PRACTICE NOTE

Administrative Tribunal Design

Workers' Compensation Appeals Tribunal

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In October 1985, the Ontario Legislature created a new administrative law tribunal to hear appeals from decisions of the Workers' Compensation Board. It is called the Workers' Compensation Appeals Tribunal and, at the time of writing, it is an organization of some 100 full-time staff and members (with a part-time complement of about 40 Tribunal members) dealing with a caseload of about 220 appeals per month.

In October 1986, the Tribunal published the Chairman's "First Report". The report describes the Tribunal's response to a number of classic administrative tribunal challenges, and the following extracts are of general interest.

The Tribunal's Jurisdiction and its Limits

> The amended Workers' Compensation Act mandates the Appeals Tribunal to hear and determine worker or employer appeals from final decisions of the Workers' Compensation Board Appeals Adjudicators (now Hearings Officers) concerning entitlement to benefits, health care and vocational rehabilitation. The mandate also includes hearing and determining employer assessment appeals.
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> In addition to hearing appeals, the Tribunal has been given jurisdiction over a number of other matters. These include deciding in a particular case whether a worker's right to sue in the Province's civil courts has been taken away by the Workers' Compensation Act, determining disputes over employers' access to workers' files, and dealing with workers' objections to medical examinations requested by employers.

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Finally, the Tribunal is required to hear and determine applications for leave to appeal that may be brought by workers or employers in respect of old WCB Appeal Board decisions. Leave is to be granted in the circumstances where it can be shown that there is substantial new evidence not previously available or where the Appeals Tribunal is satisfied that there is "good reason to doubt" the correctness of the decision.

Subject to the WCB Board of Directors' right to review interpretations of policy and general law (described below), the Tribunal's decisions are final. They are shielded from court review by the same "privative" clause that has always shielded WCB decisions. . . .

The Tribunal's Assignment

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 conclusion 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? . . .

The Adjudication Process

The Tribunal's adjudication process remains, of course, in an active developmental phase. Adjustments continue to be a weekly experience. However, the basic principles to which the Tribunal has been committed from the outset remain constant. These principles are as follows:

1. The adjudication process must not be adversarial in nature.
2. The hearing environment must reflect respect for the seriousness of the undertaking but not be intimidating to workers or employers.
3. The adjudication process must be *effective* from the parties' perspective. That is, it must permit and facilitate the identification and exploration of issues and the effective challenge or clarification of evidence.
4. The decision-makers must not have private information. What the Hearing Panel receives, the parties must receive.
5. The Hearing Panel in a particular case must be excluded in that case from the Tribunal's pre-hearing investigation and preparation process.
6. The adjudication process must be effective from the decision-makers' point of view. It must produce the evidence and understanding a Hearing Panel needs to make a fair and sensible decision.
7. The process must *be* fair and objective. It must also not give the appearance of being otherwise.

The essential operational features of the adjudication process as it stands at the end of September are:

1. Pre-hearing identification of facts and issues by the Tribunal's counsel and parties through the joint development of a Case Description and a selection of relevant documents from the WCB file.
2. Pre-hearing all-party disclosure of evidence and issues to Tribunal counsel.
3. Any necessary pre-hearing Tribunal instructions to Tribunal counsel given through tripartite Case Direction Panels composed of Tribunal members not involved in hearing the case.
4. Hearing dates established through consultation with the parties. Dates so established subject to a no-adjournment policy.
5. Hearings featuring cross-questioning of witnesses; flexible and case-responsive in-hearing procedures; participation in some cases by Tribunal counsel; evidence called where necessary on the Tribunal's initiative; minimal rules of evidence, and active participation where necessary by Hearing Panel chairman and members.
6. In some types of appeals or applications, and with the consent of the parties, decisions without a hearing on the basis of documents only.
7. Careful post-hearing consideration of decisions and reasons by the full Hearing Panel. Reconvening of hearings where panels conclude post-hearing that there is a gap in the evidence.
8. In every case, written reasons explaining fully why the Panel came to its decision.
9. Significant decisions published for general public reference (without identification of worker or employer).
10. Where one of the Panel members dissents, he or she gives written reasons for the dissent and these are issued and published along with the majority reasons.

