WORKERS' COMPENSATION APPEALS TRIBUNAL

MEMORANDUM

TO: Advisory Group Members **DATE:** December 20, 1995

FROM: S.R. Ellis, Chair

RE: **Jackson Review**

Members will recall my statement to the meeting two or three months ago to the effect that WCAT would not be making submissions to the Jackson review in defence of the Tribunal.

In the course, however, of preparing to respond to Minister Jackson's invitation to a briefing session, I came to the realization that because of my position of being responsible for WCAT over the past ten years, I had a unique perspective on final-level appeal structures in a workers' compensation system, and therefore some responsibility to make the systemic information and insights derived from that perspective, available to Minister Jackson's review process.

For your information, I now enclose a set of "notes" which I have filed with the review for that purpose. I thought it particularly important that group members have a chance to see these notes in light of my earlier assurances that I would not be filing material.

Ron.

Enclosure

WORKERS' COMPENSATION APPEALS TRIBUNAL

Final-level Appeal Processes in Workers' Compensation Systems

Minister Cam Jackson Review

Notes by S.R. Ellis

December 1995

PREFACE

The focus of these notes is not the Workers' Compensation Appeals Tribunal per se, but, rather, any final-level appeals structure in a workers' compensation system. The notes reflect my own personal experience and insights derived from 10 years experience with the planning and operation of Ontario's existing final-level appeal structure.

These notes, which include a recap of the ground that was covered in my October meeting with Minister Jackson and his staff, are intended to speak to the nature of the system context within which any final-level appeal structure must fit. They also address the principles and practical considerations which, in my view, will be important to the design of any such structure.

NOTE HEADLINES

NOTES

Ontario's experience with chronic-stress claims - a useful context for the study of final-level appeal structures.

1. In the first part of these notes, one will find something of a pre-occupation with the Ontario system's experience with chronic-stress claims and in particular with the Tribunal's chronic-stress decisions. The reason is that that experience provides an important context in which to examine the nature of a final-level appeal structure's role in a workers' compensation system. I appreciate that this is possibly the most controversial area of the Tribunal's work and that in featuring it here I am in some danger of being seen to be intentionally provocative. However, it is because the subject is controversial that it provides an especially useful context for any review of the role of a final-appeal structure. Please understand that, in these notes, I have no interest in defending the Tribunal's chronic-stress decisions or in suggesting any view as to the advisability from a policy perspective of that type of claim being compensable under a workers' compensation system.

2. In the process of considering what is to be learned from Ontario's experience with chronic stress claims, it is essential to begin by acknowledging that, while it has always been Ontario WCB policy not to compensate for psychological disabilities caused by chronic workplace stress, such disabilities have at least since 1963 been in fact compensable under the terms of the Workers' Compensation Act. In Ontario, workers suffering from disabling psychological damage that can be shown to have been caused by chronic workplace stress are as legally entitled to workers' compensation benefits as if they had fallen off a ladder in their workplace and broken their leg. In terms of compensation, the Act makes no distinction in principle between psychological injuries and physical injuries, or between traumatic, one-time injuring events, and chronic injuring processes.

3. The compensability of chronic stress cases was not officially recognized in the Ontario system until the Tribunal began issuing decisions on appeals involving this type of claim in 1987. It is generally believed that the recognition came first in 1988 with *Decision No. 918*, but in fact there had been three earlier decisions in which the principle was recognized.

4. In the eight years since the first decision in 1987, the Tribunal has heard and decided 40 appeals of chronic stress claims of which 24 were denied and 16 allowed. On average, therefore, we have had five chronic stress cases a year of which two were allowed.

5. The WCB's policy continues to be to reject these claims in principle as though they were not compensable in law.

6. In evaluating the institutional lessons to be learned from the system's experience with chronic stress claims, it is not only essential to understand that disabling psychological damage caused by chronic workplace stress was at all times during this experience clearly compensable under the law, it is also important to realize that this fact was never seriously disputed.

7. The following points establish, in my view, both propositions:

a) On the compensability principle, the Tribunal decisions have always been unanimous. The employer members as well as the worker members have understood from the first case that chronic stress cases are compensable in law. There has been disagreement on some of the collateral issues, but not on the main point.

b) The advice of the WCB legal staff to the board of directors has always been that the Tribunal was correct on the legal point. It was because of that view that the WCB administration recommended in 1989 that the board develop a policy for compensating chronic stress claims.

c) Written submissions of employers and their advocacy organizations opposing the Board administration's proposed chronic stress policy never challenged the legal staff's view as to the compensability of these claims on legal grounds. (There may have been one exception). Indeed, many of the submissions acknowledged explicitly that the Act as written, provides for such benefits. The arguments were confined to objecting to the policy on policy grounds - the policy would be too expensive, it would be too difficult to adjudicate fairly, it was not the kind of thing for which employers *ought* to be held accountable in a workers' compensation scheme, and so on.

d) Despite a number of sophisticated employers having lost chronic stress appeals at the Tribunal, there was never any attempt to challenge the compensability issue in the Ontario courts. Indeed, in the single Tribunal chronic-stress decision that was challenged by application for judicial review, the legal issue concerning the compensability of such cases was not put in issue. Both the employer applicant and the Divisional Court accepted implicitly that the Act provided for such benefits. The issue the Court was asked to rule on was whether the Appeals Tribunal had come to the correct conclusion concerning the causative role of the particular workplace stressors. The Court's decision in this case has not been reported. The name of the case is *N. Police Services Board* v. *the Workers' Compensation Appeals Tribunal* and it may be found in Court File 211/92. The decision, which rejected the

employer's application for judicial review and upheld the Tribunal's decision, is recorded in an endorsement on the court documents, dated February 4, 1993.

e) The issue of the legal validity of chronic stress claims in Canadian workers' compensation systems has been addressed directly in reported court decisions on two occasions outside of Ontario. Both decisions indicate that the compensability under law of this type of claim is perfectly plain. The two cases are:

   i) *Dowling* v. *Prince Edward Island Workers' Compensation Board* (1994), 7 C.C.E.L. (2d) 157 (P.E.I. Supreme Court Appeal Division) and

   ii) *Poan* v. *Nova Scotia's Workman's' Compensation Board* (1994), 113 D.L.R. (4th) 284 (Nova Scotia Supreme Court Trial Division).

f) *Dowling* dealt with statutory language identical to Ontario's. The P.E.I. Court of Appeal found that the law on the point was straightforward and that the WCB's decision to refuse compensation in such cases was clearly wrong. The *Poan* decision is technically not directly on point as, on the facts in that case, the injury resulting from the chronic workplace psychological stress was a stomach ulcer rather than psychological damage. However, the compensability issue is the same.

g) It may be noted that in *Poan* the Nova Scotia Court was effectively working with the common-law definition of accident. The Nova Scotia Workers' Compensation Act did not have the expanded statutory definition of accident that included "disablement" that was added to the Ontario Act in 1963.

h) The relevant statutory language in the Nova Scotia Workers' Compensation Act read as follows:

> Where in any industry to which this part applies personal injury by accident arising out of and in the course of employment is caused to a worker, compensation as hereinafter provided shall be paid to such worker, or his dependents, as the case may be.

i) The Nova Scotia WCB's final decision in *Poan* had held:

> Reviewing the case, it is noted the client was carrying out the normal job duties with no traumatic or critical incident and in accordance with our present practice no changes are warranted in the status of the case. [the worker's claim was denied]

j) Mr. Justice Goodfellow of the Nova Scotia Supreme Court in allowing the appeal said this:

> I adopt the reasoning of Edwards J. in *Walker* v. *Camphill Medical Centre*, 122 N.S.R. (2d) 338 at P. 341. An "accident" can be represented by continuous physical strain resulting in injury and, similarly, an accident can occur where psychological injury may follow with or without physical manifestations. A determination as to whether or not stress in a particular situation constitutes "an accident arising out of and in the course of employment" is a question of fact in each case.
>
> Personal stresses from non-work related influences will, as is the case here, likely exist in stress cases and will likely require evidence concerning the role of the workplace in the development of the disability. That is far different from having to establish a specific chance event that precipitated the disability.

8. I should mention that I am not unaware of the argument that the "privative" clause in the Workers' Compensation Act provided an umbrella of protection against court review under which the Board or the Tribunal could have lawfully sheltered a decision against compensating chronic stress claims, even if the decision was technically incorrect. It is my view, however, that that is not a legitimate argument.

9. The privative clause prevents a court from interfering with even an incorrect Board or Tribunal decision unless the court considers the decision to be so incorrect as to be *patently* unreasonable. And the argument, if I understand it correctly, is that if a decision against the compensation of chronic stress cases was not <u>so</u> incorrect as to be patently unreasonable, that decision would have been enforceable even though it was not correct.

