeal may quash any order granted that is outside its jurisdiction</p> <p>Privative clauses: s350, s378</p>
Policy	
Binding on Tribunal?	Unable to determine
How is policy challenged?	Unable to determine
WCB Standing Before Tribunal	Unable to determine
Other	<i>NOTE: Information is not readily available in English (e.g. CSST Policies and CLP's website are only available in French) and, consequently, the information above only contains what could be gleaned from the statute and AWCB's website.</i>

SASKATCHEWAN: Workers' Compensation Board

Workers Compensation Act, 1979, SS 1979, c W-17.1

Appeal Processes	
Administrative Structure	<ol style="list-style-type: none"> 1. Initial review by WCB staffer responsible for initial decision: s 104; Policy 31/2010 (Doc # 9.2) 2. Appeals Department/Employer Services Assessment: Policy 31/2010 (Doc # 9.2), Policy 32/2010 (Doc # 9.7) <ul style="list-style-type: none"> • The Employer Services Assessment is the section of the Board dealing specifically with employer appeals regarding experience accounts while the Appeals Department deals with worker and employer appeals • These are independent departments of the Board established by policy to provide independent review of decisions • Powers include ability to confirm, reject or alter WCB decisions in accordance with the Act and Polices 3. Board Appeal Tribunal: ss 21, 22, Policy 30/2010 (Doc #9.6) <ul style="list-style-type: none"> • Like the Appeals Department, the Board Appeal Tribunal is not fully independent and is established by Policy 4. Medical Review Panel: ss 60-66, Policy 18/2010 (Doc # 9.8) <ul style="list-style-type: none"> • After all other remedies are exhausted, a worker submit a valid medical question (doctor or chiropractor disagrees with the position taken by the WCB) • Decisions are binding on WCB • This is the only review structure specifically set up by legislation
Limitation Periods	There are no limitation periods set by policy or the Act.
Reconsideration Powers	<p>Sections 21 & 22(3) gives the WCB the general power to reconsider, rescind, alter or amend a decision; this applies to all departments and review bodies. There are no further criteria put forward with respect to reconsideration made by a decision-maker except for the general criteria determining when Board decisions are reviewable (Policy 13/91 (Doc # 9.2)): when there is</p> <ul style="list-style-type: none"> • new evidence • subsequent contrary opinion by the Board's medical staff regarding the relationship of medical issues to injury and/or employment • subsequent contrary opinion on entitlement by Operations staff, the Appeals Committee, or members of the Board
Rule Making Powers	All rules governing practice and procedure are determined by the Board of Directors and are found in the Policy Manual.
How to get to Superior Court	All decisions are final (there is no statutory right of judicial appeal) and, therefore, are only subject to judicial review: s 22 (privative clause)
Policy	
Binding on Tribunal?	Appeals Department is bound by policy; the Board Appeal Tribunal is only bound by the Act and not by Board policy: Policy 30/2010 (Doc # 9.6, #6)

How is policy challenged?	There are not special procedures, guidelines or rules governing the challenge of Board policy.
WCB Standing Before Tribunal	N/A (the Tribunal is part of the Board)
Other	<p>Saskatchewan has a Fair Practices Office to receive complaints and questions for all areas of the WCB and operates as an ombudsman (Policy 15/2010 (Doc # 9.5)):</p> <ul style="list-style-type: none"> • It does not review issues that are under appeal. • It cannot override policy • It investigates and determines whether or not policies, processes and legislative provisions are applied fairly • It makes non-binding recommendations for improvement. • It is independent of other departments and reports directly to the Board of Directors via the Chair • Governs a variety of issues including claims, the implementation of Board and Appeal decisions, and the application of policy and procedure.

YUKON

Workers' Compensation Act, SY 2008, c-12

Appeal Processes	
Administrative Structure	<p>1. Hearing Officer: s.53(1) and (3); Policy GC-05-03</p> <ul style="list-style-type: none"> • A hearing officer or panel of hearing officers may hear a review of any decision of the Yukon Workers' Compensation Health and Safety Board (YWCHSB) concerning a claim for compensation • Not independent from the board • Is generally a documentary review, but must provide oral hearing if requested <p>2. Appeal Tribunal: s.54(1) and (2); s.62(1) and (5); Policy AP-01</p> <ul style="list-style-type: none"> • Decisions of a hearing officer or panel of hearing officers may be appealed to the Appeal Tribunal • A hearing shall be held • Independent of the YWCHSB
Limitation Periods	<p>Hearing Officer: s.52(1); Policy AP-02</p> <ul style="list-style-type: none"> • 24 months of the date of the decision <p>Appeal Tribunal: s.52(1); Policy AP-02</p> <ul style="list-style-type: none"> • 24 months of the date of the decision
Reconsideration Powers	<p>YWCHSB: s.105(5)</p> <ul style="list-style-type: none"> • General powers of reconsideration <p>Hearing Officer: Policy GC-05-03</p> <ul style="list-style-type: none"> • Hearing Officers have no express powers of reconsideration <p>Appeal Tribunal</p>