Explanation of Tribunal's Adjudication Process

The reasoning behind the development of this adjudicative system was explained in the Tribunal's *Interim Decision No. 24*. The explanation reads, in part, as follows:

> The assumption at the root of the Tribunal's process design is that the "appeal" function contemplated for the Appeals Tribunal by the revised Workers' Compensation Act is not an "appeal" in the traditional sense of the term but is, rather, a process of rehearing. It is a process in which, in reviewing the issues relevant to an appeal, the Tribunal is mandated to consider again the same evidence considered at the final WCB appeal level and to hear new evidence, including, in appropriate cases, evidence obtained by the Appeals Tribunal on its own initiative. . . .
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> That the Tribunal's role is to rehear cases in the above sense may also be seen from the fact that as part of its adjudicative role the Tribunal has been

given explicit investigative and issue-agenda setting functions not usually found in standard adversarial systems of adjudication. . . .

The need for the Tribunal to have an investigative and issue-setting function as part of its adjudication role also arises implicitly from two of its particular operating circumstances. One of these operating circumstances is the fact that the Tribunal's cases inevitably involve, in one way or another, claims against a "public" fund. The other circumstance is that there are routinely no persons responding to the applications or appeals the Tribunal is called upon to decide.

The unique circumstance of the routine absence in Tribunal proceedings of any respondent to an appellant's or applicant's case, arises because, (1) in the majority of injured workers' appeals the employer does not appear (This is either because he elects not to, or because he has disappeared — gone out of business, become bankrupt, etc); (2) in all employer assessment appeals there appear to be no natural respondents; and (3) the WCB does not appear in any case to defend its own decisions. The routine absence of respondents is a circumstance which undermines for the Tribunal a number of important assumptions about traditional adjudication processes. . . .

Potentially in most cases to some degree, the responsibility arising from the presence of unrepresented interests, requires for the Tribunal not only an investigative and issue-setting role during the preparation for the hearing, but also an interventionist role in the conduct of the hearing.

In designing a process to accommodate these investigative and issue-setting functions, the Tribunal has been very concerned to ensure that those functions are kept separate from its decision-making role. A decision-making body which has an investigative and issue-setting role is in danger during its investigative or issue-setting activity of developing a bias — a fixed disposition concerning the nature of the case and the desirable outcome. In assessing evidence presented at a hearing or in considering arguments of partisan counsel, it may be unable to effectively shake that bias. Sensitivity of our courts to this particular danger may be seen in the practice that has arisen with respect to pre-trial procedures wherein judges engaged in a pre-trial consideration of cases are precluded from participating in the adjudication of the case.

The employment of Tribunal counsel and the utilization of special case direction panels are designed to allow the Tribunal's investigative, issue-setting functions to be pursued while ensuring the necessary degree of objectivity and detachment on the part of the actual decision-makers.

The Tribunal counsel concept also provides the Tribunal with an appropriate mechanism for culling the WCB files and excluding from the hearing process any documents or materials that are irrelevant or unfairly prejudicial. The Tribunal is committed, as one might expect, to the adjudicative principle that in respect of any issue relevant to his or her concerns, a party to an adjudicative hearing must receive an appropriate opportunity to clarify, test or challenge any information or evidence which the adjudicators receive. Accordingly, interests of efficiency as well of fairness require that Hearing Panels not receive any unnecessary or irrelevant material or information.

The WCB file is a chronological collection of paper generated in the course

of a worker's association with the Board. Files a foot thick are not uncommon. The Tribunal's counsel is able to comb through those files and, with the assistance of the parties and their representatives and under the general supervision of case direction panels, to identify that part of the information or material which is, in fact, relevant, and to prevent the Hearing Panel from seeing any irrelevant or unfairly prejudicial material.

Finally, the existence of Tribunal counsel and of case direction panels provides a structure for an appropriate pre-hearing process in which in advance of the hearing the issues can be defined, the areas of agreement as to facts and law settled and the outline and dimensions of the evidence to be called, identified. That is a process which is essential not only to the efficiency of any adjudicative tribunal's operation and of any hearing but also in the long run to the quality of an adjudicative tribunal's decisions. In the circumstances of this Tribunal where there is typically only one party to a proceeding, if there were no one playing the role of Tribunal counsel it is difficult to envisage how that pre-hearing preparation process could be accomplished by this Tribunal without raising concerns of apprehended bias in the Tribunal's decision-making process. . . .