10. It is not clear what interpretation of the existing act supporting a denial of chronic stress cases is suggested as not being patently unreasonable. I am not aware of one.

11. But, more to the point, the argument does not hold up in law, and, moreover, presupposes conduct by the Board or the Tribunal which in my view would not be appropriate.

12. The legal point is that the patently unreasonable standard does not govern judicial reviews where the issue in question goes to the Board's or Tribunal's jurisdiction. On jurisdictional issues, the standard is one of correctness, and there can be little doubt that the compensability of chronic stress cases would be regarded by the courts as a jurisdictional issue.

13. The point concerning inappropriate conduct is this. The argument assumes that it would be appropriate for an adjudicative agency in pursuit of a preferred policy goal to deliberately select an interpretation that it recognizes to be incorrect in the hope that the degree of incorrectness will not be seen by a reviewing court to have reached the level of patent unreasonableness. But privative clauses are intended to protect bona fide, agency disagreement with the courts on what is correct, not to give the agency a discretion to opt for an unreasonable interpretation provided only that the unreasonableness stops short of being patent. In my view, it seems self-evident that for an adjudicative agency like the WCB or the Tribunal to be interpreting its governing legislation on the basis of asking "what can we get away with?" would be both unethical and incompatible with its legal responsibilities.

14. Accordingly, whatever one might think about the *advisability* of compensating chronic stress cases under the Ontario's workers' compensation system as a matter of policy, the law is clear that chronic stress claims are compensable under the Ontario Act as it is now written.

15. The legal compensability of chronic-stress claims under the Act has been well understood within the compensation system and within the communities of workers' compensation advocates - both worker and employer communities - since the Tribunal decisions first received media attention beginning in 1988.

16. I would emphasize again that I did not take the reader's time establishing this legal point so carefully for the purpose of defending or justifying the Tribunal's chronic stress decisions, nor for the purpose of taking any position on the policy question as to whether such claims should be compensable under an employer-funded workers' compensation system. The point I wish to make is that the Ontario's Workers' Compensation system's experience with chronic stress claims is a particularly relevant context within which to examine the policy role of a final-level appeal structure precisely because it is an instance of a final-level appeal structure dealing with a highly controversial policy issue in respect of which the basic legal requirements were not in doubt.

A final-level appeal structure's "policy" role

17. In considering what can be learned about the systemic role of a final-level-appeal structure from examining the role the Tribunal played in the chronic stress cases, the first question that springs to mind is this: *Why did the Tribunal's arrival on the scene lead almost immediately to the acknowledgment of the compensability of a category of cases which the Board, with its own internal appeal processes, had been denying?*

18. Is that circumstance evidence of an inappropriate "policy" role for an external, final-level appeal structure?

19. That question takes us to the more general issue: In the area of policy development, what is a desirable and appropriate role for a final-level appeal structure?

20. On that issue, the Tribunal 's own view of its statutory mandate may be of interest. That was set out in the Tribunal 's first annual report (The First Report, page 5). See Tab 5 of the Briefing Materials. (These are the materials left with the Minister's staff at the time of the first meeting). The relevant passages read as follows:

> F. THE TRIBUNAL'S ASSIGNMENT
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> In reviewing a WCB decision which is within the Tribunal's jurisdiction, the Tribunal has understood its assignment under the Act to be generally to ask and to answer the following questions:
>
> 1. Did the Board get the facts right?
>
> 2. Did it get the medical facts right?
>
> 3. If so, is the Board's conclusions concerning the consequences which follow from those facts based on a correct interpretation of the Act?
>
> 4. If the answer to any of these questions is "no", what consequences does the Act specify, given the correct conclusions on the facts? ...
>
> In cases where the Board decision under appeal is based on a [Board policy] directive or guideline, assuming no disagreement on the factual or medical issues, the ultimate question for the Tribunal remains the same: Does the decision comply with the Act? The Tribunal is not intent on reviewing Board directives or guidelines from a policy perspective but it must, as a threshold matter, satisfy itself that the directive or guideline in question is not incompatible with the requirements of the Act.

21. In 1989, after nearly four years of experience in being responsible for Ontario's new, external, final-level appeal process, I had occasion to speak to a Corpus conference on Workers' Compensation at the Old Mill in Toronto. The part of the speech text which is relevant on the question of the policy role of a final-level appeal structure, has been extracted and appears at Tab 9 of the Briefing Material. I believe that readers would find that text particularly useful in understanding the Tribunal 's perception of its role as the system's final-level appeal structure and I have, accordingly, attached a portion of that speech as an Appendix to these notes. The speech should be of special interest on the often discussed question as to whether the Tribunal *does have*, *should have*, or *could have*, a policy agenda of its own.

The WCB's changed operational environment: file access and expert advocates

22. In considering the relevance and significance of the system's past experience with internal, final-level appeal structures, two dramatic changes in the WCB's operational environment are of pre-eminent importance. Both have occurred since about 1980 . The first is the arrival on the scene of communities of workers' compensation advocates who are as expert and as knowledgeable as the Board in evaluating the merits of a compensation claim. The second is the opening of workers' files and the Board's files, policies and guidelines to access by workers and employers and by the expert advocates who now represent them. The two changes are, of course, related since it was access to the files and policies which allowed the worker and employer advocacy communities to develop their expertise.

23. The process of opening Board files and policies to both parties to a disputed claim began with the creation of the Ombudsman in the early '70's, and by 1985 access had become, effectively, unrestricted.

24. In retrospect, it is apparent that the Board's freedom to adjudicate benefit claims in secret - i.e., without parties to the claims knowing what information or evidence the Board adjudicators were working with, or what policies they were applying, and without the parties ever being given a full explanation for the adjudicative decisions - was always an anomaly from an administrative justice perspective. It is interesting for example to compare the open procedures of the Ontario Labour Relations Board from its inception in the 1940s.

25. In contemplating the implications for the design of a final-level appeal structure of the fact that the compensability of chronic stress claims only became an issue for the system shortly after the Tribunal 's arrival on the scene, it is particularly important to appreciate the role that the communities of expert advocates played in this development.

26. A final-level appeal structure does not invent the issues which it decides nor is it responsible for initiating the appeals in which those issues arise for decision. Its only role is to decide appeals brought to it by the parties in individual cases. Thus, it is the communities of expert advocates - both for injured workers and for employers - and their level of activity at the appeal level which will effectively determine the policy impact of a final-level appeal structure. Chronic stress became an issue for the system when the worker community's advocates with their developing expertise perceived the legal possibilities and decided to make it an issue. By the time that happened, the Tribunal had become the system's final-level appeal structure with the responsibility for dealing with such issues.

27. There is, I would suggest, no practical possibility of returning to the days of closed files, secret policies, no reasons, and no expert advocacy. Accordingly, in considering what appeal structures are appropriate in this modern era, when files are open, decisions are reasoned, and workers and employers are represented by experienced expert advocates, it seems likely that the Board's experience during the pre-Ombudsman era will not be helpful.

One option: the courts as the final-level appeal structure

28. It is arguable that, under these modern circumstances, as a practical matter, the only realistic choice now lies effectively between an external, final-level appeal structure or a high level of active intervention in Board decision-making by the courts. (In the latter circumstances, it would also be reasonable to expect a return to an enhanced role for the Ombudsman in workers' compensation cases.)

29. In considering that possible choice it would be important to look at the experience in recent years in other provinces where the combination of informed, expert advocacy communities and no credible appeals structure has lead to routine, frequently heavy-handed, court intervention in WCB decisions[1].

30. Court interventions in the system have the disadvantage that they occur at the hands of judges with no workers' compensation background or expertise, are reviewable only through appeals to the Court of Appeal and the Supreme Court of Canada, and are mandatory for the system with no possibility of internal reconsideration. Courts are only capable of dropping in, wielding a hammer, and dropping out again, whereas what is often required in the correction of interpretation issues in a sophisticated and complex system like the workers' compensation system is a process of expert exploration of the issue over time from the different perspectives provided by a series of cases.

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[1] It should be noted that the level of that activity is inadequately reflected in reported decisions. For example, court decisions which are disposed of by endorsement without reasons, which is the typical case, will not be reported.

The Board's conflict of interest problem

31. The WCB's conflict of interest problem is not a subject that is often referred to in so many words, and since 1985 and the establishment of an external appeal process there has been no reason to refer to it at all. But it was clearly the underlying problem fueling the strong support for an external appeal structure in 1985, and it is a problem with which the design of any new appeal structure would have to deal.

32. The conflict arises from the fact that the Board's adjudicative decisions have a direct impact on the Board's financial position, on its unfunded liability and, ultimately on the assessment rates it will have to charge employers. While the fact that the Board is conflicted in this way is not often discussed, it is, nevertheless, quite an unusual position for an adjudicative tribunal to be in. And, again, it is instructive to compare the Board's situation in that respect with that of the OLRB. It is also useful to compare the situation of the courts in dealing with personal injury compensation claims outside of the workers' compensation system.