	<ul style="list-style-type: none"> • Can reconsider its decision if new medical evidence has been brought forward
Rule Making Powers	<p>YWCHSB: s.101(d)</p> <ul style="list-style-type: none"> • The board of directors may make rules relating to the establishment of procedures and time limits governing reviews and appeals <p>Appeal Tribunal: s.63(a)</p> <ul style="list-style-type: none"> • The Appeal Tribunal may make rules and procedures consistent with the Act and regulations
How to get to Superior Court	<p>A worker, dependent of a deceased worker or employer can apply to the Yukon Supreme Court for judicial review of a decision of the Appeal Tribunal on a question of law or jurisdiction: s.59(3). Decisions of the Appeals tribunal are protected by a privative clause: s.65(3)</p>
Policy	
Binding on Tribunal?	<p>The Appeal Tribunal is bound by board orders and policies of the board of directors: s.64(3). Furthermore, the board of directors may direct the Appeal Tribunal to rehear an appeal if it considers the Appeal Tribunal has not properly applied the Act or board of director policies: s.64(8); Policy AP-01</p>
How is policy challenged?	<p>Either the Appeal Tribunal or the board may apply to the Yukon Supreme Court for a determination of whether a board of directors' policy or an Appeal Tribunal decision is consistent with the Act. In such an application, both the Appeal Tribunal and the board have standing: s.51(1) and (2)</p>
WCB Standing Before Tribunal	<p>The board has standing as a party at an appeal before the Appeal Tribunal on matters pertaining to jurisdiction or to clarify the record: s.55</p>
Other	

APPENDIX B

Jurisdictional Comparison of *Charter* and Human Rights Jurisdiction

Key Questions:

1. What authority do tribunals have concerning *Charter*/constitutional jurisdiction?
2. Is there legislation limiting *Charter*/constitutional jurisdiction?
3. Is the *Tranchemontagne/Figliola* approach abrogated in any other province or territory because of legislation?

Province	Authorities	General Approach
British Columbia	<ul style="list-style-type: none"> • <i>Administrative Tribunals Act</i>, SBC 2004, c 45, ss 44-46.3 • <i>Workers Compensation Act</i>, RSBC 1996, c 492, s 245.1 • WCAT Manual of Rules of Practice and Procedure, 3.4.1-2 	The WCAT does not have authority to decide constitutional questions, <i>Charter</i> issues or to apply the provincial <i>Human Rights Code</i> . Its ability to consider human rights issues has been statutorily removed.
Saskatchewan	<ul style="list-style-type: none"> • Policy 05/2005 	Policy relies on SCC decisions giving administrative tribunals the authority to hear <i>Charter</i> and constitutional issues and this authority has not been abrogated by statute. However, the scope of this authority is quite limited as Policy states that only bona fide <i>Charter</i> /Constitutional issues may be argued by workers concerning the validity of policy or the Act and that it is never valid for a worker to appeal a decision on the basis that a claim was rejected on the grounds of discrimination or a <i>Charter</i> breach. It is worth noting that Saskatchewan's tribunal is an extension of the WCB – it is not a true independent body.
Manitoba	<ul style="list-style-type: none"> • <i>Workers Compensation Act</i>, CCSM, c W200, s 60(2.2) 	Pursuant to the <i>WCA</i> , neither the Board nor the Appeals Commission has jurisdiction over constitutional questions. Nevertheless, there does not seem to be any authority that would detract from the <i>Figliola</i> or <i>Tranchemontagne</i> approach with respect to the Commission's ability to decide human rights issues.
Ontario	<ul style="list-style-type: none"> • WSIAT: Practice Direction, Procedure When Raising a Human Rights or Charter Question, Page 3ff • <i>Tranchemontagne v Ontario</i> • <i>Nova Scotia (WCB) v Martin</i> 	The WSIAT Practice Direction specifically cites <i>Tranchemontagne</i> for its authority to consider human rights under the Ontario <i>Human Rights Code</i> . It also cites <i>Nova Scotia (WCB) v Martin</i> for its authority to consider the validity of legislation pursuant to the <i>Charter</i> .

