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Article abstract

C'est avec plaisir que nous faisons paraître la présente étude du professeur Ison, dont la compétence est reconnue en matière de régimes d'indemnisation du travail au Canada. En particulier, l'auteur a déjà étudié et comparé les législations provinciales, dans son livre intitulé *Workers' Compensation in Canada*, édité par Butterworths (1983). M^e^ Ison examine ici les nouvelles formes d'appel, en matière d'accidents du travail et compare deux options : « *internal and external appellate structures* ». Les deux systèmes d'appel ont des avantages et des inconvénients propres que l'auteur identifie avec précision et clarté.

Workers' Compensation Appeals : the Significance of the Structural Options[1]

by

Terence G. Ison[2]

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1. Introduction

In several jurisdictions, the last few years have seen turbulence and change in our systems of workers' compensation. One of those changes, and the subject of this article, is the development of new appeal structures.

Until 1973, systems of appeal and review in relation to workers' compensation were generally contained within the workers' compensation boards, except that in the Maritime provinces, appeals to the courts were allowed, generally on points of law. In 1973, an external board of review was created at the intermediate level of appeal in British Columbia. That was followed by an external Appeal Board at the second level of appeal in Nova Scotia, and external appeals

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[1] This is a revision of a paper first given at the Fifth Annual Workers' Compensation Conference organized by Corpus Information Services on 12th October, 1988, in Toronto.

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tribunals have been established more recently at the second level of appeal in Quebec, Ontario, and Newfoundland.

I would like to say that these changes all came about following a careful analysis of what was needed, that the problems with the previous structures were carefully identified, that the dimensions of the problems and their causes were ascertained, that the remedial options were identified and analyzed for their significance, that the optimum solution was identified to the problems that were found, and that the structural changes were then adopted. However, that is not what happened.

While these comments may not all be true of every province, the general picture seems to be that there was no government inquiry that identified exactly what the problems were with the previous structure, what was their scope and what were their causes, what were the possible remedial options, and why was the proposed change seen as the optimum solution. For example, many of the complaints related to appointments, and to the qualifications and characteristics of the personnel who were adjudicating in the previous appellate bodies. To whatever extent those complaints might have been valid, it is difficult to see why the appropriate response should have been a change in structure.

Exactly why these changes were made is not entirely clear, partly because credible reasons were not generally recorded. There were long-standing and vociferous complaints from the labour movement about negative attitudes within the boards, including complaints that the boards were violating the terms of the Acts by constraining unlawfully the scope of the coverage, as well as the levels and duration of the benefits. There was also some pressure from sections of the legal profession, and others who may have been influenced by legal modes of thought, and who wanted an appeal to a body that would be "independent". References were made, by way of analogy, to the court system ; and yet paradoxically, the hierarchical structure of decision-making in the court system seems to have more in common with the internal structures that prevailed in workers' compensation than with the new structures that include external appeals tribunals.

Related to this, union officials, professional advocates and other workers' advisers generally came upon the scene, if at all, only

after a decision had been made in primary adjudication, and their roles related primarily to the conduct of complaints and appeals. Hence the appellate system was at the forefront of their vision, and it may be for this reason that their condemnation fell upon the system of appeals more than upon primary adjudication.

Concurrently with the establishment of the most recent external appeals tribunals, other system changes have been made[3] that are placing an enormous stress upon the appellate processes, and these changes too were generally made without any adequate analysis of the significance of what was being done.

Probably the most useful service that I can render here, however, is not to lament the way in which these changes came about, but to suggest some conclusions about the significance of the structural options.

2. Significance of the Structural Options

One conclusion that has become more obvious from recent experience is that as between internal and external appellate structures, one is not better in every way than the other. Each has its advantages and its disadvantages, and probably the most useful contribution that I can make is to try to identify what they are.

