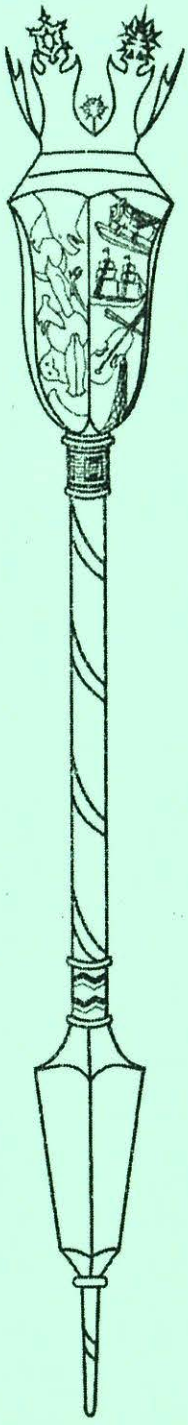
Committee Report 5-15(6)
August 21, 2007



# 15th Legislative Assembly of the Northwest Territories

## Standing Committee on Governance and Economic Development

Report on the Review of
Bill 6: *Workers' Compensation Act*

Chair: Mrs. Jane Groenewegen

## MEMBERS OF THE STANDING COMMITTEE ON GOVERNANCE AND ECONOMIC DEVELOPMENT

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Northwest Territories Legislative Assembly
Standing Committee on Governance and Economic Development

August 21, 2007

SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Governance and Economic Development is pleased to provide its Report on the Review of Bill 6: *Workers' Compensation Act* and commends it to the House.

Jane Groenewegen, MLA
Chairperson

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# STANDING COMMITTEE ON GOVERNANCE AND ECONOMIC DEVELOPMENT

# REPORT ON THE REVIEW OF BILL 6: *WORKERS' COMPENSATION ACT*

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# STANDING COMMITTEE ON GOVERNANCE AND ECONOMIC DEVELOPMENT

# REPORT ON THE REVIEW OF BILL 6: *WORKERS' COMPENSATION ACT*

## INTRODUCTION

The Standing Committee on Governance and Economic Development is pleased to report on its review of Bill 6, the *Workers' Compensation Act.*

The Committee conducted public hearings on Bill 6 in Yellowknife on April 18-19, 2007, in Fort Smith on April 23rd, in Fort Resolution on April 24th, and in Hay River on April 25th. The clause-by-clause review of the Bill took place on August 14th. The Committee would like to thank all of the witnesses who made presentations or provided written submissions, and in particular, the Workers' Advisor, Mr. Colin Baile, who undertook a comprehensive analysis of the Bill and provided detailed comments on several provisions. Mr. Baile's comments ultimately led to many of the 37 amendments the Committee brought forward during its clause-by-clause review with the Minister.

Because of the unusually large number of detailed issues raised during the hearings, the Committee felt it necessary to conduct follow-up meetings with the Minister and representatives of the Governance Council, the Workers' Compensation Board (WCB), the Office of the Workers' Advisor, and the Appeals Tribunal to attempt to work out solutions jointly. The Committee chose to do this in a workshop format, as the usual formal Committee hearing process does not lend itself well to exploratory discussions. These meetings took place on June 4th and 5th in Yellowknife. Committee representatives took part in a follow-up meeting on June 19th with the NWT and Nunavut Ministers, the Chair of our counterpart Nunavut Committee, the Chair of the Governance Council, and WCB officials. We are pleased that, through this process, we were able to come to a consensus on several amendments to the Bill that we believe will make substantial improvements to the workers' compensation system.

Although there was insufficient time for a full second round of public hearings on the amendments to the Bill, the Committee did advise employer and employee representatives of the two major changes under consideration that were likely to have a direct impact on their constituents. These changes, which are explained in more detail later in this report, concerned the structure of the Appeals Tribunal, and the standard of causation that must be met for a workers' injury or disease to be compensable. We would like to thank the Union of Northern Workers, the NWT Federation of Labour, the Public Service Alliance of Canada, and the NWT Construction Association for their written submissions in response to our letters.

## PURPOSE OF THE ACT

Over the last several years, Members have participated in many discussions with WCB officials, Ministers and, most recently, the Auditor General of Canada about communications and other operational concerns that we believe ultimately originate with the corporate culture of the organization. Although Bill 6 as introduced did include a preamble, the Committee felt strongly that a purpose statement, which is contained in the body of the *Act* itself, was necessary. During the clause-by-clause review of the Bill, the Committee moved, and the Minister concurred with, amendments to delete the preamble and replace it with a reworked statement of purpose. In addition to the principles already contained in the preamble, the new purpose section adds the concepts of openness, fairness, compassion, respect, and accountability, which we believe are critical for the workers' compensation system. While it is impossible to legislate corporate culture, the Committee believes that a strong purpose statement at the outset of the *Act* could go a long way toward guiding the attitudes and actions of all persons involved in the workers' compensation system. We urge all officials and employees to consider this statement carefully and to make every effort to align their work with it.

Also, in considering the purpose of the *Act*, the Committee did not believe that the term "Safety Fund" accurately captured the reason for the Fund's existence. During the clause-by-clause review, the Committee and Minister agreed to amend the Bill to change the name to the "Workers' Protection Fund".

## GOVERNANCE

The issue of governance, and in particular the respective roles and responsibilities of the Legislative Assembly, the Minister, the Governance Council, and the WCB administration, has been a source of confusion and frustration for many years. Although the workers' compensation system must be allowed to function at arm's length from Government, it is an important public body and needs to be accountable not only to its stakeholders, but also to the Minister and the Legislative Assembly. While Bill 6 did go some way to better explain the roles of the Governance Council and administration, the Committee did not believe it adequately addressed the need to clarify the role and authority of the Minister. The Minister himself expressed concerns about this during the public hearing process.

During the clause-by-clause review of the Bill, the Committee proposed and the Minister agreed to amendments giving the Minister explicit powers to direct the Governance Council to consider any issue that is or could be the subject of a policy, and to require the Governance Council to report on any matter requested

by the Minister within the time specified. The intent of these new provisions is not to allow the Minister to intervene in individual cases, but to allow the Minister to provide very high-level direction to the Governance Council, and to have access to information needed to meet accountability requirements.

Other governance-related amendments agreed to during the clause-by-clause review of the Bill: Removed the requirement for the Commission's headquarters to be in Yellowknife; reinstated the requirement for the Governance Council to establish a consultation process for its policies; clarified the provision respecting the information the Commission must provide to the Committee on its annual report; and added a requirement for the Minister to table the Workers' Advisors' reports.

## CLAIMS AND COMPENSATION

As mentioned earlier in the report, the Committee advised several employer and employee stakeholder groups of its intent to consider a change to the provision that set out the standard of causation that determines which injuries and diseases can be compensated. Subsection 13(3) of Bill 6 as introduced provided that an injury or disease that appears to have more than one cause and that is prevalent in the general population is only compensable if work is the "dominant cause" of the disease. Members were concerned that this would leave some workers without any compensation where work played a significant, but not dominant, role in their condition. The Committee proposed a more inclusive provision based on the approach taken in several other Canadian jurisdictions, including Alberta, Ontario, Quebec, Saskatchewan, and the Yukon.