Quebec		Both Quebec's Policies and their tribunal's (CLP) website appear to be unavailable in English and so I was unable to completely explore Quebec. Their statute, however, does not address jurisdictional issues concerning the constitution or human rights issues.
New Brunswick	N/A	There is no statutory abrogation of the tribunal's ability to hear human rights issues, nor are there policies or procedural rules governing the tribunal's consideration of human rights issues. However, the Court has seemed comfortable with the tribunal's jurisdiction over human rights issues and has operated accordingly: see e.g. <i>Laronde v New Brunswick (WHSCC)</i> , 2007 NBCA 10.
Nova Scotia	<ul style="list-style-type: none"> WCAT Practice Manual, Rule 3.30 	There is no statutory abrogation of the tribunal's ability to hear human rights issues. This Practice Rule governs issues before the tribunal concerning both the constitutional validity of legislation and the violation of specific human rights pursuant to the <i>Charter</i> or any other human rights legislation.
PEI	N/A	There does not appear to be any abrogation of the tribunal's jurisdiction by any statute. Although <i>Figliola</i> or <i>Tranchemontagne</i> have never been judicially considered in PEI, on at least one instance, the court has seemed comfortable considering decisions made by the tribunal on questions of human rights grounded in PEI's <i>Human Rights Act</i> and the <i>Charter</i> : see <i>Jenkins v Workers' Compensation Appeal Board of PEI</i> (1986), 31 DLR (4th) 536 (SC (AD)).
Newfoundland	N/A	There does not appear to be any statutory abrogation of the tribunal's ability to handle human rights or constitutional issues. In <i>Chiasson v Happy Valley-Goose Bay</i> , 2011 NLTD(G) 156, <i>Figliola</i> was adopted in the context of labour arbitration and the Human Rights Commission. Presumably, the same analysis would apply to the workers' compensation tribunal. In <i>Jesso v Newfoundland (Workers' Compensation Commission)</i> it was decided that the commission had jurisdiction to consider the <i>vires</i> of Board policies (affirmed for WHSCRD in <i>Newfoundland & Labrador</i>

		<i>(WHSCC) v Mount Pearl</i> , 2008 NLCA 69 at para 21).
Nunavut/NWT	<ul style="list-style-type: none"> • Appeals Tribunal Rules of Procedure, s 26 • <i>Workers' Compensation Act, SNWT 2007, c 21, s 7.3</i> 	<p>There has been no statutory abrogation of the tribunal's ability to hear constitutional or human rights issues.</p> <p>In <i>NWT (WCB) v Nolan</i>, [1999] NWTJ No 12 (SC) it was decided that the tribunal has jurisdiction to assess the constitutionality of WCB policies and due to its ability to aside questions of law generally. Further, in <i>Valic v NWT & Nunavut (WCB)</i>, 2005 NWTSC 105, the tribunal adjudicated a s15 <i>Charter</i> issue without jurisdictional difficulty even though its decision was ultimately incorrect (<i>Nova Scotia (WCB) v Martin</i> and <i>Eldriedge v BC</i> were cited as authorities for the tribunal's jurisdiction to determine both the validity of legislation and its application in specific instances).</p>
Yukon	N/A	<p>There has been no statutory abrogation of the tribunal's ability to hear constitutional or human rights issues.</p> <p>In Appeal Tribunal Decision #146, the tribunal considered whether the Board's adjudication of a worker's claim violated s15 of the <i>Charter</i>.</p>

APPENDIX C Claims and Appeals Statistics

KSM 1 – Number of Claims Reported (#)

	2010	2011	2012
Canada	774625	785851	
AB	135024	144453	148566
BC	136632	141559	144865
MB	38066	39015	38390
NB	24076	23332	22609
NL	13163	14152	14310
NS	28002	27786	26422
NT/NU	3549	3893	3764
ON	240220	⁴²³ 235815	⁴⁶⁶ 233236
PE	3772	3791	3932
QC	⁴⁶ 112672	⁴⁶ 111523	⁴⁶ 111094
SK	37771	38718	38790
YT	1568	1814	1812

Extracted On: 10/28/2013 11:14:56 AM

Note: Cells with a grey background indicate data that has not yet been published. It is currently in a pre-approval state.