A. Advantages of an External Appellate Body

(i) Hearings

External appeals tribunals generally hold hearings, or at least recognize a right to a hearing upon request. Indeed, they may sometimes go to the extreme of holding unnecessary hearings when there is no real issue to be heard. At most times and places, internal appellate bodies also hold hearings, at least at one level in the appeals structure, but the right to a hearing has not always been recognized among all internal appellate bodies. The right to a hearing has not recently been recognized, for example, by the Commissioners of the Board in British Columbia.

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[3] Primarily the expansion of experience rating and the revival of the actual loss of earnings method of providing or denying benefits for permanent disability.

(ii) Fidelity to Law

The incidence of political power is often different in the legislative process from what it is in subsequent administration. This has always plagued our systems of workers' compensation, creating substantial pressures not to fulfil the provisions of the Acts.

Since the external appellate bodies are not responsible for the setting of assessment rates, it is commonly thought that they have more freedom from any pressures that could divert them from a proper standard of adjudication according to law. Political pressures
 for financial cutbacks do not seem to operate so directly and so powerfully on the external appeals tribunals as they often do upon the boards. Whether or not this is the explanation, most of the external appeals tribunals have generally recognized an obligation to provide justice according to law, although criticisms can be made of significant deviations.[4] Fidelity to law has been found among internal appellate bodies, but it has probably been less consistent over time and place than among the external appellate bodies. Indeed, some sad examples have been found of a board exercising a power (contrary to constitutional principle) of dispensing with statutory provisions.

(iii) Analysis of the Issues

The external appellate bodies have generally done well in separating and identifying the issues of law, medicine, and non-medical fact. Most of the external bodies have also done well in analyzing the evidence, and in forming their own conclusions. The contrast is particularly marked with regard to medical issues. Among some of the internal appellate bodies, board doctors have tended to dominate the outcome, not only of the medical issues, but also commonly of the questions of law and non-medical fact, and this has been so even in jurisdictions in which they have been absent from the appellate hearings. This dominance over the outcome by an absentee group has sometimes reduced an appellate hearing to the status of a useless formality.

This advantage of an external appellate body is maximized when it is at the intermediate level of appeal, as in British Columbia. If the other conditions necessary for efficiency are present, that

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[4] For example, in Ontario in relation to the earnings loss supplements.

structure may enable a thorough and detached analysis of the issues to be achieved at an earlier stage than under other structures.

(iv) Reasons for Decisions

The external appellate bodies have generally been better at giving reasons for decisions. Again, the contrast is not consistent. For example, the external Appeal Board in Nova Scotia has not given proper reasons for decisions, while some of the internal appellate bodies have done so ; but overall, it seems to be true that the external appellate bodies have done better.

(v) Appointments

Because their function is confined to adjudication, the external appellate bodies have been able to attract people who are talented in that function without the need to consider whether they have other talents that would be required for other functions within a board.

Also in some jurisdictions, the function of Chairman of the Board seems to have been perceived sometimes by government as primarily a political role. Where it is perceived in that way, the person appointed to that position may not be selected by reference to any talent for appellate adjudication.

Moreover, the external appellate bodies do not seem to have attracted the worst features of the political process in their appointments in the same way as the boards sometimes have. In particular, the worst forms of patronage and of improper political interference do not seem to have been practised on the external appellate bodies to the same extent as they have sometimes been practised on some of the boards.

B. Advantages of an Internal Appellate Structure

(i) Expedition

The external appellate structures seem to have introduced the most incredible delays. For example, under the internal appellate structure that was familiar to me in British Columbia in 1973, it took about three to four months from date of accident until a decision at the final level of appeal. Nowadays, with the external appellate body at the intermediate level, that time seems to be more like 3 years, and it is now about 3 to 4 years in Ontario. That is hopeless for a system

that was established in the first place to provide for income continuity.