None of the stakeholders contacted raised objections to this change. The NWT Construction Association, Union of Northern Workers and NWT Federation of Labour all expressed support for it in their written submissions.

During the clause-by-clause review of the Bill, the Committee proposed and the Minister agreed to an amendment that removes the concept of "dominant cause" and provides instead that diseases and injuries will be compensated as long as work contributed in a material way.

The Committee proposed and the Minister agreed to several other amendments to improve the provisions on claims and compensation. Four of these amendments removed the term "invalid" from the Bill, as this word is considered by many to be outdated and offensive. Another amendment reinstated a provision in the existing *Workers' Compensation Act* that establishes a presumption that certain severe injuries, such as the loss of both hands or the loss of sight in both eyes, constitute a permanent and total disability. This

provision had been left out of Bill 6 to avoid perpetuating negative stereotypes of persons with disabilities. While the Committee appreciates the intent of avoiding negative stereotypes, we believe this concern is outweighed by the benefit of making it easier for people with very severe injuries to get compensation.

A further amendment establishes a clearer process for resolving conflicting medical opinions, which have been at the heart of many disputes between claimants and the WCB. The amendment requires that the Governance Council establish a policy that sets out the procedure for seeking third party medical opinions; provides that the selection of the third party physician and questions to be determined by that person are based on written submissions from the medical advisor, the worker's health care provider and the worker; provides that both the medical advisor and worker's health care provider may make submissions to the third party physician; and provides that the worker will be examined by the third party physician when requested by the worker.

The Committee also brought forward amendments to: Strengthen the provision that makes it an offence to obstruct a claim; to require that the Commission provide financial information to claimants who request lump sum payments in the place of a pension, and offer to pay for them to obtain independent financial advice; to change the requirement that workers cooperate with "suitable productive" employment to "suitable meaningful" employment; and to ensure that claimants receive the full amount of any pain and suffering awards ordered by a court before the WCB recovers its own legal costs. The Minister concurred with all of these amendments. At the Minister's request, a further amendment was made to exclude mental stress as a result of labour relations matters from the list of compensable injuries, in keeping with recent case law on this issue.

## APPEALS TRIBUNAL

As indicated at the outset of this report, the Committee advised stakeholders in late June that it was considering a change to the structure of the Appeals Tribunal. The Ministers currently make appointments to the Tribunal with the requirement that there be a balance between members recommended by employer representatives and members recommended by employee representatives. The Ministers also appoint public interest representatives. Appeals are heard by panels of three, which must include at least one member from each of these three constituencies.

Over the last several years, Members have heard several complaints about the length of time required for appeals to work their way through the system. The Committee understands that one of the reasons for these delays is the difficulty in scheduling hearings that require the availability of three panel members who

live in different communities and have other employment. A solution proposed by the Workers' Advisor was to shift to a model where only one adjudicator hears each case, similar to what is currently in place under the *Human Rights Act* as well as several workers' compensation appeals tribunals across Canada. In this system, tribunal members would have to be appointed based on professional qualifications, rather than the recommendation of labour or employer groups to avoid perceived or actual bias.

In response to the Committee's letter, the NWT Construction Association expressed support for this change. The NWT Federation of Labour, Union of Northern Workers, and Public Service Alliance of Canada all stated their opposition to the change, and requested that the current system, which they view as more balanced and transparent, remain in place. As alternatives to changing the appeals system, they suggested appointing a full-time Chair, better resourcing the Tribunal with staff support, and appointing more members, possibly including a vice-chair. The Public Service Alliance further suggested that the GNWT should relax restrictions that make it difficult for its employees to participate on tribunals.

The Committee strongly agrees with the need to increase the capacity of the Tribunal both by appointing a full-time Chair and by ensuring adequate staffing and resources, and urges the Minister to take the necessary steps for this to occur.

After carefully weighing the comments of all the stakeholders who provided their views on the structure of the Appeals Tribunal, the Committee decided to pursue the sole adjudicator model. The Committee proposed and the Minister agreed to an amendment that requires the chair of the tribunal to designate one member of the tribunal to hear each appeal, while allowing the chair to convene a panel of three members if the chair considers this more appropriate, for example, if a case is especially complex. The Committee and Minister also agreed to amendments adding transitional provisions for the change from the existing tribunal to the new one, and requiring that the chair and vice-chair of the Tribunal be appointed by the Minister in consultation with the Nunavut Minister rather than on the recommendation of the Tribunal. The Committee intended to make an additional motion to amend the Bill to remove the requirement that the Minister appoint tribunal members representing the respective interests of the public, employers and employees, with a requirement that tribunal members have either five years experience as a member of an administrative tribunal or court, or five years good standing as a member of a law society in Canada. However, as the Minister advised the Committee that he would not concur with this amendment, the Committee did not pursue the motion at that time.

Many of the delays in the appeals process are outside the control of the Tribunal itself and involve, for example, difficulties scheduling the parties or expert advice. One factor that is within the Tribunal's control is the length of time required for decisions to be rendered once all the evidence has been heard. During the clause-by-clause review of the Bill, the Committee moved and the Minister agreed to an amendment which will require the Tribunal to render its decisions within 90 days of a hearing.

Clause 131 of Bill 6 as introduced would have allowed the Governance Council to order the Appeals Tribunal to rehear a matter more than once until the Governance Council was satisfied that the Tribunal had properly or reasonably applied policy and legislation. The Committee was concerned this provision would have compromised the independence of the Tribunal and could have put some appeals into an endless cycle of rehearings with no prospect for a final decision. The Committee and the Minister therefore agreed to an amendment that limits the number of rehearings the Governance Council may direct to one.

Also in keeping with the need to reinforce the independence of the Tribunal, the Committee and Minister agreed to delete a provision that would have allowed the Tribunal to ask the Commission to determine whether a Governance Council policy applied in a given case. This type of determination should be made by the Tribunal itself.

Finally, the Committee also passed two motions to amend the Bill to remove the one-year limitation periods for requesting reviews and appeals of Commission decisions. The Committee was of the view that these limitation periods would cause unnecessary hardship to some claimants. The Minister did not concur with these motions.

## OTHER ISSUES

During the public hearing in Hay River, Mayor John Pollard voiced concerns with clause 160 of the Bill, which continues the requirement for municipal governments to notify the WCB of building permits for projects in excess of an amount prescribed by regulation, which is currently set at $10,000. In his view, this provision places an excessive burden on municipalities. When the Committee raised this issue with the WCB, they replied that they had not received any complaints from municipal governments that the provision is too onerous, but that a potential solution would be an amendment to the regulations to raise the amount that triggers the requirement for the municipalities to notify the Commission of a building permit. The Committee urges the Governance Council to initiate discussions with the NWT Association of Communities to determine what, if any, changes should be made.

Another concern raised at the public hearing in Hay River was the Commission's involvement in safety, both because of the additional cost to employers, and the potential for conflict when the same body that provides safety advice to employers is also investigating compliance and enforcing the *Act*. As safety matters are addressed in other legislation and fall outside the scope of this Bill, the Committee did not investigate the possibility of amendments on this issue, but did research practices in other jurisdictions. We found that WCBs across the country have a mandate for safety education and promotion, and also have an investigation and enforcement role in British Columbia, New Brunswick, Quebec and the Yukon. As this issue is of concern to at least some employers, the Committee encourages the Government to initiate consultations with stakeholders on the appropriateness of continuing to have the safety investigation and enforcement function remain with the Commission.