The information contained in this report is based on accepted national definitions and may not be the same as statistics published in WCB annual reports. This document should be read in conjunction with the "Preface to Accompany" Report.
Source: Association of Workers' Compensation Boards of Canada (AWCBC)

Footnotes

46	Quebec includes Medical Assist only claims for amounts that exceed predetermined thresholds.
423	Program for Exposure Incident Reporting (PEIR) claims are excluded
466	Program for Exposure Incident Reporting (PEIR) and amalgamated claims are excluded.

Appeal Statistics

2010

Jurisdiction	Appeals Commenced	Overturns
AB	1,568	465*
BC	3,946 (3,293)	1,383
MB	(125)	40
NB	702 (421)	310
NL	334 (24)	60
NS	894 (783)	352
NT/NU	16	4
PEI	26	16
SK	1,152	200
YT	17	7

2011

Jurisdiction	Appeals Commenced	Overturns
AB	1,059	330
BC	4,583 (3,129)	1,377
MB	(182)	52
NB	798 (472)	407
NL	323 (185)	26
NS	821 (617)	264
NT/NU	15	6
PEI	11	4
SK	940	191
YT	13	6

2012

Jurisdiction	Appeals Commenced	Overturns
AB	950	269
BC	5,065 (3,223)	1,450
MB	(146)	33
NB	799 (378)	338
NL	335 (207)	31
NS	832 (664)	291
NT/NU	8	4
PEI	17	5
SK	841	237
YT	5	3

Bracketed number indicated # of decisions released.

* In 2010, appeal statistics in AB were reported by issue rather than claim.

Note: Ontario and Quebec did not respond.

APPENDIX D

Appeal Tribunal Members: Selected

Biographical or Positional Information

Jurisdiction	Information
<p>Alberta</p> <p><i>Appeals Commission for Alberta Workers' Compensation (AC)</i> https://www.appealscommission.ab.ca/Pages/default.aspx</p>	<ul style="list-style-type: none"> • Members are appointed by the Lieutenant Governor in Council See section 10 of Alberta's Workers' Compensation Act <p>Biographical details: https://www.appealscommission.ab.ca/aboutus/Pages/biographies.aspx</p>
<p>British Columbia</p> <p><i>Workers' Compensation Appeals Tribunal (WCAT)</i> http://www.wcat.bc.ca/index.aspx</p>	<ul style="list-style-type: none"> • The Chair is appointed by the Lieutenant Governor in Council. Vice Chairs of WCAT are appointed by the Chair in consultation with the Responsible Minister. See section 232 of British Columbia's Workers Compensation Act • The chair may only appoint a person as a vice chair if they have knowledge of the workers' compensation system, knowledge of the principles and practice of administrative law, the ability to analyze relevant information, and the ability to make difficult decisions within an established framework of law and policy. They must also show such qualities as good judgment and decisiveness, be of good character and proven integrity, have effective communication skills, and the ability to work with others and to work effectively. http://www.wcat.bc.ca/about/vice_chairs.html <p>Biographical details: http://www.wcat.bc.ca/about/bios_summaries.html</p>
<p>Manitoba</p> <p><i>The Appeal Commission The Workers Compensation Act of Manitoba</i> http://appeal.mb.ca/default.aspx</p>	<ul style="list-style-type: none"> • Members are appointed by the Lieutenant Governor in Council See section 60.2 of the Workers Compensation Act <p>Biographical details are not listed, but the Government of Manitoba website includes the following as desirable expertise:</p> <p style="padding-left: 40px;">An appeal commissioner must have a comprehensive knowledge of <i>The Workers Compensation Act</i> of Manitoba, as well as the regulations and WCB policies. The commissioner must also be able to combine this knowledge with an ability to deal with complex technical and</p>