33. The question which that conflict presents is whether it would now prevent the establishment of an *internal*, final-level appeal structure that would be credible in the eyes of the WCB's now well-informed users and their expert advisors.

34. It may be important to note, for instance, that the WCB's performance with respect to the chronic-stress issue is not encouraging as to its abilities to on its own overcome its conflict of interest respecting contentious entitlement issues. Everyone knows the Act legally requires chronic-stress claims to be paid. That has been a well-known fact since at least 1988. Yet, for a period of eight years (years in which the board was first, multi-representative and then bipartite), in the face of strong resistance from the employer side of its constituency the WCB has proven itself unable to decide to do what the law requires it to do. Neither was it able to apply its section 93 review powers to a review of the Tribunal's chronic stress decisions.

35. In contemplating a possible reform of the adjudicative process, it may, therefore, be important to ask whether there is reason to be confident that the Board would be more successful in the future in dealing objectively, on its own, with contentious issues.

36. At our meeting with the Minister, I described at too great a length a somewhat prosaic hypothetical illustration of the conflict of interest problem taken from the insurance field outside the world of workers' compensation.

37. I am taking the risk of compounding that initial imposition by including the particulars of that example in these notes. I do that because, in my view, the illustration does bring the conflict problem to life.

Conflict of Interest Illustration

Suppose a business operating a light manufacturing plant in "Valley City" has taken out a fire insurance policy with "Amalgamated Fire Inc." One night a tornado strikes the city and the plant is completely destroyed. With great relief the plant owner remembers that he has a wind-damage clause in his fire policy and the next day he claims against the policy for the money required to rebuild the plant.

The tornado has done extensive damage throughout the city, and Amalgamated Fire Inc., active in Valley City for many years, finds itself faced with a large number of claims which in the aggregate threatens its profitability. It's Board of Director' decides that it must take an especially cautious approach to these claims.

In due course, the Company advises this plant owner that, in its view, his claim is not valid. It cites two reasons: (1) that the owner's representations as to the nature of the structure and the size of the plant at the time the insurance policy was issued were misleading, and (2) that, in any event, the wind-damage clause was never intended to cover damage caused by tornadoes.

Without the insurance proceeds, the plant owner will be bankrupt. Therefore, upon receiving the letter rejecting his claim he immediately consults his insurance lawyer. After investigating the insurance company's positions, the lawyer advises the owner that, in his opinion, there *are* some questions concerning the accuracy of the information provided to the insurance company at the time the policy was purchased concerning the nature of the building structure and the application of the wind damage clause to tornado damage is not crystal clear. However, it is his opinion that, while not without risk, the chances of a successful claim against the insurance company are very good.

In the real world, the plant owner would sue Amalgamated Fire Inc. for breach of the insurance contract. And a court would hear evidence and decide both the factual issue as to the representations that were made concerning the building, and the legal issues concerning the effect of any misrepresentations and the interpretation of the wind damage clause. In making its decision whether or not to accept the claim in the first place, Amalgamated would have had to take into account the probability that a law suit would be brought.

> But in this case, the plant owner's insurance lawyer has to advise him that there is recent legislation which gives fire insurance companies protection against outside review of their claims decisions, and that that legislation effectively prevents the plant owner from suing Amalgamated. In law, the lawyer advises, the insurance company now has the final say on the owner's claim.

38. In the context of that illustration, the inappropriateness of legislation which empowers a person who is a party to a dispute - a person with a financial stake in the outcome of a dispute - to themselves decide that dispute in a final way seems obvious. One can well imagine the uproar in Valley City when it became clear that Amalgamated Fire Inc. was able to make unilateral, unchallengable decisions on the validity of claims. And it would not matter that the insurance company was in fact trying to make correct decisions in good faith.

39. It is my respectful suggestion that, in considering possible final-level appeals structures, it will be important to be clear about what it is in principle that distinguishes the WCB's situation from situations like that illustrated in the Amalgamated Fire example.

The relationship between an external final-level appeal structure and the WCB in respect of policy issues

40. The next issue which it is useful to examine in the context of the chronic stress experience is the relationship between the WCB and an external final-level appeal structure as that relationship affects the development of the system's policy.

41. It has always been my own, personal view that Professor Weiler definitely had it right when he recommended that the WCB board of directors have the final say on interpretation issues. The board of directors brings perspectives to the interpretation process that an external, final-level appeal structure cannot have. It also has both the responsibility and the exclusive authority to implement interpretation decisions. And I must say that I really find it impossible to picture a WCB administration implementing a major new policy in an effective and appropriate way based on an interpretation of the Act that its board of directors believed to be wrong.

42. It is also, I would respectfully submit, unrealistic to suggest that a small, external, final-level appeals agency could in the long run sustain the political burden that would accompany final responsibility for determining the legal validity of policy directions for a multi-billion dollar, employer-financed organization for whose financial viability it has no responsibility. The system's current experience of the Tribunal shouldering alone the final responsibility for issues like chronic-stress is a case in point.

43. It is true that the conflict of interest problem still pertains when the board of directors makes the final decision on an interpretation issue, but that problem is substantially ameliorated - sufficiently so, I would suggest - when the board's decision-making process in that regard is structured by the statute so as to require a public, reasoned response to prior reasoned views of an external appeals structure.

The board of directors' review of interpretation decisions - the viability of the s. 93 power

44. Professor Weiler's design for providing the board of directors with the power to review a Tribunal interpretation with which it does not agree is to be found in s. 93 (originally 86n) of the Act. In my view, this section defines a practical and effective process for ensuring that the concerns which an external, final-level appeal structure may have about a WCB interpretation get a full, public airing and are ultimately resolved in an appropriate way, while, at the same time, preventing that external appeal structure from hijacking the system on any particular issue.

45. One knows, of course, of the perception that s. 93 has proven to be an unworkable concept. It is my personal view, however, that that perception is quite wrong. And I am very concerned that any reform of the system's adjudicative processes not proceed on the basis of any misapprehensions on that point.

46. While section 93 is a review power that was not well suited to a bi-partite governance structure, it is a power which I believe would be effective in the hands of a multi-representative board of directors.

47. The points that are commonly made against the viability of the s. 93 concept, as I understand them, include the following:

a) That the review power is not effective because the Tribunal does not see itself as bound to come to a different decision when it is directed by the board of directors to reconsider its decision pursuant to the s. 93 power;

b) That the utilization of the power is too administratively burdensome to be practical for a part-time board of directors.

c) That the impracticality of the device is amply demonstrated by the mere fact that notwithstanding that there are a significant number of interpretation issues in respect of which the Tribunal 's views are at odds with the view of the Board, the review power has been resorted to on only two occasions in its ten year history.

48. I will deal with each of these points, beginning with the allegation that the power is ineffectual because of the Tribunal 's refusal to take the Board's s. 93 direction on an interpretation issue.

49. At the outset, it may be noted that, in point of fact, in the ten years of the Tribunal 's life there has been only one instance in which the board of directors saw fit to exercise its powers to direct the Tribunal to reconsider its decisions. (In its first exercise of the review power the board decided not to direct the Tribunal to reconsider.) That one instance involved a number of individual cases but they were all the subject of the same direction and all turned on the same issue. The issue was whether chronic pain benefits of a temporary nature should be subject to the same limit on the retroactivity of benefits as those which the Tribunal (and the Board) had found the law required respecting chronic pain benefits where the disability was permanent.

50. The Tribunal had interpreted the law to mean that the overruling of previous interpretations of the Act and of the medical evidence concerning the entitlement to chronic pain benefits meant that permanent chronic pain disability benefits could only be paid back to March 27, 1986. However, for reasons which are not important here, in a number of *temporary* chronic pain cases it had ordered benefits to be paid back to accident dates prior to March 27.

51. In its s. 93 review of Tribunal *Decisions No. 915, 915A* and associated decisions, the WCB board of directors found that the Tribunal had been correct in holding that chronic pain conditions were generally compensable, and it accepted the Tribunal's date for limiting the retroactive award of those benefits. It could not, however, see the logic of not imposing that same limit regardless of whether the disability was seen to be temporary or permanent. Accordingly, it disagreed with the Tribunal's interpretation on the latter point and, pursuant to its s. 93 powers, it directed the Tribunal to reconsider the temporary disability decisions in light of that different view.

52. It is true that when those decisions came to be reconsidered by the Tribunal's panels pursuant to those directions, in each case there were found to be substantial case-specific reasons for the panels in those cases coming to the same substantive result as before, notwithstanding the Tribunal's acceptance of the board of directors' direction on the interpretation issue. The reasoning in support of those conclusions can be found set out in those individual decisions and I will not take the time to explain here why the direction to reconsider did not in the end change the substantial result in those cases.