## CONCLUSION

Bill 6 is the culmination of several years of work, which began in the 14th Assembly with the Act Now Report and first set of amendments to the *Act*. The Committee believes that the Bill as amended represents a significant improvement over the existing legislation and will pave the way to addressing many longstanding concerns of employers, workers, and Members, including those highlighted in the 2006 Auditor General's report.

During the clause-by-clause review, the Committee and Minister agreed to four amendments of a minor and technical nature in addition to the amendments already referenced earlier in this report.

Following the clause-by-clause review, a motion was carried to report Bill 6, *Workers' Compensation Act*, as amended, as ready for consideration by Committee of the Whole.

This concludes the Committee's opening comments on Bill 6. Individual Members may have questions and comments as we proceed.

# APPENDIX A

## SUBMISSIONS - STANDING COMMITTEE ON GOVERNANCE AND ECONOMIC DEVELOPMENT

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## REPORT ON THE REVIEW OF BILL 6: *WORKERS' COMPENSATION ACT*

NORTHERN TERRITORIES
# FEDERATION OF LABOUR

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PHONE (867) 873-3695 FAX (867) 873-6979



July 17, 2007

Mr. Doug Schauerte, Deputy Clerk
Standing Committee on Governance
and Economic Development
Legislative Assembly of the NWT
PO Box 1320
Yellowknife NT X1A 2L9

**Bill 6 Workers' Compensation Act**

On behalf of the Northern Territories Federation of Labour, thank you for providing the extended opportunity for us to provide comments on the Committee's proposed amendments to Bill 6.

1. Compensable Diseases

We agree with the Committee's proposal regarding Subsection 13 (3).

In determining which diseases are compensable, workers will definitely be better served by work being considered a contributing factor, rather than the dominant cause of a disease.

2. Appeals Tribunal

The Federation shares the Committee's concerns about the delays experienced in scheduling appeal hearings. Delays may be alleviated by the current legislation which allows the Minister to appoint "one or more persons" from each of the worker and employer interest groups. The Minister may appoint as many persons as necessary from each group to mitigate this problem.

Also, the Minister may further alleviate delays by appointing a full time Chair, and exercising the option to appoint a Vice-chair as provided in current legislation.

Moreover, ensuring that the office of the Appeals Tribunal is fully staffed, resourced and funded will aid in this endeavour.

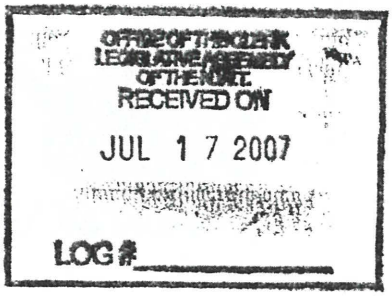
We disagree that a sole adjudicator will serve the best interest of the injured worker. Through consultation with other jurisdictions, we have found that a tribunal system establishes balance and fairness. If this amendment is given further consideration by the Committee, we would welcome the opportunity to review and comment on the full text of Sections 117 through 133 with proposed changes included.

Furthermore, we disagree that the issue of lengthy delays for appeals could be resolved through the assignment of a sole adjudicator. It is difficult to understand how any convention could result in agreement between business and labour, when there are currently no labour friendly lawyers in the NWT. As above, we would appreciate the detailed process of the proposed convention be provided for review and comment.

In closing, a representative from our organization would be more than willing to meet with the Committee to discuss this in further detail.

Sincerely,

Tim Laity, Treasurer


July 17, 2007

Standing Committee on Governance
and Economic Development
Attn: Doug Schauerte, Deputy Clerk
Legislative Assembly of the NWT
P.O. Box 1320
Yellowknife, NT X1A 2L9
*Sent via facsimile (867)873-0432*

***Re: Bill 6 Workers' Compensation Act***

On behalf of the Public Service Alliance of Canada, which represents over 6000 workers in the Northwest Territories and Nunavut, I would like to provide some comments on Bill 6, the proposed amendments to the Workers Compensation Act.

First of all, I would like to express my disappointment that the proposed amendments were not presented in a separate format that would have made it much easier for stakeholders to review. I did get a copy of the revised Act from your website, but one has to go through it line by line with a copy of the current legislation to obtain the amendments. A copy of the amendments themselves should be made available for review.

That said, we are strongly opposed to the changes proposed to the composition of the Appeals Tribunal. The current format, with members designated by stakeholders, allows for a much more balanced approach, transparency and a sense of ownership from the community.

We too are concerned with the delays in scheduling and hearing appeals, but we don't believe that eliminating the three person tribunals would alleviate this problem. Demands for judicial reviews are likely to increase as appellants might distrust a process that lacks the participation of peers. This would increase the workload of the Tribunal, not decrease it.

We would support the appointment of a full time Chair, which might help deal with the day to day business and scheduling. This position would have to be well resourced, with strong administrative and logistics support.

We would also like to suggest that a roster of tribunal members be established for both the employer and labour side. A minimum of five individuals per side should be on this roster so as to provide some flexibility in scheduling.

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It would be most helpful if the Government of the Northwest Territories could relax its restrictions on its employees to get time-off to serve on the tribunal. A good number of individual members of the PSAC-UNW are precluded to serve on tribunals due to operational requirements and the requirement to provide three weeks notice to take any kind of leave for "union business". Many have expressed an interest in serving on tribunals, but have been prevented to do so by their employer.

In closing, I would like to assure you that we appreciate the work of your Committee and wish to remain informed of its deliberations. Do not hesitate to contact my office for comments on legislation that may affect our membership and workers in general.

Sincerely,

Jean-François Des Lauriers
Regional Executive Vice-President
Public Service Alliance of Canada, North

cc: Mary Lou Cherwaty, Northern Territories Federation of Labour
Todd Parsons, President, Union of Northern Workers
Marilee McCallum, Regional Representative, PSAC North

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Union of Northern Workers

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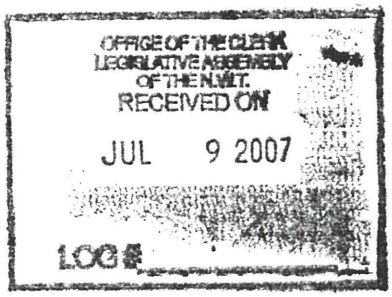
July 6, 2007




Standing Committee on Governance
and Economic Development
Attn: Doug Schauerte, Deputy Clerk
Legislative Assembly of the NWT
P.O. Box 1320
Yellowknife, NT X1A 2L9

***Re: Bill 6 Workers' Compensation Act***

Thank you for providing the Union of Northern Workers with the Committee's proposed amendments to Bill 6 and the opportunity to provide comments.

We are in agreement with the Committee's proposal regarding Subsection 13(3) that would provide for a worker's disease to be compensable if the work is a **contributing** rather than a **dominant** cause of the disease. On this point we commend the Committee on the reasonableness and fairness of its position.