	<p>evidentiary issues. This knowledge assists them in reaching a non-partisan decision that is consistent with the legislation and policies, and is at the same time reflective of the individual facts of each case.</p> <p>A qualified appeal commissioner will possess several, but not usually all, of the following qualifications:</p> <ul style="list-style-type: none"> - Knowledge of administrative law and the principles of natural justice; - Experience as an adjudicator in some type of mediation or quasi-judicial function or familiarity with quasi-judicial proceedings; - Ability to comprehend medical, legal and other technical issues quickly; - Demonstrated capability of making objective decisions within legislative and policy parameters and of supporting his or her decision with concise rationale; - Demonstrated communication skills – articulate speaker, good listener, and excellent writing skills to effectively communicate in clear and concise language; - A comprehensive understanding of the workers compensation system obtained through some direct involvement in the system is highly desirable; - Practical knowledge of work sites, workplace environments, and type of work related injuries; - Knowledge of the principles of injury compensation, occupational safety and health, or WCB assessments are assets. <p>Source: http://www.gov.mb.ca/asset_library/en/abc/fs/wcb_appeal_commission.pdf</p>
<p>Ontario</p> <p><i>Workplace Safety and Insurance Appeals Tribunal (WSIAT)</i> http://www.wsiat.on.ca/index.asp</p>	<p>Biographical details are not provided; however, the WSIAT provides position descriptions, which include a qualifications section:</p> <ul style="list-style-type: none"> • Chair: http://www.wsiat.on.ca/english/about/chairposition.htm • Vice-Chair: http://www.wsiat.on.ca/english/about/vcposition.htm • Member: http://www.wsiat.on.ca/english/about/memposition.htm

APPENDIX E**Table of Cases**

Alberta (Workers' Compensation Board) v. Alberta (Workers' Compensation Board Appeals Commission) 2005 ABQB 543

Alberta (Workers' Compensation Board) v. Alberta (Workers' Compensation Appeals Commission), 2005 ABCA 235

Bell Canada v Canadian Telephone Employees Assn., 2003 SCC 36

British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52

Braden-Burry Expediting Services Ltd. v. Northwest Territories (Workers' Compensation Board), 2002 NWTSC 48 (NWTSC)

Campbell v. Workers' Compensation Board, 2013 SKCA 56

Canadian Pacific v Matsqui Indian Band, [1995] 1 SCR 3

Dunsmuir v. New Brunswick, 2008 SCC 9

D.W. v. Workplace Health, Safety and Compensation Commission and Via Rail Canada Inc., 2005 NBCA 70

Fundy Linen Service Inc. v. Workplace Health, Safety and Compensation Commission, 2009 NBCA 13

Guy v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2008 NSCA 1

J.D. Irving, Limited (Sussex Sawmill) v. Wayne Douthwright and Workplace Health, Safety and Compensation Commission, 2012 NBCA 35

Johnson v. British Columbia (Workers' Compensation Board), 2011 BCCA 255

Macoon v. Alberta (Workers' Compensation Board) (1993), 7 Alta LR (3rd) 201 (ABCA.)

Nabors Canada LP v. Alberta (Workers' Compensation Appeals Commission), 2006 ABCA 371

Nabors Canada Ltd. v. Alberta (Appeals Commission for Alberta Workers' Compensation), 2010 ABCA 243

Northern Transportation Co. v. Northwest Territories (Workers' Compensation Board), [1998] NWTR 366 (NWTSC)

Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54

Parada v. Alberta (Appeals Commission for Alberta Workers' Compensation), 2011 ABCA 44

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 SCR 982

Q. v. College of Physicians & Surgeons (British Columbia), 2003 SCC 119

Sanford v. Workplace Health, Safety and Compensation Commission, 2012 NBCA 86

Sciberras v. Workers' Compensation Board (Man.), 2011 MBCA 30

Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board Appeals Commission), 2001 ABQB 624

St. Cyr v. Alberta (Workers' Compensation Board), 2011 ABQB 407

Thompson Brothers (Construction) Ltd. v Alberta (Appeals Commission for Alberta Workers' Compensation), 2012 ABCA 78

Tranchemontagne v. Ontario (Director, Disability Support Program), 2006 SCC 14

United Messenger Co-op Ltd. et al. v. Workers' Compensation Board (Man.) (1994), 96 Man R (2d) 17 (QB)

Vallette Estate v. Alberta (Appeals Commission for Alberta Workers' Compensation), 2012 ABCA 12

Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board), 2010 BCSC 1340

Winnipeg (City of) v. Workers Compensation Board Of Manitoba (the) et al, [1998] 3 WWR 378; 123 Man R (2d) 118 (CA)

Yukon Territory (Workers' Compensation Appeals Tribunal) v. Yukon Territory (Workers' Compensation Health & Safety Board) (2005), 2005 YKSC 5

APPENDIX F

Biographical and Contact Information

Douglas R. Mah, QC

Barrister & Solicitor

Edmonton, AB

Profile

- A lawyer with 30 years combined experience as an in-house counsel and a private practitioner.
- Primary areas of expertise: workers' compensation law and policy, administrative law, corporate governance, and information & privacy.
- Secondary areas of interest & expertise: media law, regulation of the legal profession.
- Bencher of the Law Society of Alberta for 8 years, including one year as President (February 2011 - February 2, 2012).