53. But the primary goal of a s. 93 review is to resolve interpretation issues between the Tribunal and the Board, not necessarily to deal with results in individual cases. And, on the interpretation issue - whether temporary chronic pain cases should be treated the same as permanent chronic pain cases as far as retroactivity is concerned - the board of directors' view prevailed. In cases that came before Tribunal hearing panels after the board of directors released its decision on that issue, that distinction was dropped by the panels. Thus, while the board of directors' directions under s. 93 did not ultimately affect the substantive outcome in the individual cases in question, it was effective in its main purpose of reconciling the Tribunal and WCB views on the interpretation issue.

54. In my view, there are three main reasons why the board of directors' powers under s. 93 were not used more than twice in ten years, and not subsequent to the 915/915A review, and none of them are grounds for thinking that the section would not be viable under the multi-representative governance structure now specified in the revised legislation. (Please note that in the explanation of that view which follows, I am drawing on my own knowledge of the board of directors' proceedings derived from the vantage point of my position as an *ex officio* member of the board of directors from 1985 to 1995. That experience, it should be noted, however, did not include participating in either of the s. 93 reviews of Tribunal decisions.)

55. In the first place, there was the problem that the 915/915A proceedings had proved to be an enormous administrative burden on the part-time members of the board of directors and no one was keen to repeat the experience. However, it is now, I believe, generally conceded that the administrative burden is a problem that can be fixed. In the 915/915A review, the Board chose to proceed by way of a public hearing, with multiple parties, and it was the hearing that proved to be so burdensome. The hearing was also uniquely complicated by the number and complexity of the issues that those two decisions happened to present. These were decisions made by the Tribunal in the early days of its existence and they addressed an inordinate number of questions of first impression.

56. But s. 93 does not require an oral hearing; it allows the review to be conducted through the consideration of written submissions from interested parties. And the process could be conducted on the basis of written submissions utilizing procedures that would not take longer or require more resources than what is typically committed in the Board's usual consultation processes on new policy proposals. A review could also be focussed on a more limited set of issues.

57. The second reason for the board of directors' lack of use of its s. 93 powers was that the worker community had never conceded the legitimacy of the board of directors being able to review the Tribunal decisions. It believed the Tribunal decisions should be final and binding on the Board. The worker community had lost that argument during the legislative committee discussions of Bill 101, and was never reconciled to that defeat. On principle, the worker representatives on the board of directors were, therefore, always strongly resistant to the exercise of the s. 93 power in any circumstances. In a multi-representative governance structure, this would not, presumably, be a view that would stand in the way of the section being exercised in appropriate cases.

58. The third problem with the use of the s. 93 power arose after the board of directors became, in 1991, a *de facto* bipartite board. At that point, if the s. 93 powers were invoked respecting an issue on which the members of the board of directors were effectively deadlocked, the board would put itself in the position of forcing a decision on an issue which could not be negotiated. The s. 93 process is an adjudicative process and a deadlock result is not permissible. In those circumstances, invoking the section would have set up a situation in which the board Chair would be effectively given the power and the responsibility to decide the issue by his lone casting vote. Neither the employer members of the board nor the worker members wanted that result, and neither, it is reasonable to suspect, did the Chair.

59. I have had previous occasions to set out my own views concerning the board of directors' failure to exercise its powers under s. 93. See, for instance, the passage from pages 11 - 12 of the Tribunal's 1992/1993 Annual Report at Tab 14.

60. In light of the experience since 1989, I would now add the observation that where the Board fails to exercise its powers to review Tribunal decisions that find existing Board policy - or lack of policy - to be in conflict with the requirements of the Act, the Board effectively forfeits its policy role to those decisions. Thus, in the chronic-stress area, the Ontario workers' compensation system does now have a chronic stress "policy", but it is one that has evolved through the decisions of Tribunal hearing panels on a case by case basis, as the Tribunal continues to deal with these issues in the absence of any direction from the board of directors.

The practical, dispute reconciliation process promoted by the s. 93 power

61. It is also important to appreciate that a board of directors' power to review interpretation decisions of an external final-level appeals structure sets up and anchors a working relationship between the Board and the external appeals structure in which conflicts between the decisions of the appeal structure and Board policies can be reconciled over time through a range of constructive devices predicated on *avoiding* the necessity of a formal exercise of the board of directors' review power.

62. This is an interactive relationship between the Board and the external final-level appeal structure that it would not be possible to duplicate if the courts were to become the effective final-level appeal institution for the workers compensation system.

63. In 1994, the *de facto* interactive relationship which had evolved over the years between the WCB and the Tribunal was formally adopted through the approval by the board of directors of a written protocol for dealing with the Tribunal decisions which conflict with Board policies.

64. In the Tribunal 's 1994 Annual Report (at page 9), we have reproduced that protocol and a copy of that passage from the Report appears at Tab 21 in the Briefing Material.

65. You will see that the protocol starts with the Board administration reviewing the Tribunal decisions and identifying those that are in conflict with Board policies. If the administration concludes that a Tribunal decision that is in conflict with existing Board policy is right, it may then recommend to the board of directors a change in policy, with which the board may or may not, of course, agree. If the administration thinks the Tribunal decision has raised an issue where the correct view may not be clear, it can recommend to the board of directors the commencement of a policy review so that the board may develop more information and a better informed perspective on the issue in question.

66. Where the Board's administration is of the view that the Tribunal Panel has made a mistake, it may advise the Tribunal of this view and may provide the Tribunal with written submissions giving reasons for that view.

67. On receipt of such submissions, it has been the Tribunal's practice to examine them from the point of view first of determining whether or not it should initiate a reconsideration of the decision itself in light of those submissions. Reopening a final Tribunal decision in reaction to post-decision submissions from the WCB administration will not often occur because of the restrictive criteria that governs the Tribunal's decision to re-open a decision that is otherwise characterized by the statue as a final decision.

68. Failing the re-opening of the decision in question, the Tribunal will keep the Board's written submissions on file and provide them to panels and parties addressing that same issue in future cases. Those panels may or may not agree with the Board's submissions. If they agree with the Board's submissions, they are free to disagree with the previous panel's decision. And, if subsequent panels also agree with the Board's submissions, then the problem will have been resolved at that point and the Tribunal and Board positions on that interpretation question will have been reconciled.

69. If the subsequent panel does not agree with the Board's submission, it will be obliged to give its reasons for not agreeing, which will, in any event, help to further elucidate the issue should additional steps need to be taken. It is not impossible that the second panel's reasons for rejecting the Board's submissions may serve to persuade the Board administration and ultimately the board of directors that, indeed, the original Tribunal decision was correct.

70. If the Board administration's submissions are not accepted by future panels, the conflict between the Board's policies and the Tribunal's interpretation will remain, but the nature of the conflict and the reasons for that conflict will have been focussed. In some cases, the area of conflict may well have been shown to be narrower than the initial decision suggested. The ground will thereby have been laid for a useful and constructive s. 93 review.

71. An example of the effectiveness of this procedure in reconciling differences on interpretation issues to the Board's satisfaction, short of a s. 93 review, may be found in the following trilogy of Tribunal decisions. The issue in question was whether written notice from the Board of the worker's fitness for employment was necessary to trigger an employer's re-employment obligations under the new s.54. Early decisions of the Tribunal had held such notices to be necessary whereas Board policy was to the contrary. While the Tribunal's early decisions had found that the Board's policy on the notice issue did not comply with the Act, later decisions considered the Board's submissions respecting those early decisions and agreed with the Board's interpretation. See:

Decision No. 372/91;

Decision No. 605/91; and

Decision No. 716/91I.

72. Of course, the overriding safeguard in all of this is that should either the Appeals Tribunal or the board of directors persist in a patently unreasonable interpretation of the Act, that persistence can ultimately be corrected by an application to the Ontario Divisional Court for judicial review.

The role of the Tribunal chair as an ex officio member of the WCB board of directors

73. I propose to turn for a minute to the subject of the role of the chair of a final-level appeal structure as, *ex officio,* a member of the WCB board of directors. See Tab 8 of the Briefing Materials for my analysis of my own experience in that role as published in 1987 at pages 12 - 14 of the Tribunal's Second Report. You will see that it was my view at that time that having the Tribunal chair as a non-voting member of the WCB board of directors was a valuable element in the overall design of the system. Nothing that has occurred since has caused me to change my mind.

The functions required of any final-level appeal structure

74. The next subject I think it might be helpful to address is the general question as to why a workers' compensation system needs a final-level appeal structure. Obviously, any assessment of the current adjudicative processes and any reform of such processes must begin with a good understanding of what the system inherently requires of these processes at the various levels.

75. The following reflects my own understanding of what a final-level appeal structure must contribute to the system as that understanding has developed over the course of the Tribunal's life as Ontario's first, external, final-level appeal structure.