We are not, however, in favour of the Committee's suggestion that the appeals tribunal be reduced from a three member panel to a single adjudicator. While we appreciate the Committee's concern for reducing the lengthy delays in scheduling hearings due to the need to bring the panel members together, we feel that use of the three member panel encourages and allows far more transparency in the process than a single appointed arbitrator would allow. The lack of transparency in WCB's actions and decisions has been heavily criticized by MLA's and members of the general public.

The Union is particularly troubled by the following: "It is **expected** that a convention would be put in place .....to choose names from a list" agreed to by worker and employer representatives. We are uncomfortable with the **expectation,** because it is unenforceable, and is then prone to being unheeded. In short, we suggest that a sole arbitrator might be chosen more with a view to timeliness than to other important factors.

The Union is concerned about the delays experienced in scheduling appeal hearings but we suggest there may be other methods of ensuring that hearings take place in a timely fashion. The appointment of a full-time Chair may help in this regard.

Should you have any questions, or wish to discuss this further, please feel free to contact me.

Sincerely,

Todd Parsons

Todd Parsons, President

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July 6, 2007

Doug Schauerte, Clerk
Standing Committee on Governance and Economic Development
Government of the Northwest Territories
Box 1320
Yellowknife, NT X1A 2L9

Dear Mr. Schauerte,

**Bill 6: Workers' Compensation Act**

In response to the Standing Committee on Governance and Economic Development's request for comment on proposed changes to the above Act, the NWT Construction Association (representing NWT and Nunavut companies) agrees with the amendment that would allow only one person to hear appeals. However, instead of relying on convention, which can be subject to political whim, we would much prefer that qualifications for the Chairs and adjudicators be clearly defined in the Act, and that Ministers be obliged by law to appoint only those who meet the qualifications.

We have no comment on the proposal to compensate diseases that are only partially related to work

Please extend our thanks to the committee for the opportunity to comment on this matter.

Sincerely,

Bob Doherty, P. Eng.
President

Northwest Territories Minister Responsible for Workers' Compensation Board



MAY 2 4 2007

MS. JANE GROENEWEGEN
CHAIRPERSON
STANDING COMMITTEE ON GOVERNANCE & ECONOMIC DEVELOPMENT

**Bill 6 *Workers' Compensation Act***

Thank you for your letter dated May 7, 2007, with its attached questionnaire. Enclosed is a response to the 17 questions posed.

Mr. Colin Baile, Workers' Advisor will be available to attend the workshop on June 4 and 5 so that he can fully participate in discussions along with the Governance Council and Workers' Compensation Board (WCB) staff.

As you are aware, Bill 6 is very lengthy and contains a number of complicated concepts. In order to assist the Committee, I have attached the briefing notes that were prepared for me.

David Krutko
Minister

Attachments

c: Distribution List

Distribution List

Honourable Patterk Netser
Minister Responsible for the Workers' Compensation Board, Nunavut

Mr. Hunter Tootoo
Chairperson, Standing Committee on
Government Operations & Accountability, Nunavut

Hon. Joseph L. Handley
Premier

Ministers

Mr. Denny Rodgers
Chairperson, Workers' Compensation Board

Ms. Anne Clark
President & CEO, Workers' Compensation Board

Committee Members
Accountability and Oversight

Committee Staff
Governance and Economic Development

# REPLY TO COMMITTEE QUESTIONS

## 1. Consultation/Process

- **Q:** Was there any opportunity for stakeholders to review all or part of the draft Bill? Which stakeholders?

**A:** Extensive consultation was done with stakeholders in the development of the Act Now report. Subsequent to the report, further focus group consultation with stakeholders (worker representatives, employer representatives, members of the general public and the Workers' Advisor) was conducted through an independent facilitator. The Cabinets of both the Northwest Territories and Nunavut approved the Legislative Proposal which became the drafting instructions.

WCB staff and the legislative drafters are not permitted to share a draft Bill until it has been approved by Cabinet; therefore, stakeholders did not review the draft prior to 1st reading. There was one exception. The NWT Medical Association reviewed suggested wording for the provisions related to "conflicting medical opinions." The Auditor General's report addressed the issue of conflicting medical opinions and suggested a possible solution that would impact upon the medical profession, and therefore it was determined that the WCB should discuss the matter with the Association prior to finalizing the draft wording.

- **Q:** Who was involved in decisions about what did or did not make it into the Bill?

**A:** Those participating in the decision-making process on the recommendations to be made to Cabinet were the Ministers responsible, the Governance Council, WCB staff, experts retained by the WCB, the Departments of Justice (NT and NU), and the legislative drafter.

## 2. Preamble

- **Q:** Why was the Bill drafted with a preamble instead of a statement of purpose in the Act itself?

**A:** A "purpose statement" in an *Act* has a specific legal meaning to legislative drafters. The Department of Justice, Legislative Division does not support the use of "purpose statements" in legislation and the WCB deferred to this advice in the drafting process. However, a preamble has been included in the *Act* as a means of addressing the concerns raised in the Act Now report.

- **Q:** Why doesn't the preamble include a statement about the need to administer the Act in accordance with the presumption in favour of the injured worker and principles of natural justice, as recommended by the Act Now report?

**A:** The Act Now report raised many concerns. The manner proposed to deal with some of the concerns was not always the best or most appropriate one. For example, a preamble does not have the same legal effect as the provisions of legislation. The presumption in favour of injured workers already has the strength and authority that comes from being contained within the Bill. Restating it in the preamble will not give it further strength.

In addition, the WCB, like all administrative tribunals, is bound by the rules of natural justice. This is so regardless of whether or not it is specifically stated in a preamble or within the body of the Bill.

The WCB deferred to the advice of legal drafters with respect to this issue.

### 3. Determining Cause of Injuries

- **Q:** What is the rationale for the new "dominant cause" requirement and how can it be reconciled with the presumption in favour of the injured worker?

**A:** There is no conflict with the presumption in favour of the injured worker and there is no requirement for the worker to prove anything.

In all workers' compensation schemes in Canada it is well established and generally accepted that issues should be determined according to the ordinary standard of proof in civil cases; that is on the balance of probabilities. Where workers' compensation differs from ordinary civil cases is when it comes to the burden of proof. In ordinary civil cases it is up to the plaintiff to prove his or her claim. If the evidence is evenly balanced the plaintiff will not be considered to have satisfied the burden of proof on the balance of probabilities. The WCB, however, operates under an inquiry model. A claimant does not have to prove anything. The decision maker is required to gather sufficient information to make a decision on a matter before it. If the evidence is evenly balanced, the claim will be accepted, either as a result of the presumption or as a result of the benefit of the doubt.

Once the individual tasked with making the causation decision is satisfied that there is sufficient information to make a decision there are only three possible conclusions: 1) the evidence indicates that injury/disease arose out of and during the course of employment; 2) the evidence indicates that the injury/disease did not arise out of and during the course of employment; or 3) the evidence is evenly balanced as to whether the injury/disease did or did not arise out of and during the course of employment . The third situation is when the benefit of the doubt kicks in and the decision is made in favour of the worker.

Bill 6 also contains a presumption of causation. This is slightly different than the benefit of the doubt. For example, the Bill states that where an injury/disease occurs during the course of a worker's employment, it is presumed to arise out of that employment. In order for this presumption to apply, the decision maker must first conclude that personal injury/disease occurred "at work." If so, the claim is compensable unless it can be proven on a balance of probabilities that the injury/disease did not arise out of the work. There is a similar presumption that an injury/disease arose out of one's work if it occurred during the course of employment.