Incidentally, during my term as Chairman of the Board in British Columbia, appeals at the final level would be processed expeditiously, primarily because of the coalescence of appellate and executive functions. Most of my time was spent on executive responsibilities, and most of that role did not involve fixed-time appointments. Thus when a notice of appeal was received that included a request for a hearing, or if I directed a hearing, it was generally
340 held in the next few days. The decision was commonly rendered at the hearing, or within a few days thereafter. In any event, the written decision relating to any appeal (whether with or without a hearing) was almost always mailed out within 14 days of receiving the notice of appeal. Hearings were scheduled as required and there was no backlog ; but the interesting point in the present context is that this was achievable because of the coalescence of executive and appellate functions.

(ii) Policy Co-ordination

An internal appellate structure allows the law and policy of the system to be developed in a coherent way and to be applied consistently at all levels of decision-making. Because the final level of appeal is also the body with executive responsibility in relation to primary adjudication, it can ensure that its decisions are treated as precedents and that a consistent body of law is applied throughout the system. Related to this, the appellate body is likely to be sensitive to the need for simplicity in primary adjudication. An external appellate tribunal may be more sensitive to variations in the facts of each case, and perhaps more prone to introduce more variables into the rules, thereby making the system more complex[5].

Appellate adjudication is, in the nature of it, sometimes policy-making ; but an external appellate structure does not permit policy development by the same range of methods as might be used inter-

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[5] For example, the Appeals Tribunal in Ontario has decided that drunkeness may take a worker outside the course of employment, depending on the degree of intoxication *(Decision No. 99/89)*, and that whether an injury causing impotence is compensable depends upon whether there is evidence of consequential psychological harm that impaired the earning capacity of the worker *(Decision No. 785/88)*. Apart from being objectionable on legal grounds, those decisions introduce variables that are incompatible with the simplicity that is needed for the efficient operation of a social insurance system.

nally, for example, a seminar attended by the appropriate staff. Moreover, an external appellate tribunal, particularly when it is at the final level of appeal, tends to be a rival and potentially conflicting policy-making body, with the result that two contrasting bodies of law are likely to develop, and different criteria are likely to be applied at different levels in the appellate structure. This seems to be happening in Ontario.

This problem can be minimized if, as in British Columbia, the external appellate body is at the intermediate level. The overall responsibility for the development of law and policy then remains with the Commissioners of the Board as the final appellate tribunal, and as the body responsible for primary adjudication.

There is, of course, also an obvious downside risk with any structure in which the final level of appeal is internal. If the Board succumbs to the external or internal pressures to deviate from the terms of the Act, there is no external appellate tribunal to provide a corrective influence.

(iii) Quality Control

Where the commissioners of a board are the final level of appeal, the process can be used for quality control in relation to primary adjudication, as well as for the decisions on particular cases. Where a decision is reversed at the final level of appeal, the chairman can consider how it came to be wrong in the first place. Was it normal human error, or was it a predictable consequence of choices relating to the structure of primary adjudication, procedure, records systems, instructions, training, qualifications, personnel selection, workload, working conditions, or what ? When the cause of the initial error has been identified, any appropriate directions can be given to avoid its repetition. Because an external appeals tribunal has no executive responsibility, it tends to focus more exclusively on getting the right answer to the case under appeal.

(iv) Informality

Internal appellate bodies usually proceed informally, using whatever modes of communication seem to be preferred by the parties. An external appellate structure tends to attract more lawyers, both as tribunal members and as advocates, and whether for this or other reasons, it seems to operate with a higher level of formality. In

Ontario, for example, if a claim is denied and the worker appeals to the Appeals Tribunal from that decision, the employer is notified of the worker's appeal even if the employer never opposed the claim in the first place. Some of these practices are more formal than in the courts, and they contribute to unnecessary cost and delay.

Again, some of the appeals tribunals require a party to give notice to the tribunal and to any other party of the documents and witnesses that the party plans to produce. Needless to say, non-compliance with these formal requirements is commonplace, and again, the result is to increase the cost and the delay. In Ontario and Quebec in particular, it has become almost routine for the appeals tribunals to plod through preliminary objections on procedural matters before getting to the merits of an appeal.