76. In my view, the necessary functions to be performed by a final-level appeal structure will be the same whether or not that structure is an external or internal one. However, the nature of these functions may present a question as to whether it is effective or appropriate to locate these functions in an internal or external structure.

Allowing for justice to be done and to be seen to be done in individual cases

77. For individual workers and employers, a workers' compensation system is, above all else, a system of justice. And the function of a final-level appeal structure that is most obvious from a layperson's perspective is allowing justice to be done and be seen to be done in individual cases. The "do justice and be seen to do justice" phrase has become a trite way of describing what is required of a justice system, but it refers to a truth that remains timeless. For a losing party, there can be no *experience* of justice unless the *appearance* of justice has been strong.

Why multiple levels of adjudication are necessary

78. The reader will be aware that the WCB adjudication process is currently in a transitional phase as the Board experiments with a more flexible process in the post, claims-adjudication stages. However, the experience with these new arrangements is just beginning to develop, and it is the experience with the Board processes that have been in place over the last 10 years which is likely to inform any current evaluation of adjudication processes. Accordingly, in what follows I will be referring to the Board's processes as they existed prior to the recent re-structuring.

79. It may be important to ask why an appeal structure is necessary to achieve justice or to be seen to achieve justice in individual cases. Why, for instance, can this not be effectively accomplished with only one level of decision making? In the workers' compensation system, why should the claims adjudicators' decision- making process not be itself a sufficient process from a justice perspective?

80. In any event, why, in the workers' compensation system, has justice been apparently thought to require three levels of "appeal" beyond the initial adjudication? In the judicial justice system, for example, there is commonly only one level of appeal as of right and even in that appeal, factual findings of the first-level decision maker are rarely reviewed.

81. It is very important to appreciate, however, that in the workers' compensation system, the first two levels of decision-making - the claims adjudication level, and the paper review in the decision review branch - were not primarily dictated by considerations of fairness and justice. They were required for reasons of efficient management of a system that must be understood as most importantly a system of *mass adjudication*.

82. Every year the Ontario WCB opens in round figures about 400,000 new claim files. Of this, approximately, 200,000 arise out of lost time accidents. Approximately 85% of these claims are not contentious in any way.

83. To provide at the first level - the claims adjudicative level - the trappings and quality of an adjudication process that from a justice perspective would be necessary and appropriate for adjudicating contentious issues of fact, medicine and law would be uneconomic and inefficient. What is required at the first level of adjudication in the workers' compensation system is a highly efficient screening process that will very quickly recognize and pay the 85% of claims in which there is no significant dispute.

84. So, at that level, one must locate a large number of adjudicators with high caseloads who must in their decision-making operate within narrow limits of discretion and judgment. The Board has developed extensive policy guidelines to assist these front-line decision makers in handling cases quickly and as consistently as possible.

85. The paper review at the Decision Review Branch level was simply a refinement of that initial screening process. It allowed more experienced adjudicators to pick up and deal with obvious mistakes in the initial screening.

86. Thus, in effect, for cases involving issues that were disputed, the hearings officer level was the system's first level of adjudication that approximated what is appropriate for dealing with disputed issues from a justice perspective. The Hearings Officer process is analogous, therefore, to the trial court in the civil justice system.

87. Accordingly, while the initial levels of Board decision-making were called levels of "adjudication", in effect, there were two levels of a screening process and only one level of adjudication.

88. In my view, those who have from time to time suggested reducing the levels of adjudication in the system by improving the quality of the initial adjudication have not taken into account the indispensable role of a rough and ready initial screening process in the efficient management of a system of mass adjudication.

89. That justice requires one level of appeal above the trial court level is a principle which has always been accepted in Canadian judicial systems and usually in its administrative justice systems as well. The number of levels varies from subject matter to subject matter but the need for at least one level of appeal has been by and large accepted. Prior to 1985, that role was played in the workers' compensation system by the WCB's own "Appeal Board". Subsequently, it has been played by the Tribunal.

The "policy" function

90. After the doing-justice function, the next thing one needs a final-level appeal structure to do for the system is to perform the policy function which we have previously examined in the context of the chronic stress decisions.

91. As mentioned above, the writer's understanding of a final-level appeal structure's policy role will be found summarized in the text of his Corpus speech at Tab 9 of the Briefing Materials and in the parts of that speech which are attached as an appendix to these notes. (See then Tabbed material). A key passage from that speech (at page 6 of the material at Tab 9) reads as follows:

> Of course, the Act does assign to the Tribunal a policy role but one of a very limited nature. It consists of this:
>
> Where the Board refuses to provide what the law requires, or where the Board insists on providing what the law does not permit, and a case comes to the Tribunal for decision in which the facts put such a deficiency or such an overreaching in issue, then, in those circumstances - and only in those circumstances - a Tribunal decision is capable of forcing the Board to review its policy.

92. Determining what the law requires or does not permit is, of course, in the first instance, an interpretation function.

93. I say "in the first instance" because, in a workers' compensation system, from a policy perspective the most significant thing to be determined about what the law requires or does not permit is often whether it requires or does not permit the award of benefits in a particular category of circumstances. In making that determination, regard must often be had not only for law but also for science, notably medical science. At the margins, the science is never clear and it is always changing. Therefore, the final-level appeal structure's policy role must include, in addition to legal interpretation, the resolution for the time-being of generic, medical science issues.

94. Thus, the policy role of a final-level appeal structure may be most simply described as checking the Board's interpretation of the law and checking its generic, medical-science findings.

95. It is well known, of course, that many people in both the worker and employer communities are frustrated by the proposition that written laws and policies should require "interpretation" by adjudicators. Just write it clearer is the cry. Write it clearer so that the board of directors' intent will be effective and there won't be room for the Board's policies to be distorted or extended or limited by "interpretation".

96. No one associated with this system would deny that there is a significant need for clearer statutory wording. However, we also know that it is neither possible nor desirable to write law or policies with the degree of detail and precision that would be required to anticipate all the questions that will arise in their application, particularly in their application at the margins of their intended scope.

97. In point of fact, there is no escaping the reality that interpretation and the control of interpretation will always be a key and indispensable component of any process devoted to the implementation of statutory law or to the development and application of policy devoted to the implementation of statutory law.

98. The frustration with the uncertainties on the science side of things is not as general because there is not the same familiarity with that problem, but it is a similar problem. There are many generic medical questions for which there is no settled science but which the workers' compensations system has nonetheless to decide one way or the other. The final-level appeal process reviews the Board's views on those issues and that is a "policy" role which is not much remarked. The Tribunal 's findings concerning the medical side of the chronic pain entitlement question, as set out in *Decision No. 915*, is a case in point.

99. (I would just note in passing here that there might be a question as to whether s. 93 as currently written in fact empowers the board of directors to review generic medical science decisions of the Tribunal. And that is a point that probably should be clarified respecting the decisions of any final-level appeal structure.)

100. It is in the system's interest that serious conflicts concerning the meaning of statute language and policy language and the significance of medical or scientific evidence be ultimately resolved in a central process characterized by a level of experience and sophistication that is appropriate to the systemic significance of the conflicts.

101. And it is in the nature of a final-level appeal structure that the resolution of such issues will be pursued in a structured process in which in the concrete context of particular cases and with the close involvement of interested parties those issues can be effectively explored and clarified.

102. It follows, then, that the final-level appeal structure should also be well placed to play an educational role within the system.

103. The importance of the role that the Tribunal has played in this latter respect was commented on by Mr. Les Liversidge, the employer advocate, in submissions which he filed with the late Royal Commission on behalf of his firm L.A. Liversidge and Associates Ltd. I assume that the Minister will be likely to hear directly from Mr. Liversidge, but the insight in his Royal Commission submission concerning the role of a final-level of appeal is especially important, in my view, and I am, therefore, taking the liberty of quoting that submission here. The submission is complimentary to the Tribunal , but its importance in the context of these submissions lies in what it says about what I would submit is one of the necessary functions of any final-level appeal process in a healthy system. Mr. Liversidge's submission reads as follows:

> The advent of the Workers' Compensation Appeals Tribunal, a particularly significant and far reaching institution, with its courageous and controversial determination to publish decisions combined with its thoroughness in resolving and explaining disputes, ensured an enduring and ongoing education previously not possible. While the system may be more complex and enigmatic to the neophyte, the Tribunal set in motion a dynamic process of law reform that not only ensured individual cases would receive a higher standard of justice, but significant and contentious issues would be openly debated. The individual claimant, be it employer or worker, now had an opportunity, based exclusively on the merits of the case, to access and positively influence the policy

agenda. The potency of this single ability quickly, and rightly, ended a parochial control of the issue agenda by the Board.

Limiting the jurisdiction of the final-level appeal structure

104. One is, of course, aware of some sentiment in favour of limiting the jurisdiction of the final-level appeal process in the workers' compensation system to questions of fact, excluding questions of law and policy. And I have some comments to offer concerning that suggestion.