The benefit of the doubt provision is somewhat broader because it can apply to situations where the decision maker is unable to determine either that the injury/disease occurred at work or that the injury/disease arose out of the work. In such case the presumption will not apply but the benefit of the doubt provision will.

There is nothing associated with the concept of dominant cause which undermines the presumption of causation or the benefit of the doubt applying to the worker. Dominant cause relates to situations where there are multiple causes that occur concurrently and give rise to injury or disease.

The current *Act* envisions a specific single event (an "accident") as a prerequisite of a compensable injury. The concept of "accident" has been eliminated from Bill 6. The only relevant factors are that there is an injury/disease and that the injury/disease was caused by work. Thus there does not have to be a specific single event at work as the cause of the injury/disease.

As is the case throughout Canada, workers' compensation is only intended to compensate workers for disability or impairment that arises out of the workplace. If the worker has a pre-existing condition that is aggravated or enhanced by a workplace injury, the resulting disability or impairment will be compensable because the aggravation at work will undoubtedly be the dominant cause of the injury.

However, in the case of disease, the issue of causation is more complicated. Many diseases are prevalent in the general population and it is difficult to determine work relatedness. Often, diseases develop over many years and the multiple contributory causes occur concurrently and combine to produce a disabling disease. In such circumstances there are three policy options:

1. Compensate for the entire disease even though work many not be the dominant cause;
2. Apportion the compensation and only pay for that portion of the disease that is attributable to the workplace; and
3. Compensate for the entire disease but only where the workplace is the dominant cause.

There are problems with all of these policy options. Option 1 is often seen as a burden on employers who are asked to pay for the cost of disease that they had little to do with and can not prevent. Option 2 is difficult to adjudicate medically and may result in compensation benefits that are below the rates payable by social assistance. Option 3 has been recommended because it is easier to determine dominant cause than to try to apportion between causes, and if work is the dominant cause, the worker will receive full compensation without reduction having regard to the fact that there may well have been other contributing causes.

There are some diseases that are prevalent in the general population. For example, all people will develop to varying degrees of severity, osteoarthritis and/or muscular/skeletal degeneration as they grow older. The policy option chosen is based on the assumption that employers who pay for the compensation system, including lifetime pensions, should not be responsible for paying for a medical condition most likely to occur in the absence of a work-related cause. There are, however, certain work activities that obviously contribute to osteoarthritis and/or muscular/skeletal degeneration. In these situations, the work activities are considered the dominant cause and the worker will be compensated fully for the disability or impairment resulting from the disease.

There should be no doubt that if a worker has a pre-existing condition that is aggravated or enhanced by a workplace injury, the resulting disability or impairment will be fully compensable. If the current wording leaves any doubt in the minds of legislators as to the intention of the Bill, the Bill can be amended to delete any reference to "injury" in subsection 13(3). The inclusion of "injury" in subsection 13(3) was not intended to affect substantive rights.

- **Q:** Is this requirement consistent with practice in other jurisdictions?

**A:** As mentioned above, there are three generally accepted models in Canada.

1. Compensate for the entire disease even though work many not be the dominant cause (Alberta, Saskatchewan, Ontario, Quebec, and Yukon).

2. Apportion the compensation and only pay for that portion of the disease that is attributable to the workplace (Nova Scotia, Newfoundland and Labrador, and New Brunswick).

3. Compensate for the entire disease but only where the workplace is the dominant cause (Prince Edward Island and Manitoba).

British Columbia has a fourth approach which lists certain diseases that are listed in a schedule and these diseases are presumed to be work-related unless it is proven to the contrary.

## 4. Determining Date of Disease

- **Q:** What is the reason for allowing the WCB the discretion to determine whether the date of disease is diagnosis or disablement?

**A:** The date of the disease is important for the purposes of establishing when the one-year limitation period would begin. Currently, the date of disease is limited to the date of disablement. It is possible that a worker may be disabled for more than a year without being diagnosed; although subsection 20(2) should permit an extension of the limitation period due to the lack of a diagnosis. This provision makes it clear that the limitation date is not mandated to start on the date of disablement. The alternative is also true that a worker could be diagnosed with a disease but not be disabled for more than a year after the diagnosis.

- **Q:** Is the intent that the determination would always be made to the benefit of the claimant?

**A:** Yes, if this is not clear, alternative wording can be developed.

## 5. Conflicting Medical Opinions

- **Q:** Is it the intent that under 27(2), when the medical advisor and the attending physician seek a specialist opinion to resolve a conflict, that the claims administrator will be bound by the specialist's opinion?

**A:** Yes. Section 27(3) makes a resolution reached under subsection 1, and a specialist opinion obtained under subsection 2 binding on both the Commission and the claimant. This is, however, subject to new medical evidence at a later date being available.

- **Q:** Who was consulted on this provision and what were the results of consultation?

**A:** The NWT Medical Association was consulted and agreed to this provision subject to being consulted on the development of the policy related to this provision.

The Workers' Advisor correctly notes that these provisions raise some questions, particularly with respect to process. These questions are most effectively addressed in policy (please see comments under questions 6 and 7 regarding the relationship between legislation and policy). The Governance Council will be consulting with stakeholders (in particular the Workers' Advisor and the NWT Medical Association) to address these concerns and others to ensure that the policy specifies a process that is fair, timely, and cost effective.

## 6. Additional Compensation

- **Q:** The Act does not say how the WCB will decide whether a claimant is entitled to additional compensation. How will the WCB ensure this discretion is applied fairly and consistently to all claimants?

**A:** The purpose of *legislation* is to outline the authority and obligations. The purpose of *policy* is to provide detail for how the authority will be exercised, and how those obligations will be met. The Governance Council will develop detailed and specific policy to guide decision-makers and ensure the discretion to award additional compensation is applied fairly and consistently to all claimants. Decision makers at the initial level and in the appeal process are bound to follow the policy established by the Governance Council.

## 7. Lump Sum Payment

- **Q:** The Act does not say how the WCB will decide whether or not a claimant will receive a lump sum payment. How will the WCB ensure this discretion is applied fairly and consistently to all claimants?

**A:** See comments in question 6 with regard to the relationship between legislation and policy.

The Governance Council will develop detailed and specific policy to guide decision-makers and ensure its discretion to award a lump sum payment is applied fairly and consistently to all claimants. Although the current Policy 06.02 – Lump Sum Payments and Advances on Pensions will have to be modified to address proposed legislative changes, it does set out the Governance Council's current direction on this matter.

## 8. Rehearings

- **Q:** What was the rationale behind subsection 131(4)?

**A:** The Bill is set up to clarify roles and responsibilities in the workers' compensation system. The Governance Council has, among other duties, the responsibility of establishing policy by which the Commission, Review Committee, and the Appeals Tribunal are to use in the making of decisions. In order for there to be fairness and consistency, all decision makers must apply the same rules. The decision makers must apply the policy that is established by the Governance Council.