The external appeals tribunals also seem to use more legal jargon. Often this is unintelligible to the general public, and even when it is understood it can be off-putting. For example, workers are often told to "appear before" the tribunal rather than being invited to meet with the panel members. However, internal appellate bodies sometimes use in-house jargon, which can be just as mystifying.

(v) Protection of the Worker

Internal appellate systems have tended to offer the worker better protection from therapeutic harm, or from harm in the employment relationship. For example, some of the external systems recognize a right to cross-examine a disabled worker more extensively than the internal systems. Also some of the procedural changes that have accompanied the more recent external appellate systems have included access by an employer to the information on a board file relating to the worker, including medical reports, and even including psychiatric reports. Thus the adversary system, which was originally abandoned in the design of our workers' compensation structures, has been revived, and it has happened without any analysis of the therapeutic and labour market significance of what was being done, or of the other consequential costs.

(vi) Preparation

Under the internal appellate structures, the preparation required for a hearing has generally been minimal. If it appears at the hearing that further evidence is required, or that further inquiries

should be made, appropriate directions can be given and the matter can be adjourned, but that does not happen very often. Some of the external appellate bodies seem to perceive of the hearing as analogous to a "trial" in the courts, and the preparatory steps sometimes seem to be excessive.

(vii) Finality

An internal appellate body can generally bring to finality all of the issues which appear to be outstanding. It is not confined to the issues raised by the parties or to the issues that have been determined in primary adjudication. Where the commissioners of a board constitute the final level of appeal, they have the authority to determine matters at first instance as well as on appeal. For example, if a worker is appealing for a higher pension, and it appears from the evidence that the level of pension is appropriate, but that rehabilitation assistance is required, the commissioners can direct the provision of the appropriate rehabilitation assistance. Conversely, if the appeal related to the refusal of a rehabilitation measure, the commissioners could deny that appeal but determine that the level of pension should be increased.

The external appellate bodies are more confined to the issues that have been determined in primary adjudication, and thus the external structure creates a measure of inter-agency ping-pong.

Another example relates to the application of the statutory bar to personal injury claims in the courts. In Ontario, the Appeals Tribunal now has the jurisdiction to determine whether the statutory bar applies. The Tribunal has taken the view that its decisions in these cases do not bind the Board for compensation purposes. Yet one rationale for having these questions decided by a board or tribunal, rather than by the court, is to ensure that all of the decisions relating to the injury are made in a consistent way. Splitting the jurisdiction between the Board and the Appeals Tribunal has meant that all of the critical issues relating to the application of the Workers' Compensation Act to that case are no longer resolved in one proceeding, and the possibility has been created of inconsistent conclusions being reached by the Board and the Tribunal.

(viii) Rehabilitation

Because an internal appellate body may also have executive responsibility in relation to the rehabilitation consultants, it may be in a better position to direct the revision of a rehabilitation programme.

(ix) Retroactivity

An internal appellate body may be in a better position to deal with retroactivity issues. Suppose, for example, a claim is denied on the ground that the worker was not employed in an industry that is
344 covered by the Act. Suppose that the claim is allowed at the final level of appeal on the ground that the industry is covered. Substantial injustice could be done if that decision were to be applied to workers and to employers with the same degree of retroactivity. Where the final level of appeal is the commissioners of a board, they might decide that the decision should be retroactive to a certain extent in relation to workers, but that another date should be established for the commencement of assessments. An external appellate body has no comparable authority to plan and direct the application of the coverage in a comprehensive way. That would have to be done by a separate process at the Board.

(x) Orientation

In an internal appellate structure, the system is more likely to be seen as one of social insurance, and to be developed with that perspective. In some of the new external appeals systems, there has been a tendency to see the system as requiring integration with the common law rather than to see it as part of our overall structure of social insurance.

Perhaps related to this, the reasons for decision issued by some of the appellate tribunals have followed a judicial style. Decisions of the common law courts are used as precedents even when they relate to other subject areas, and the style sometimes suggests that the author is writing for the court with an eye on judicial review rather than for the parties to the claim, the administrators of the system, or primary adjudicators. Moreover, an external appellate structure seems to negate any statutory mandate not to feel bound by strict legal precedent.