105. In the first place, in my experience, it is frequently not possible to draw sharp lines between what is a legal or policy issue and what is a factual issue. Consider, to take only one obvious example, the legal and policy content inescapably present in the so called factual issue as to whether or not a particular injury or disability was "caused" by workplace events.

106. It is also apparent, as indicated previously, that the system's need for a routine process of resolving interpretation and medical-science issues at a senior and central level is really the principal justification for a final-level appeal structure. This is as true in the workers' compensation system as it is in the judicial-justice system.

107. In my view, the more interesting question is why, unlike other systems of justice, the workers' compensation system requires its final-level appeal structure to retry the factual issues. There are persuasive answers to that question, and I do not personally doubt that it is essential in the workers' compensation system to have the final-level appeal structure deal with factual issues, but that is a question that is not without substance. Most appeal structures do not routinely deal with disputes about facts.

108. One answer to the latter question relates to the workers' compensation system's unique problem with mass adjudication in a non-adversarial system. Even after the screening of cases at the claims adjudication and decision review levels was completed, the number of cases that remained, while only a small percentage of the total, was still a large absolute number. For the processing of this volume of appeals to be accomplished economically it had still to be done in a relatively summary fashion. It is true that hearings were held and that workers and employers were able to present testimony, but it is apparent from an examination of the caseload of the typical hearings officer that, as compared to the time that would be spent in a trial court in the civil justice system dealing with factual and medical issues of equivalent significance, the hearings officer process, while making a better stab at a more traditional adjudicative process, was still in substantial measure something of a screening operation.

109. In reviewing the role to be assigned to the final-level appeal structure, it will, of course, be important now to re-assess the quality of the Board's final adjudication process in the light of its new procedures.

110. A second reason for having the final-level appeal process retry factual issues is to be found, I would suggest, in the conflict of interest problem previously mentioned. In comparing the hearings officer processes with the civil justice system processes, it is important to appreciate that the factual decisions of trial court judges in the civil justice system do not suffer from the conflict of interest problems faced by the Board.

111. Thus, when one is considering an external, final-level appeal structure such as the Tribunal , the Board's conflict of interest is an important consideration arguing in favour of including factual issues as well as law and policy within the appeal jurisdiction.

The user-friendly features of a full-issue, final-level appeal structure

112. The fact that the final-level appeal structure provides another chance for the parties to a disputed case to address all the issues - the factual as well as the legal and policy issues - is also important to the system for another strategic reason. It allows both the employers and workers involved in these disputes to limit the extent of their participation - or to choose not to participate at all - in the processes at the Board level.

113. The fact that if the result at that level is unacceptable they still have a chance to address all the issues finally in a fully considered manner at the final level of appeal, gives them the opportunity to sit back safely at the Board level and see what the system will do for them. This arrangement adds an element of user-friendliness to the system which is not often remarked but which is not unimportant.

114. The small-business criticism that appearances before the Tribunal require employers to hire a lawyer only pertains to the low proportion of cases in which important issues are not resolved to the parties' satisfaction at the hearings officer level. And, in the absence of a final-level appeal structure for law or policy issues, and for factual issues, employers who now feel it necessary to hire a lawyer to represent their interests at the Tribunal would then be faced with the same need at the hearings officer level. Thus that requirement would present itself in a larger number of cases than is presently the case. The increased incidence of court challenges in those circumstances would be another complicating factor.

115. If the hearings officer level of adjudication at the Board became the point where the *final* decision on the medical and factual issues or on law and policy issues was in point of fact made, one would have to expect the pressure from the worker and employer parties at that level of appeal to be much greater than is presently the case.

The problems with having the hearings officer level as the final-level of adjudication

116. Experience at the Tribunal indicates that the bulk of cases that will be brought to a final-level appeal process will involve hotly disputed issues of fact, medicine or law, on which either the worker or employer involved in the case believe strongly the WCB has not done justice, and which they see as affecting interests of theirs that are of great importance.

117. The Appeals Tribunal is currently dealing with approximately 2200 to 2400 applications a year which is in the order of less than 1.5% of the total of new lost time claims that the Board receives each year.

118. As is to be expected, some proportion of the cases that come to the Tribunal can be characterized as instances of parties making the system tick over one more time just because it lies in their power to do so, but that category of case is, in our estimate, a small proportion of the total.

119. If it were decided to exclude law and policy issues from the workers' compensation final-level appeal processes, the interpretation process would either have to be left with the hearings officers, or some other internal process for controlling interpretation would have to be devised.

120. From a system perspective, leaving the interpretation function with the hearings officers would seem a very problematic design. It would be comparable to a civil-justice system of trial court judges absent appeal courts.

121. If the system were so structured as to give individual hearings officer's responsibility for dealing in a final way with interpretation arguments or medical-evidence arguments urged by one party or the other, the result will be either to have the Board's policy effectively shaped - haphazardly - at the hearings officers level, or to have the board of directors itself routinely reviewing and correcting the hearings officers' decisions.

The complexity factor in final-level appeal decisions

122. It seems likely that in considering possible designs of final-level appeal structures the Minister will want to consider the implications of the existing structure's reputation in two particular areas. I am referring here to the perceptions in some quarters that the Tribunal's decisions are too complex and that its hearing process is too complicated.

123. Any design of a final-level appeal structure will have to start with acceptance of the hard fact that a workers' compensation system is destined to deal with medical, scientific and legal subject matter that is highly sophisticated from a technical perspective and inherently very complicated.

124. At Tab 22 of the Briefing Material one will find highlights of the issues dealt with by the Tribunal in decisions released in 1994. These highlights appear in the Tribunal 's 1994 Annual Report, pages 11 - 22. I commend that material as a one-year snapshot of issues which clearly depicts the inescapable technical sophistication and complexity of the issues with which any final-level appeal process will have to deal.

125. Naturally, one cannot help but be aware of a feeling within the employer and worker communities that it is only since the creation of the Appeals Tribunal in 1985 that the workers' compensation subject has become complicated. But in considering potential reforms to the final-level appeal process it will be important to appreciate that the complexity is inherent in the subject matter. The only difference since 1985 is that now the chapter and verse of that complexity must be explored in public. As I have said elsewhere, the Tribunal has been no more than the designated messenger.

126. The - in my view - inescapable complexity of some proportion of final-level appeal decisions is attributable, in my opinion, to a combination of the following factors:

a) The functions which a final-level appeal structure must perform;

b) The complexity of the legislation and of the legal, medical and scientific issues arising under that legislation; and

c) The expert, and highly informed level of advocacy[2] with which the system must deal and to which the decisions must respond.

127. If one accepts the above description of the functions that a final level of appeal must perform, then it is inevitable that some proportion of the reasoned decisions of any final-level appeal process will be inescapably complex.

128. In the 1991 Tribunal Annual Report (pages 1 - 5), I had occasion to address the question of decision quality and the problem of complexity in the decisions. You will see that analysis reproduced at Tab 11 of the Briefing Materials. As noted in that material, the complexity of Tribunal decisions should not be overstated. In 1991, the median length of Tribunal decisions was seven pages.

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[2] I should not like to suggest that all advocates appearing before the Tribunal are expert and highly informed. Regrettably, in individual cases, we find too often that that is not the case. But the appearance of advocates who are expert and well-informed is commonplace and the expert advocates on both the employer and worker side of things constitute active communities of well-informed critics.

129. In that material, you will see, as well, an account of the reasons why fully reasoned decisions are essential, given the responsibilities of a final-level appeal structure. One of these is the controversial nature of so many of the issues that reach the final-level appeal structure and their, typically, large impact on the parties to the dispute - both financial and emotional. These circumstances require that the reasons for the decisions be carefully explained, especially to the losing party. This, in my view, is an obligation which any final-level appeal structure would have to live up to.

The process imperative in final-level appeal proceedings

130. I am assuming that Minister Jackson will want to address the question as to whether the perceived complexity of the Tribunal process is a necessary feature of final-level appeal structures.

131. It is not true that either a worker or an employer needs a lawyer to be effective at the Appeals Tribunal. The Tribunal keeps data on the proportion of cases in which lawyers appear for one or both of the parties. The 1994 Annual Report records that 41% of participating employers and 22% of participating workers are represented by lawyers. It is true, however, that being represented by a person who is knowledgeable about the Act and understands the issues is a significant help both to the party and to the Tribunal.

132. In any assessment of the existing processes, it is important to understand two unique aspects of the Tribunal process.

133. First is the fact that the appeal process is an inquisitorial rather than an adversarial process. Put simply, the Tribunal hearing panels have the responsibility to get it right - not just to decide which party has presented the better case. This essential distinction between the role of a workers' compensation system's final-level appeal process and a court's typical role is a pervasive influence in everything the Tribunal does.