In question 6, the Governance and Economic Development Committee asked:

*"How will the WCB ensure this discretion is applied fairly and consistently to all claimants?"*

The answer is that the Governance Council (not the WCB/Commission) sets policy and the Commission has to apply policy to the facts of the case. If a worker or employer is dissatisfied with the decision, they can refer the matter to the Review Committee.

The Review Committee is made up of two Commission staff that are operationally independent of the initial decision maker. The Review Committee is required to apply policy to the facts of the case. If a worker or employer is dissatisfied with the decision they can appeal it to the Appeals Tribunal.

The Appeals Tribunal hearing is like a trial *de nova* in the court system, a new fresh hearing of the matter. The Appeals Tribunal still has to apply all the same rules that the Commission and Review Committee have to apply in making a decision. The Appeals Tribunal has to apply the *Act* and policy. The question that arises is what happens when they do not apply the *Act* or policy. The options are:

1. the courts can order a rehearing;
2. the Governance Council can order a rehearing; or
3. the non-application of the *Act* or policies can be ignored.

The third option is not advisable because it will result in different rules being applied to different people. The first option was not seen as a viable alternative because of the high costs of litigation and the time delays associated with it. The second option was chosen because the Governance Council has greater familiarity with the *Act* and its policies than the courts and the process of applying to them is less expensive and timelier than the court process.

It has been stated that this takes away the independence of the Appeals Tribunal. The Governance Council is not making a decision on the matter before the Appeals Tribunal; it is only ensuring that the *Act* and their policies are applied. This is theoretically no different than the Court ordering a rehearing on a judicial review application on matters of natural justice and errors of jurisdiction. The Courts are not deciding the issue; they are giving direction on how the hearing is to be conducted.

The 131(4) provision is a direct response to the 2nd *Rennie* decision where the Nunavut Courts of Justice said, based upon the language of the current *Act,* the Governance Council can only order a rehearing once. This, despite the fact in the first decision the Court said, "In other words, the Legislature has clearly and unambiguously decided that it is the Respondent [Governance Council] and not the courts that will determine whether the Tribunal has complied with the *Act* or regulations."

The current provision (7.7(2)) is rarely used. In 17 years, there have been approximately 11 applications made to the Governance Council to order

rehearings; six of these applications were made by workers. On three occasions, the Governance Council ordered rehearings (two were applications by workers where the Appeals Tribunal concluded that chronic pain was not an injury). On one occasion, the Governance Council felt it was necessary to order a second rehearing.

**9. Judicial Review**

- **Q:** What is the rationale for extending the protection from judicial review to the Governance Council in section 133?

**A:** The current *Act* provides this protection to Governance Council decisions (see section 7 *Workers' Compensation Act* and the Northwest Territories Court of Appeal decision *Fullowka et al v. Witte et al* 1999 NWTCA 1 where the court upheld one of the Board of Directors' decision). Section 133 does not change the current situation.

**10. Annual Reports**

- **Q:** There is a new requirement for the Appeals Tribunal to make an annual report, which the Minister must table. Is there any reason there could not also be a requirement for the Minister to table the Workers' Advisor annual report?

**A:** No.

**11. Budget for Office of the Workers' Advisor**

- **Q:** What is the rationale for subsection 108(4)?

**A:** The purpose of this subsection is to guarantee the independence of the Workers' Advisor program by ensuring its financial security. Currently, there is no provision guaranteeing funding for the Workers' Advisor program. The Governance Council is responsible for stewardship of the Accident Fund, which includes accountability for expenditures. The policy issue that this provision is attempting to address is balancing Governance Council accountability for the Accident Fund and maintaining the security of adequate funding for the Workers' Advisor program. This provision establishes the current funding level as the base for future increases and guarantees budget increases over time to a measurable standard, being the cost of living in the north. Increases above this amount are to be made by way of agreement between the Governance Council and the Minister.

## 12. Duty to Accommodate Injured Worker

- **Q:** What were the reasons for not addressing employer's duty to accommodate injured workers in the Bill?

**A:** There is no issue about the legal requirement for employers to accommodate their injured workers. This requirement currently exists in the *Human Rights Act.* When the Act Now recommendation was made, the *Human Rights Act* did not exist. The issue became whether it should also be included in the *Workers' Compensation Act.* Some jurisdictions include it while others do not. There are pros and cons to both positions. (Cons to inclusions: staff have to become experts in human rights issues and the possibility of multiple processes going on at the same time or sequentially. Pros to inclusion: potentially having the issues dealt with in one spot as opposed to having compensation issue by Commission and accommodation by Human Rights Commission). The Human Rights Commission advised the WCB that it does not support including the provision in the new *Act.* In drafting, the decision was made not to include reference to an employer's duty to accommodate.

## 13. Employment Insurance

- **Q:** The Act expressly states that employment insurance is not included in calculating annual remuneration. What would be the impact if EI were included? How do other jurisdictions treat EI?

**A:** Including EI in the calculation of remuneration will increase annual claims costs by approximately $1.5 million. One of several scenarios would likely occur as a result: employer assessments would increase, compensation for workers would decrease, or programming such as vocational rehabilitation would be curtailed. The WCB is not as concerned with including EI in the calculation of remuneration as it is with ensuring that stakeholders are aware of the implications of its inclusion. Any decision must be made with the interests of all stakeholders in mind. We know from past focus groups that employers are opposed as they feel they would be paying a tax on a tax.

There is no uniform approach to this issue across the country. Some jurisdictions include EI in the calculation of remuneration while others do not. It is not helpful to compare the NWT and NU with other jurisdictions on the sole criteria of who includes EI in its formula and who doesn't. This is because there will necessarily be differences in assessment rates, compensation benefits, and programming that are not being taken into account.

The WCB decided to address concerns that injured seasonal workers would lose out on money that s/he would otherwise receive in a particular year because of their workplace injury through section 57(3)(a) in Bill 6.

If a worker normally worked June 1 to October 1 (18 weeks) and received $20,000.00 during this time, they would also be entitled to receive EI benefits of $413 a week for a total of 34 weeks (under a current federal pilot project) for a total of $13,216. Their taxable income for the entire year would be $33,216 if they were not injured.

Under the proposed system, if the worker was injured on September 15 and was on total temporary disability benefits until June 1 of the next year, they would receive $371.45/week tax free for this period. Being injured, the worker receives $12,629.30 tax free. Not being injured, they receive $13,216 which is taxable. If the current federal pilot project is not continued, the amount of money received in EI benefits will decrease, but the compensation benefits will not.

If the person was on TTD benefits until December 1, they would be entitled to receive EI benefits for the period until they returned to work on June 1.

If EI benefits are included in the calculation of remuneration and section 57(3)(a) is adopted, these workers will be receiving more money being injured than they would if they had not been injured.

**14. Time Limits for the Review and Appeals Process**

- **Q:** Act Now recommended legislating time limits for the review and appeals processes. Why was this not addressed in the Bill?

**A:** The length of time it takes for a review or appeal to be heard is a legitimate concern. However, the specification of dates is arbitrary considering the complexity of matters to be considered. For example, a review is currently before the Review Committee that raises a new and complex human rights issue. The worker required extra time to make submissions on the issue and now the Review Committee has sought legal advice. The WCB's concern is that instead of promoting efficiency in the review and appeal processes, established time limits may amount to setting the WCB up to be non-compliant with the *Act*. An additional issue is what happens if the Appeals Tribunal or Review Committee are not able to meet the legislated timeframe? Are these individuals charged with violating the *Act*? Is the appeal automatically allowed even though the justice and merits of the case would require it to be denied or is a legitimate appeal automatically denied because the injured worker can not properly prepare his/her appeal in the timeframe established?