Education

- Bachelor of Laws, University of Western Ontario, 1981.
- Bachelor of Arts (English Literature), University of Calgary, 1978.

Professional Background

Workers' Compensation

- Secretary & General Counsel of the Alberta-WCB since March, 1998. Member of the Executive Management Team. Responsible for the Secretary & General Counsel Division, consisting of the Legal Services Department, Special Investigations Unit, Policy Development Department, Information & Privacy Department, and the Office of the Appeals Advisor (worker advocates). Act as corporate secretary and senior legal counsel for the WCB. Responsible for corporate governance. Represent the WCB before the Appeals Commission and in the Court of Queen's Bench and the Court of Appeal in judicial review matters.
- Between 1993 & 1998, Manager, Legal Services Department, responsible for direct supervision of lawyers, paralegals, investigators and support staff and providing full-range legal services to the organization. Acted as legal counsel to the WCB, representing the WCB at all levels of court.
- Between 1988 & 1993, staff lawyer in the WCB's Legal Services Department. Provided legal counsel and advice to the WCB and represented the WCB at all levels of court, including the Supreme Court of Canada.
- Sessional Instructor in workers' compensation law at the University of Alberta Faculty of Law, 2007 to 2010.

Private Practice

- Articling student (1981-1982) and then litigation associate (1982-1988) at Milner & Steer⁶⁷, Barristers & Solicitors, Edmonton, AB. Practice consisted primarily of commercial litigation with an emphasis on receivership and insolvency.

Media Law

- Since 2004, Sessional Instructor at MacEwan University in Edmonton, AB in the Bachelor of Communications Studies Program, teaching a course called “Communications Law”.

Regulation of the Legal Profession

- Elected Bencher of the Law Society of Alberta in 2003, 2005 and 2008.
- Committee Memberships: Governance, Finance, Audit, Executive, Appeal, Equality Equity & Diversity, various policy task forces.
- Committee Chair: Executive, Conduct, Credentials & Education, Practice Review, Insurance, Pro Bono, Communications, Joint Library, Alternate Delivery of Legal Services Project.
- President-Elect of the Law Society of Alberta in 2010-2011.
- President of the Law Society of Alberta 2011-2012.
- Participated in approximately 100 hearings of an adjudicative nature as a panel member or chair, primarily related to conduct or discipline matters but also with respect to credentialing, good character, interim suspension, conduct appeals, defalcation and other regulatory matters.

Publications

- Author, *Workers' Compensation Practice* (Carswell, 1996).
- Author, *Workers' Compensation Title, Canadian Encyclopedic Digest* (Carswell, 2002).
- Author, *Workers' Compensation Practice in Alberta, 2nd Edition* (Carswell, 2005)⁶⁸.
- Co-Author, *The Law of the Written Word: A Legal Guide for Writers in Canada*, (Carswell, 2013).
- Numerous papers written and presented for the Legal Education Society of Alberta and other continuing legal education conferences on topics including workers' compensation law, administrative law, civil litigation, information and privacy, media law and corporate governance.
- Regular legal columnist since 1998 for *Worksight* magazine, a semi-annual periodical publication of the WCB-Alberta with a circulation of 85,000 stakeholders in the province. The *Legal View* column focuses on explaining issues and developments in workers' compensation law to ordinary Albertans.
- Regular back-page columnist, *The National* (the official magazine of the Canadian Bar Association, having a circulation of approximately 40,000 in Canada).

⁶⁷ This firm, following a number of mergers, is now called Dentons LLP.

⁶⁸ Looseleaf textbook, updated three times a year.

Other Professional Activities

- Peer reviewer, *Alberta Law Review* (2003)
- Instructor, Bar Admission Course
- Volunteer Lawyer, Edmonton Community Legal Centre, a *pro bono* legal clinic that provides free legal services to disadvantaged people in Edmonton (2004 to present)
- Retained as technical consultant by the Statutory Review Committee reviewing the *Workplace Health Safety & Compensation Act* of Newfoundland and Labrador (2012)
- Retained as an expert reviewer jointly by the Government of New Brunswick and the Workplace Health Safety and Compensation Commission of New Brunswick to review and make recommendations for amendment of the *Workplace Health Safety & Compensation Act* of New Brunswick (2013).

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