134. In 1989, I had occasion to explain this aspect of the Appeals Tribunal's process at a conference of the Ontario Branch of the Canadian Bar Association. In that speech, I contrasted the Appeals Tribunal procedures with those of the OLRB - which is a traditional adversarial type of adjudicative agency. A copy of that speech may be found at Tab 10 of the Briefing Materials.

135. The second unique feature is what I referred to in the Briefing Agenda as the "one-legged nature of the process". The reference is to the fact that in many of the cases in a workers' compensation system appeal process, one or more of the parties to the dispute will not be present. Typically, in workers' appeals, it will be the employer who is not participating, but in matters of direct concern to employers - disputes with the Board over classifications, assessments, penalties, SIEF relief, and so on - the employer will usually be the only one present. The Board does not appear as a party in the Tribunal proceedings defending its decisions. Thus, part of the reality of any final-level appeal structure in a

workers' compensation system is that one needs a structure which is effective notwithstanding the fact that there may well be no one defending one side of the case.

136. As far as the details of the actual process at the Appeals Tribunal are concerned, you will find in the CBAO speech at Tab 10 a description of the Tribunal's basic structure. A description of its process may also be found in the 1992/1993 Annual Report at pages 22 - 24.

137. We are in the process of restructuring our procedures and the nature of that restructuring is described in the 1994 Annual Report (at pages 4 - 6). Still, even after the restructuring is complete, it is anticipated that, as far as the cases requiring what we refer to as our mainstream treatment are concerned, the process is likely to retain at least the essential elements of the process described in the 1992/1993 Report.

138. As to the complexity of the process and the criticism of it on that ground, you will see at Tab 12 an extract from the Tribunal Annual Report 1991 (pages 5 - 6) containing an analysis of that complexity and criticism.

139. The ideal process dreamed of by workers and small-business employers would involve adjudicators sitting down with them around a coffee table - preferably one in their own living room - listening to what they know that justice requires in their case and then going away and setting it right.

140. However, the reality is that disputes that come to a final level of appeal are inherently contentious - typically, for starters, there would be more than one person's coffee table that one would have to sit down at. Also, the issues are regrettably but inescapably too complicated and sophisticated and of too great importance to one or more of the parties for that kind of informality to be acceptable.

141. As everyone will understand, the decisions of a final-level appeal structure can involve many thousands of dollars of benefits, and corresponding costs, can mean the difference for an injured worker and his or her family between a life on welfare or a secure, relatively reasonable income, and for an employer the difference between a profitable or non-profitable business. They also can often impact on the personal reputation of workers and/or their employers. These decisions may, as well, have system impacts with potentially very large cost consequences. They easily compare in all of those unfortunate aspects with cases which are dealt with in court systems at the highest levels. Much as people may want to resist the reality, these are not, I regret to say, Small Claims Court matters.

142. Employer and worker complaints of the legalistic and overly complicated nature of the Tribunal's process have always been heard at some level of intensity. In or about the third year of the Tribunal's existence, I had occasion to convene a series of meetings with worker and employer representatives who were familiar with our process. In these meetings we attempted to resolve the problem, and I addressed each element in the process in turn and asked the representatives how they would like it changed. The following summarizes the typical course of those discussions.

143. The first thing we do which is rather court-like is to give both parties notice of the proceedings and allow both parties to participate. Should we, I would begin by asking, do as Nova Scotia does (and no longer does) and not give employers notice of the proceedings in worker's appeals or allow employers to participate? Since this was (and is) not possible under the Ontario Act, naturally everyone acknowledged that all parties were entitled to reasonable notice and had a right to participate fully.

144. What about our "three-week" rule, I would ask. This rule requires people to give advance notice of the evidence they intend to present at the hearing. This is clearly a complicating technicality, should we get rid of it? Immediately the consensus came back: of course not, it is important for everyone to know what the other side will be doing at the hearing.

145. Well then, lets consider, I would say, the practice at our hearings of allowing the other party to cross-question the witnesses that testify, including, for example, the worker. This is a very court-like procedure which intimidates witnesses, including workers and employers, and which lay participants are not skilled at. Should we go back to the rule which the previous Appeal Board had of not allowing cross-questioning of witnesses? Immediately, everyone would agree that that was not a desirable move; that it was very important for the employer and for the worker to be able to challenge the testimony of each other's witnesses. How else could one get at the truth of that testimony? And so it went. Every single element of the procedure that I would raise, everyone would agree that it was not something they would want to do without.

146. The conclusion that I came to as a result of those meetings was that, overall, the process was felt to be more legalistic and complicated than anyone ideally wanted, but for mainstream cases there was no element in it which anyone felt was dispensable.

147. I have recounted this experience at this length because I believe it reflects what would be the reality for any final-level appeal structure's process. As I have said, these are not Small Claim Court matters, they involve complicated, significant issues of great importance to the parties. There is a basic minimum of procedure and process that must be followed if the hearings held to determine such issues are to be both efficient and effective. There are also, of course, minimum procedural requirements imposed on any decision-making structure of this kind by the principles of natural justice, enforced by the courts.

148. It is, therefore, necessary to recognize, in my view, that in any final-level appeal structure in the workers' compensation system very simple procedures will never be a realistic possibility except in some small proportion of cases.

Why the final-level appeal structure should be tripartite

149. The final thing I want to do in these notes is to address the tripartite aspect of the Tribunal's design and the significance of that aspect for the design of any final-level appeal structure in a workers' compensation system.

150. In an environment of radical fiscal restraint, the tripartite element of the design is a naturally vulnerable aspect of the current structure. The question easily arises: why should we pay for three people to do what one might do alone?

151. It is, however, my view that a tripartite, final-level appeal structure is of very great importance in a workers' compensation system and I would like to draw your attention to three significant points in support of that view.

152. The first, and perhaps the most important, is the unique feature of the workers' compensation system adjudication process that I have referred to previously - that frequently one party to the dispute is not participating. The most common example is of course the worker's appeal where the employer is not participating. It is, in my view, not realistic to expect that that feature of the system's adjudication process will ever change significantly, so that one has to design a system of adjudication which takes that unusual circumstance into account.

153. When one party does not attend an adjudication, the adjudicators must compensate for the partisan development of evidence from only one side of the case. It must also appear to be able to do that in a fair way. In my submission, the credibility of the adjudication where one party does not appear is thrown into doubt by the absence of any witness to the fairness of the process from the other side of the case. With a tripartite panel, both the worker and the employer communities are given reason to be confident that both perspectives will have received a fair hearing even where one of the parties has not participated.

154. The tripartite design provides that assurance, and it is not clear to me what might take its place from that point of view. The one-party nature of many of our proceedings is a very unusual feature of this system to which careful attention must be paid.

155. The second point that I would make in this regard presumes that we are talking about a *collegial* tripartite structure. By that I mean a structure in which the "representative" members are not acting in the adjudicative process as partisan advocates but as adjudicators - people engaged in a process of genuinely trying to decide what in their best judgement is the right answer in the case, given the evidence that has been presented and the law that is available. Sensible decisions in workers' compensation cases require good insights about the realities of a workplace and it will be rare to find in one adjudicator the background and experience that provides a sufficient basis for such insights. The three-person panel sets up a dynamic in which insights drawn from years of experience of the workplace, as a worker, or as an owner or manager, combine to make a crucial contribution to the good sense of the ultimate decision.

156. The role that representative members in a tripartite, final-level appeals structure play as communication links with their respective constituencies is the third point I would make. These links are of great importance in maintaining what will always be the fragile credibility of such structures in those constituencies.

157. Tripartism at the Tribunal is described and its importance explained in the Preamble to the Tribunal 's Code of Professional Responsibility (see Tab 15 of the Briefing Materials). I would commend that analysis to your attention.

158. You will also see in the Code itself, the obligations on both representative members to act as adjudicators and not as partisan advocates. This obligation is a pervasive theme throughout the Code, and may be seen particularly in the code sections beginning at section 8.

159. In the Corpus speech, I also had occasion to explain the role of the representative members in the Tribunal's adjudication process and that may be seen, as mentioned before, at Tab 9. See particularly pages 22 to 29.

I regret that these notes have had to be so long. I hope they will prove to be of value.

S.R. Ellis
Chair
Workers' Compensation Appeals Tribunal

Toronto, Ontario, December 1995

AN APPENDIX TO ELLIS NOTES

FOR JACKSON REVIEW

DECEMBER 1995

EXTRACT FROM SPEECH

DELIVERED BY S.R. ELLIS

TO THE CORPUS CONFERENCE

IN TORONTO

FEBRUARY 28, 1989

... In considering the Tribunal's proper role in the area of policy, it is not, a question for us of what is an appropriate role - what I and my colleagues might personally think was a good role for the Tribunal in an ideal world. On this question, as on all others, the basic principle applies. If we are involved in policy matters it can be - and it is - only because and to the extent that the Workers' Compensation Act requires it of us. ...