The Advisory Group

Since the early planning stages the Tribunal has had the benefit of consultations between the Tribunal Chairman and Alternate Chairman and a group of representatives of worker and employer constituency organizations called the Advisory Group. The Advisory Group came together at the invitation of the Tribunal Chairman and met for the first time in June, 1985. A total of four meetings have been held, and the Group has been consulted by mail on two occasions concerning the development of the Tribunal's Medical Roster.

The Chairman's purpose in organizing the Advisory Group was to provide a forum where information about the planning for the Tribunal could be shared with major players in the various constituencies with a view to keeping the constituencies apprised of the nature of the developing plans and giving them an opportunity to react and advise as the planning progressed.

The forum proved to be very useful from the Tribunal's perspective and the reaction and advice voiced in Group meetings has been influential in respect of many of the choices the Tribunal made as it developed its processes and procedures.

It would be unfair to the members of the Group, however, to suggest that the Group is in any sense responsible for the nature of the Tribunal as it has evolved to date. The Chairman made it clear at the first meeting that he did not propose a decision-making role for the Group and that the Tribunal reserved the right to finally make the decisions that would be required. The Chairman's commitment to the Group was to provide full disclosure and to give careful and open-minded consideration to the views expressed at the Group meetings. . . .

Publication of Written Reasons

Prior to the existence of the Tribunal, decisions of the WCB Appeal Board were neither published nor distributed. Essentially, a decision was only available to the worker and employer involved in a given case. The lack of access to decisions meant that workers, employers, and their associations and representatives were often unable to discover the principles which would be applied to a given case. Representatives and organizations less frequently involved in compensation appeals or in smaller Ontario centres were particularly disadvantaged by the inability to research an issue by reviewing past decisions. And the principle of relative fairness — that like cases should receive like treatment — could not be addressed.

Also, the removal of the final appeal step from within the WCB organization created the need for a method of routine communication between the Appeals Tribunal and the Board as to the reasons for the Tribunal's decisions. If the system is to work as an integrated whole, the Board's primary decision-making process must be responsive to the Tribunal's day-to-day decisions. Because of the principle of the independence of the Tribunal from the Board, these communications must be public. Published written reasons are, therefore, the indispensable means of maintaining the essential Tribunal-Board nexus.

For all of the above reasons the Appeals Tribunal is publishing and indexing its decisions. . . .

The Tribunal Counsel Office

(i) *The Role Generally*

One aspect of the Tribunal's adjudication process that proved particularly contentious was the concept of the Tribunal utilizing its own in-house counsel. The Tribunal has had occasion to describe the role of the Tribunal's counsel in its *Decision No. 24* and to justify that concept in the Technical Appendix to that decision. The description as extracted from the body of Decision No. 24 reads as follows:

> The role of . . . Tribunal counsel . . . may be described briefly as follows. They take the WCB file and cull from it what they consider to be the relevant documents. They then prepare a draft "Case Description", setting out the background and undisputed facts and identifying the factual issues and any legal issues. They provide to the parties to the appeal copies of the Case Description and of the documents from the WCB file which they believe should be filed with the Hearing Panel.
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> The parties to the appeal are invited to advise counsel if there is anything in the Case Description which they think needs to be amended or deleted or if there are any omissions. Any changes that the parties require are then made or disagreements noted. When the Case Description and the

> list of documents have been settled copies of the Description and documents are then provided to the Hearing Panel.
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> In the preparation of the Case Description and the selection of relevant documents, etc., Tribunal counsel have no contact with members of the Hearing Panel. They act under general instructions from the Tribunal and where they feel it necessary to get specific instructions concerning any aspect of a particular case they will appear before a separate Panel of the Tribunal called a Case Direction Panel — a tripartite Panel like the Hearing Panel — which will provide them with those instructions. If contentious issues arise during the preparation of a Case Description which cannot be resolved by discussion between the Counsel and the parties, the parties may make representations to the Case Direction Panel and the matter may be resolved at that level.
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> Ultimately, any unresolvable issues about the relevancy of any document or the identification or definition of issues, etc., will be left to be dealt with by the Hearing Panel at the first hearing.
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> The Tribunal's instructions to the Tribunal Counsel Office and to the members of the Tribunal concerning contact in any case between the Tribunal's counsel and any member of the Hearing Panel prior to the hearing are explicit. With the exception of the documents delivered to the Hearing Panel in preparation for the hearing — copies of which are also provided to the parties — the Hearing Panel members are to have no prior communication with the Tribunal counsel about any case on which they sit as a member of the Hearing Panel. Any such prior contact disqualifies them from sitting as a member of the Hearing Panel.