These postures of some of the external tribunals tend to negate and preclude the development of expertise in the administration of social insurance.

(xi) Cost

The external appellate structures appear to create a substantial increase in adjudicative cost. They require separate premises, separate personnel, separate libraries, and of course there are the very substantial costs of inter-agency co-ordination.

These cost increases go beyond anything that is shown in published accounts because the published figures generally show only the direct operating costs of the external tribunals. Part of the administrative cost of the boards is attributable to the appellate structure.(6) The increased use of lawyers and of other professionals in the external systems increases in the formality of the process, and this results in a significant increase in the costs incurred by workers' organizations and by employers, as well as in the costs that are met by the boards from assessments.

Also part of the compensation cost is attributable to the therapeutic damage that is done, particularly by the delays in the system, but it is hard to form any estimate of how this compares with the therapeutic damage that is done by the injustices that occur in some of the internal appellate structures.

(xii) Implementation and Acceptance of Appellate Decisions

Where an external appellate body reverses a decision made at the board, the reaction at the board may sometimes be one of resentment. This may find expression in subsequent decisions relating to the claim. For example, if the appellate body has allowed a claim that had been disallowed at the board, the result may sometimes be an incredibly negative attitude in the assessment of benefits. Examples have been found of cases in which an external appellate body has decided that the claimant is entitled to a pension for a significant disability, but when it came to the assessment of the pension at the board, it was assessed at close to zero. An internal appellate body which has disciplinary authority in relation to primary adjudicators

(6) For example, in Ontario, the Board now has a committee to review WCAT decisions.

is in a better position to ensure fidelity in the implementation of its decisions.

C. Hybrid Structures

A structure which might be seen as lying somewhere between an internal or external appellate body is to have a board consisting of one or two full-time executive personnel together with labour and management representatives serving on a part-time basis. The part-time members participate in appellate adjudication at the final level and also in the determination of policy issues, but do not participate
346 in the routine administration of the board. This structure was used for many years in Manitoba and has recently been revived in New Brunswick. A good analysis of the significance of this structure would be helpful, but it is not something to which I have had any exposure. Also the jurisdictions that have used this structure have not published reasons for decisions, so that there is not much of a documentary record from which any impressions can be drawn.

D. A More Broadly Based External Tribunal

For a period of several years in Quebec, the final level of appeal in workers' compensation cases was the *Commission des Affaires Sociales.* That Commission was also responsible for appeals in relation to other areas of social insurance. That was changed in 1986 when workers' compensation appeals were transferred to the new *Commission d'Appel en Matière des Lésions Professionnelles.*

An analysis of the significance of having appeals to the *Commission des Affaires Sociales* would be useful, but it would need to be written by someone who is close to the scene. Incidentally, a more broadly based appellate structure is used in Australia, where the Administrative Appeals Tribunal receives appeals relating to a wide variety of matters lying within federal legislative jurisdiction, including workers' compensation appeals for employees of the federal government[7].

E. Conclusions

The establishment of the new external appeals tribunals has been in many ways an improvement, but it has not been an unmixed

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[7] For a description of a commentary on that system, see *The Administrative Appeals Tribunal of Australia*, T.G. Ison, 1989, Law Reform Commission of Canada.

blessing. Nor is it clear that we had to take the disadvantages to get the benefits of this structure. If, instead of proceeding by the impulses of the political process, the structural options had been considered in a more analytical way, it might well have been found that a better structure could have been developed to capture most of the advantages of both an internal and an external appellate system, without the disadvantages of either.

Perhaps I should add that while I have tried to discuss the significance of the structural options, I do not want to suggest that the choice of an internal or an external appellate structure is the most important influence on the efficiency of appellate adjudication. Far more important than the structure is the quality of the appointments and the willingness of governments to shield the system from pressures to deviate from the pursuit of justice according to law. To the extent that the new external appellate bodies have been successful, a large part of the success seems to result from the calibre of the appointments.