Reviews and appeals must to be conducted in a timely manner. Currently there are timeframes established for the Review Committee which are reported to the Governance Council. If the Governance Council is dissatisfied with the Review Committee's performance, it can have its concerns addressed by the President. The preferred manner to address this issue is through appropriate accountability provisions in Bill 6.

## 15. Duty to Assist Injured Worker

- **Q:** Following its review of the Auditor General's report, the Accountability and Oversight Committee recommended the Act state explicitly that the Commission has a duty to assist injured workers. Why is this not stated in the Bill?

**A:** The WCB's duty to assist injured workers is created through the establishment of workers' rights. Every time the legislation states "shall" in relation to an injured worker's right, it creates the duty to assist injured workers.

## 16. Municipal Governments' Duty to Give Notice of Building Permits

- **Q.** The Committee heard concerns that the section 160 requirement is too onerous for municipal governments. This issue was also raised in the Act Now report. Is this requirement necessary? Are there other means the WCB could check on employers' compliance.

**A.** The provision is one of many that the WCB uses as a check to ensure that employers are registered and are properly reporting their payroll. It has been in place for many years and the WCB has not received any complaints that it is too onerous. A simple solution, if the municipal governments are finding the reporting requirements too onerous, would be to raise the value of the building permit they are required to report.

## 17. Implementation and Coming Into Force

- **Q.** When is it expected the Act would come into force?

**A.** January 1, 2008.

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| | "eligible claimant" means a person who has claimed compensation or who is entitled to claim and receive compensation. | The term "eligible" implies entitlement and as such may be misconstrued in sections 19 & 62. |
| | "invalid" means a person who is physically or mentally incapable of earning his or her living. | Notwithstanding the term "*invalid*" is a recognized legal term found in the present Act, it is submitted that such a term is outdated and offensive to many. Terms such as disabled or impaired would better reflect acceptable terminology. |
| 5(1) | **5.** (1) A person whose remuneration comes primarily from harvesting wildlife is deemed to be a worker, if he or she<br>(a) is a resident of the Northwest Territories;<br>(b) is lawfully harvesting wildlife under a land claims agreement, a treaty or other Aboriginal right or the *Wildlife Act*; and<br>(c) is not harvesting the wildlife under a contract of service. (Underline added) | The present Act states:<br><br>**10.** (1) Notwithstanding section 9, a person who<br>(a) is a resident of the Territories,<br>(b) holds a general hunting licence issued under the *Wildlife Act* or is a beneficiary under legislation of the Parliament of Canada approving, giving effect to and declaring valid the provisions of a land claims agreement related to lands within the Territories, and<br>(c) is a self-employed person principally engaged in hunting, fishing or trapping for a livelihood,<br>is deemed to be a worker for the purposes of this Act. (Underline Added)<br><br>One may ask what consequences will stem from changing the wording of "principally engaged" to "primarily". The Board's Policy 03.05 defines "Principally engaged" as meaning: *"...regularly and actively engaged in hunting, fishing or trapping for a livelihood, with at least 25% of a harvester's gross income, including $7,000 for country food, derived from hunting, fishing or trapping."*<br><br>Consideration may be given to how this section is intended to be administered and amend the Act accordingly. |
| 11 | **11.** (1) The following persons are entitled to compensation on the death of a worker arising out of and during the course of the worker's employment:<br>(a) a surviving dependant spouse of the worker;<br>(b) a child of the worker who is less than 19 years of age;<br>(c) a dependent child of the worker who | As identified earlier, consideration of changing the term "*invalid*" should be addressed. As the term is applied in this section, such a dependent child would only be entitled to compensation were he or she totally incapable of earning income. This does not reflect the reality of many parents of disabled children who are required to provide varying levels of financial support to a disabled child for life. What of the |

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| | is 19 years of age or over and attending school;<br>(d) a dependent invalid child of the worker who is of any age. (Underline Added) | disabled child who, due to a cognitive challenge, is able to work a part time job however is unable to support himself or herself. Under the proposed legislation, this child would be entitle to compensation only until age 19 despite the fact that the deceased parent would have needed to provide financial support for a much longer period of time.<br><br>It is recommended that in addition to replacing the term "*invalid*", section 11 reflect the needs of adult children who require financial support due to disabilities to a maximum of that awarded a spouse. |
| 13 | **13.** (1) In this section,<br>"dominant cause" means the cause that contributed more than any other cause to the personal injury or disease;<br>"trivial cause" means a cause that did not contribute in a material way to the personal injury or disease.<br>(2) A personal injury, disease or death arising out of and during the course of employment is compensable whether it<br>(a) was caused by a natural, physical or human cause;<br>(b) was foreseeable or not;<br>(c) was preventable or not; or<br>(d) was caused by one event or a series of cumulative events, including the repetitive performance of the worker's employment.<br><br>(3) A personal injury or disease that appears to be the result of more than one cause is compensable if,<br>(a) in the case of an injury or disease that is prevalent in the general population, the dominant cause of the injury or disease arose out of and during the course of employment; and<br>(b) in the case of an injury or disease that is not prevalent in the general population,<br>one of the causes of the injury or disease arose out of and during the course of employment and that cause | The issue of causation is at the heart of many conflicts between the Board and Claimants. The proposed wording would see causation divided into two categories, "dominant cause" and "trivial cause". This language is most subjective. Additionally, the term "prevalent in the general population" is equally subjective.<br><br>The Supreme Court of Canada has given some direction regarding causation in two of its decisions; they being *Snell v. Farrell* [1999] 2 S.C.R. and *Athey v. Leonati* [1996] 3 S.C.R. 458.<br><br>The Snell case dealt with medical negligence in which the plaintiff alleged that the defendant eye surgeon was responsible for her blindness following eye surgery to remove a cataract. This case addressed the issue of how facts are to be interpreted in light of conflicting or unclear medical information. It also set the standard used to measure causation, one need not have 100% certainty. It is enough to draw a reasonable inference where there may be several causes.<br><br>The Ontario Workplace Safety and Insurance Appeals Tribunal in its decision 549/9512 spoke to the application of the Snell principle. The tribunal stated at paragraph 188:<br>*" It follows that causation principles in tort law cannot have automatic application in the adjudication of workers' compensation* |

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| | was more than a trivial cause. | *claims. However, given the historical connection and the related purposes, it has generally been accepted that principles of law developed in the tort field must be considered to apply in workers' compensation systems unless the different context provides a compelling reason to warrant some distinction. Tort law on causation principles, as with other tort law, is, therefore, highly relevant and inherently persuasive in the adjudication of workers' compensation claims."*<br><br>The Tribunal goes on to state at paragraph 219:<br>*The next question is whether the Snell principle that an inference of negligence may be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion can or should be applied in workers' compensation cases. Obviously, the equivalent principle in the workers' compensation context would be that an inference of work relatedness may be drawn in a particular case even though medical or scientific expertise cannot arrive at a definite conclusion - i.e. on a balance of probabilities - that work-place exposures in fact caused or contributed to the disease in that case.*<br><br>The Supreme Court in the *Athey* case stated:<br><br>*" Causation is established where the plaintiff proves to the civil standard that the defendant caused or contributed to the injury. The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant. Where the "but for" test is unworkable, the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury. In some circumstances an inference of causation may be drawn from the evidence without positive scientific proof. The plaintiff need not establish that the* |