(ii) *The In-Hearing Role*

The role of the Tribunal Counsel at the actual hearing of the case has been defined in internal Tribunal documents in the following terms:

> At the hearing of a case, a Tribunal Counsel Office member shall act as counsel to the Tribunal. His or her instructions in that role are to assist the Tribunal from a non-adversarial or partisan perspective in the conduct of hearings and in the clarification and probing of evidence; to present any evidence to be called on the initiative of the Tribunal; to help with the elucidation of the issues and evidence, and to defend the Tribunal's process; all as may be necessary or desirable for an expeditious, fair and effective hearing.

Until the end of March, 1986, Tribunal counsel attended all hearings in their entirety. Since March, Tribunal counsel have continued to appear at the commencement of all hearings to address the Panel concerning the issues involved in the case, but in only a percentage of selected cases (20%) are they participating throughout the hearing. . . .

Maintaining Uniform Standards and Consistency in Tribunal Decisions

Up to the end of August, the Tribunal had issued 218 decisions involving a total of nine different Vice-Chairmen and 24 different worker and employer members, both full-time and part-time. Starting in September, the Tribunal moved into a period when it will be utilizing some 57 part-time or full-time individual adjudicators (vice-chairmen and members) with an eventual target of 215 decisions a month.

The Tribunal's mandate includes the publishing of full reasoned decisions. For this body of decisions to be useful in contributing to the goals of ensuring that cases decided in the future will receive like treatment to similar cases decided in the past, and in influencing the future decisions of the WCB, the decisions issued by the Tribunal must not only be sensible in their own individual context but must ultimately also make sense when compared one to the other. It is also necessary that Tribunal decisions be uniform in format and that they meet a uniform minimum standard of quality of writing and reasoning. It is also important that there develop a consistent Tribunal approach to such things as the kind of evidence that will be received and the nature of the evidence required to justify various kinds of decisions.

The large number of cases, the large number of individuals necessarily involved in the conduct of the hearings and the writing of the decisions, and the fact that on every issue the Tribunal is starting from scratch, make the accomplishment of these goals inherently difficult.

To deal with the difficulty the Tribunal has adopted a number of strategies:

1. The Tribunal has been actively engaged from its inception in a general Tribunal educational process involving, amongst other things, the identification and discussion at weekly Tribunal meetings of significant issues that may be expected to arise. The purpose of these discussions has not been to arrive at any conclusion on such issues but to develop throughout the Tribunal an awareness of the existence of such issues and an appreciation of their dimension and quality.
2. The role of Tribunal counsel in working with the parties to identify relevant issues prior to the hearing and in difficult cases, assisting at hearings with the elucidation of issues, ensure that Hearing Panels will be aware of issues likely to be of interest from an overall Tribunal perspective. (The Hearing Panel is, of course, ultimately responsible for determining the issue agenda in any particular case.) The Tribunal counsel's role will also ensure that Hearing Panels (and the parties) will be aware of any particularly relevant, prior Tribunal decisions.
3. The Tribunal attempts through its scheduling processes to ensure that Hearing Panels have at least one full-time member.
4. Training programs are provided to new Tribunal members.
5. At the decision-writing stage, the Chairman has established a procedure where decisions are reviewed by the Chairman's Office in draft form — occasionally by the Chairman himself, more often by the Counsel to the

> Chairman — with a view to bringing to the attention of the Vice-Chairman and Panel any aspects of the draft that present a concern from the point of view of the Tribunal's interest in consistent standards, non-conflicting decisions, etc. It is appreciated that this is a sensitive strategy from an administrative law point of view. The Chairman's Office is careful not to intervene in any manner with respect to any substantive issue of fact or medical fact, and it is made very clear to all concerned, that it is the Hearing Panel that has the final decision on any issue of interpretation as well. . . .

It is important in this respect to keep the distinction between the Counsel to the Chairman and the Tribunal's Counsel clear. The Counsel to the Chairman is not involved in the work of the Tribunal Counsel Office — she does not participate in either pre-hearing preparation or the hearing itself. The Tribunal is committed to the principle that a Tribunal counsel, who works on the case or appears on behalf of the Tribunal at the hearing, must not have any post-hearing contact with the Hearing Panel except through an exchange of correspondence with copies to the parties. (The need for such latter exchange will arise in cases where the Hearing Panel finds that it needs further evidence or more submissions, etc.) . . .