3. The Broader Perspective

As I mentioned at the beginning, several of the new appellate structures have come under enormous stress. Given the volume of appeals that they receive, they cannot produce the output with anything close to reasonable expedition. Only in part, however, has this resulted from changes in the appellate structure. The systems of appeals are under pressure from other causes, and those pressures are not going to be relieved by making the appellate structure more external or more internal, or by tinkering with it in less drastic ways.

One such pressure is the failure to maintain a satisfactory level of primary adjudication. While a high level of primary adjudication has been achieved by some boards at certain periods in their history, this has commonly not been the case, and it is commonly now not the case. No system of appeals is going to work well if primary adjudication is fundamentally defective. There have been some recent improvements. In particular, the movement to decentralize claims adjudication and administration has spread, and it now includes Ontario. But the hard reality is that internal bureaucratic and political pressures, as well as external political pressures, generally operate to depress the quality of primary adjudication.

Secondly, systems for the review or reconsideration of initial decisions within the boards have been revived and expanded. When applied to recent decisions, these processes are a buffer that prevents the appeals system from having the elevating influence that it should have on the quality of primary adjudication. They are also wasteful and damaging in other ways.

Thirdly, the revision of appellate structures has coincided with the expansion of experience rating, and this too is putting enormous pressures on the appellate systems. No system of appeals is going to work well if a collateral regime is established that creates an economic incentive to maximize controversies. For this reason, as well as for the reasons that I have explained elsewhere,[8] experience rating is a grave mistake.

Fourthly, several jurisdictions have abandoned pensions for permanent disability and replaced them by a system of lump sums, coupled with the prospect of ongoing periodic payments which are supposed to be calculated by reference to actual loss of earnings, and subject to periodic recalculation.[9] This regime tends to increase the range of controversies and to invite their recurrence, and this cannot be mitigated by any efficiency in administration. Indeed, the more efficiently this method of calculation is administered, the more likely it may be to stimulate appeals.

4. Conclusion

One is tempted to wonder what Sir William Meredith might have thought of all this if he had been able to see what has been happening to workers' compensation in Canada over the last ten years. I think that he would have been disappointed, perhaps not so much with any particular change as with the aggregate, and above all, with the process of change. The government that appointed him recognized a truism that has since been overlooked, ie., the design or redesign of a system in public administration requires a system architect. Some of the more recent reports of review bodies have been well done, and I think in particular of the Report of the Workers' Compensation Review Committee in Manitoba of 1987. In several jurisdictions, however, major changes, including changes to the appeals

[8] "The Significance of Experience Rating", (1988) 24 *Osgoode Hall Law Journal*, 723.

[9] For a critique on this system, see "The Calculation of Periodic Payments for Permanent Disability", T.G. Ison, (1985) 22 *Osgoode Hall Law Journal*, 735.

structure, have been brought about more by political impulses than by rational inquiry, without identification of the problems or their causes, without apparent recognition of the options, and without any adequate analysis of the significance of what was being done.

Until about 20 years ago, our workers' compensation systems used to be studied from time to time by a Royal Commission, and major system changes emerged out of that process ; and of course since that time the processes of Royal Commissions have become more efficient. It is a matter of regret, and it will be a cause of great injustice as well as great waste, that governments have abandoned that practice in favour of making major system changes in more superficial ways.

One consequence of our methods of system revision is that governments seem to have forgotten what is perhaps the primary rule in the design of any system of social insurance ; ie., try to keep it simple. In at least some jurisdictions, the appellate structures seem to be sinking under the overload of complexities.

ERRATUM

Dans la « Chronique de documentation » du numéro de juillet 1989 de la Revue, il aurait fallu lire « Les Éditions SEM Inc. », et non « Les Éditions SCM Inc. », dans le titre de l'article VII, page 246.