Of course, the Act does assign to the Tribunal a policy role but one of a very limited nature. It consists of this:

> Where the Board refuses to provide what the law requires, or where the Board insists on providing what the law does not permit, and a case comes to the Tribunal for decision in which the facts put such a deficiency or such an overreaching in issue, then, in those circumstances - and only in those circumstances - a Tribunal decision is capable of forcing the Board to review its policy.

But, you ask, is it not well known that what the law requires and what the law permits is often a matter of interpretation of unclear words, and with a willing mind an adjudicator can in fact always find room in the interpretation process for effecting a personal policy goal?

Thus, I have seen it suggested on occasion that, in the guise of applying the law, the Appeals Tribunal is actually actively pursuing its own private, policy agenda, and driving the Board before it on a policy course of the Tribunal's choosing.

It is a proposition which, as you might imagine, I reject utterly; for it is a proposition which either denies the integrity of individual adjudicators charged with the duty of upholding the law, or presupposes no objective determinant content in the statute itself. The first possibility bespeaks a cynicism about the human virtues of adjudicators which I find at the very least regretful and which I reject, with very considerable personal resentment, as a libel of the adjudicators I know. The second ignores the significant criteria and factors which are, in law, in fact determinative of a statutory interpretation question.

When faced in the course of our duties with the question: What does the Act say? Contrary to myth, I and my colleagues do not begin by deciding what we want it to say. We do not have the answer and then fashion as respectable a set of reasons as may be possible for justifying that answer. ...

The fact that adjudication at the Tribunal is tripartite adjudication should give additional reason for confidence that we are not engaged in a pro forma exercise devoted to giving the appearance of rationality to a pre-determined result. For adjudicators to engage in such an illegitimate exercise they would have to start the process knowing where they wanted to end up - that view of what adjudicators do presupposes not only adjudicators of no integrity, but also a single-mind concerning the policy or political goal. And, of course, with a tripartite panel of diverse, practical and ideological perspectives, such a single-mind as to the preferred policy or political goal cannot exist.

For myself or for any Tribunal panel chair to be pursuing a personal policy goal within the Tribunal's structure, we would not only have to be deliberately misrepresenting in the written reasons our own thinking process, we would also have to be engaging in an insincere - indeed a bogus - decision-making process with our panel colleagues. I can assure you our working relationship with the worker and employer members of this Tribunal would not last five minutes were we to attempt any such charade.

The question which I and my colleagues in fact ask ourselves on an interpretation issue is not, what is the result we would like? Nor is it what result would be good in socio economic terms - No, the question we ask ourselves - the question the law requires us to ask ourselves is this:

> What is the reading of the Legislature's intent that is most consistent with the words of the statute?

In answering that question we are, of course, required - by the law - to have regard, as well, for any applicable common-law principles - most notably the rules governing statutory interpretation; a particular example being the common-law presumptions against the retroactivity of changes in the law - and to take into account any prior court interpretations of the same or similar wording.

Of course in the statute-interpretation process, policy considerations are not irrelevant. It is always possible to garner from the wording of a statute - taken overall - what the Legislature's policy goals must have been in enacting the legislation. And where wording relating to a particular issue within the legislation in fact admits of more than one interpretation, it is reasonable to proceed on the assumption that what the Legislature would have intended on that point is the interpretation that fits comfortably with the words around it and best accords with the statute's overall goals.

Of course, different adjudicators will come to different conclusions - both as to the Legislature's intended overall goals and as to what interpretation on a particular point is most comfortable with its context, and most consistent with those goals. But if those differences are legitimate, they will reflect genuine, different readings of the statute - not different personal policy goals of the adjudicators.

Take by way of example Decision 915. The employer community tends to remember this decision as the one in which the Tribunal confirmed the compensability of chronic pain disorders. But it was even more significant in the overall scheme of things for its conclusion that the Board was correct in its interpretation of the permanent pension provisions in the Act - section 45 - and in its use and application of the so-called meat chart.

My impressions of the employer and worker communities' reaction to this decision are as follows.

The employer community thought the Decision's conclusions on the chronic pain issue was outrageous, but accepted its conclusions on the permanent pension interpretation issue as no more than its due - a confirmation merely of what was self-evident; the worker community accepted the Decision's conclusions on the chronic-pain issue as no more than its due - a long overdue recognition of what was self-evident - and thought the Decision's conclusion on the permanent pension issue and the meat chart to be outrageous.

The sophisticates in both communities thought the Tribunal had been politically astute in issuing a decision that gave something substantial and took something substantial to and from each community. Since the decision in that case was unanimous on both major issues, implicit in that latter, knowing, attitude was tacit acceptance that the members of the hearing panel in 915 must have, in effect, cut a political deal; that the panel members had negotiated amongst themselves a result that would minimize the political fall-out from the Tribunal's perspective and be one which they all could live with, and had then tailored their reasons to fit that predetermined political conclusion.

Well it isn't true. And if you are to deal with this Tribunal successfully in the future you really should accept it isn't true. Case strategies premised on the assumption that this Tribunal is oriented towards its own policy goals or politically motivated will be misguided and ineffectual. This Tribunal does not work that way.

In Decision 915, the Board's interpretation of section 45 and its use of the meat chart was affirmed because all members of the Panel concluded that that was the right reading of the words of the statute as much as some of them found it painful and, from a personal perspective, politically unpleasant to say so.

The compensability of chronic-pain disorders was recognized because all members of the 915 Panel were persuaded by the medical evidence of its legitimacy as a disorder and of the significant role of industrial injuries in producing the disorder. Given those two unavoidable conclusions on the medical facts, what the Act required was evident, and personal integrity and the duty they had assumed as adjudicators prevented anyone from saying otherwise - as much as some members thought the result inappropriate from a policy perspective and politically embarrassing from a personal point of view.

Had the words been different, had the medical evidence been different, we would have come to different conclusions, and we would not have hesitated to issue a decision that favoured workers on both issues or favoured employers on both issues. The Tribunal's integrity - my integrity and that of my colleagues requires no less. The fact the decision came out balanced in that respect was purely felicitous.

No, our question is, what does the Act require - what do the words demand? And we are determined not to be influenced - we set our faces firmly against being influenced - by considerations of what the answer should be from a policy, political or compassionate point of view, except as such considerations are legitimately a part of the interpretation process in the manner I have previously outlined.

It is curious that some of the same people who criticize the Tribunal for what they see to be its private policy agenda also tend to be of the view that looking only to what the words of the statute say is too technical an approach - too legalistic, if you will. The criticism seems often to be not that we have a private policy agenda, but that we have the wrong, private policy agenda.

Thus, employers seem to be generally troubled by our continued assertions that in interpreting the meaning of the language we do not allow ourselves to be influenced by the cost of any particular interpretation. This was the advantage of leaving such matters to the Board, it is said. The Board, with its responsibility for the Accident fund and for collecting assessments, is thought to be governed in its reading of the Act by prudent fiscal considerations.

The proposition would appear to be that, if it will cost too much to say what you think the law says, then you must say that it says something else. It is not an approach to the enforcement of rights that employers would tolerate elsewhere in our society and I am not sure why employers find it a presentable proposition in respect of workers compensation matters.

And, of course, if employers contend that the Tribunal - or the Board - is entitled, or indeed required, in an appropriate case to wilfully minimize statutory rights in order to minimize the costs to the system, on what grounds of principle do they then resist the flip side of that coin - that the Tribunal, or the Board, is entitled, or indeed required, in an appropriate case, to wilfully exaggerate statutory rights for compassionate reasons i.e., to minimize suffering for the worker?

The fact is that for a Tribunal - particularly a tripartite tribunal - to do other than genuinely do its best to answer the question: What is the best reading of the Legislature's intent as that intent is evidenced by the wording of the Act? is both illegitimate and entirely impractical. If that is not the question what can the question be? We must know what question we are answering. Shall we ask what would be a good result in this case? Or shall we ask what would be a sensible result in this case? Good or sensible from what point of view - against what criteria of measurement? Is it good and sensible to minimize costs or better to maximize benefits? Good or sensible in whose opinion? Mine? ... My colleague the worker member? My colleague the employer member?

No. Even leaving aside considerations of integrity, there is in fact no feasible alternative to doing simply what the law tells us to do - to genuinely try to determine from the words of the statute and accepted principles of statutory interpretation what the Legislature intended.

That may turn out to be bad or good for you depending on where your interest lies, and it may be bad or good for me depending what result I would have personally liked in an ideal world, and it may turn out to be awkward for the Board or politically damaging for the Tribunal - or not - as the case may be. But it will always be good in this respect - it will reflect the results of a genuine effort to determine what the Act was intended to say pursuant to the method and process the law provides for that purpose. It will be the product of the rule of law - anything else is purely arbitrary and unacceptable...