*defendant's negligence was the sole cause of the injury. The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. It is sufficient if the defendant's negligence was a cause of the harm."*

Again, The Ontario Workplace Safety and Insurance Appeals Tribunal in its decision 1252/02 addressed this concept. At paragraph 26 the Tribunal states:

> *"Prior Tribunal decisions have clearly indicated that in order for a worker to establish entitlement in a case such as this, he or she must prove, on a balance of probabilities, that work was a significant contributing factor in the development of the disability. It is not necessary that work be the only contributing factor nor is it fatal to a worker's claim if there are other contributing factors. It need only be established that work is a contributing factor."*

When the above is considered, two guiding principals are established:

- Only a reasonable inference need be drawn between a workplace accident/exposure and a resulting disability,
- A contributing factor to a disability need not be "the significant factor".

Consider these two principals in relation to the draft wording of section 13(3):

(3) A personal injury or disease that appears to be the result of more than one cause is compensable if,

> (a) in the case of an injury or disease that is prevalent in the general population, the dominant cause of the injury or disease arose out of and during the course of employment; and
> (b) in the case of an injury or disease that is not prevalent in the general population,
> one of the causes of the injury or disease arose out of and during the

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| | | course of employment and that cause was more than a trivial cause.<br><br>In (3)(a), compensability is dependant upon a cause being "dominant" where it is prevalent in the general population. This means it must be "*the* significant contributing factor" rather than "*a* contributing factor" and must be shown objectively that its source is the workplace injury.<br><br>An example:<br>A miner who has worked for decades in a physically demanding job, on uneven ground, in varying temperatures, and with numerous minor injuries develops osteoarthritis in the knees. With the proposed legislation, this case would be considered under section 3(a). Because osteoarthritis would be considered "prevalent in the general population", this claim would likely be denied as there would be no objective medical evidence to show the work was the "dominant" cause. While the medical literature could support the position that the Claimant's work history could have contributed to the condition, under this proposed section, the burden of proof falls to the Claimant. |
| 27 | **27.** (1) If the Commission receives conflicting opinions respecting a worker's personal injury, disease or death from a worker's health care provider and a medical advisor selected by the Commission, the Commission's medical advisor shall contact the worker's health care provider and attempt to resolve the conflict.<br>(2) If the medical advisor and the health care provider are unable to resolve the conflict respecting their conflicting opinions, they shall seek the opinion of another medical professional who specializes in the area of the conflict.<br>(3) Subject to new medical evidence being available, any resolution of the | One of the most contentious issues has been how conflicting medical opinions are addressed. The proposed legislation would require the Commission's Medical Advisor to contact a Claimant's health care provider in an attempt to resolve any conflicting opinion. Should they be unable to do so, the Medical Advisor and the health care provider are to seek the opinion of a third party medical professional who's decision is binding on all parties.<br><br>The intent of this section is reasonable on its face, however it leaves several unanswered questions as to process. Where there is an unresolved conflict of opinion, both the medical advisor and the health care provider should be required to submit written confirmation as to the contested issue(s). Where a third party medical professional is to be engaged, the |

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| | conflicting opinions reached by the medical advisor and the health care provider under subsection (1), or provided by the opinion under subsection (2), is final and binding on the Commission and the claimant. | health care provider should have an obligation to consult with the Claimant in the selection of the third party medical professional. Further, the Claimant and his/her health care provider should have the opportunity to make a written submission to the third party medical professional prior to the determination. Similarly, the Claimant should have the option of being examined by the third party professional. |
| 32 | **32.** (1) If a worker is injured during the course of employment and requires transportation to receive medical aid, the employer shall, at its own expense, provide the worker with immediate transportation to a health care provider, a health care facility or such other place as the Commission considers appropriate. (2) The Commission may pay the costs of the transportation of an injured worker that the employer fails to provide, and may collect those costs from the employer in accordance with section 142. | A circumstance has arisen on more than one occasion regarding this section and isolated camps. Where a worker is injured at an isolated camp, primary health care is provided on site by the employer. The worker may feel there is a need to be treated by a doctor rather than the on-site health care provider. In this circumstance the worker may be told that further treatment is not required. If the worker insists on leaving the camp in order to seek further medical attention, he or she may be required to abandon his or her position in order to seek medical attention. It would be helpful to have a process whereby an injured worker in an isolated camp may have his or her medical information regarding a workplace injury reviewed on an expedited basis by a Medical Advisor to determine if additional medical treatment is required. |
| 33(2) | **33**. (2) The worker must have a physician or a dentist, whichever is appropriate for the worker's treatment, to be his or her primary health care provider and to take responsibility for diagnosing the worker's condition and developing his or her treatment plan. | It is not uncommon both in the North and elsewhere for individuals to be unable to have a "primary health care provider". The worker residing in a small community with access only to locum doctors or the worker away from home with access only to walk-in clinics both are unable to meet the requirement of this section. |
| 35 | **35.** (1) A worker who is receiving, or is entitled to receive, compensation for a disability other than a permanent total disability, shall (a) take reasonable measures to mitigate the disability; and (b) cooperate with such vocational rehabilitation for <u>suitable productive employment</u> as the Commission may reasonably require. (Underline added) | This section addresses the Claimant's obligations as part of a vocational rehabilitation program. The intended purpose is to assist an injured worker return to the workforce. The term "suitable productive employment" implies work that is appropriate to the worker's disability as well as other contributing factors. However "suitable" is somewhat subjective and will be at the discretion of the Commission, not the worker. The concern with this language is |

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| | | that vocational rehabilitation is driven by the Commission as it is the Commission which determines suitability. It is suggested that by adding "meaningful and sustainable" to this section, workers will be assured of vocational rehabilitation which will provide security and economically viable options for the future. |
| 56 | **56.** (1) The Commission may convert all or a of a pension into a lump sum payment, if the entitled to the compensation requests the conversion and agrees on the amount of the lump sum.<br>(2) A pension payable to a worker must be converted to a lump sum payment if<br>(a) the worker requests the conversion;<br>(b) the worker's personal injury or disease results in a disability that reduces the worker's physical and mental abilities by no more than 10%; and<br>(c) the worker is not receiving additional compensation under section 43.<br>(3) When converting a pension into a lump sum payment, the Commission shall apply such discount rate and other actuarial factors as the Commission considers appropriate. | When a Claimant is faced with the decision of taking a lump sum pension, he or she most often does not know the pros and cons of lump sum vs. monthly pensions. A more informed decision could be made if the Commission was required to provide a summary of the discount rate and other actuarial factors employed by the Commission in arriving at the offered lump sum. |
| 57 | **57.** (1) For the purposes of this Act, a worker's remuneration is the amount of all income earned through the performance of work, including all salaries, wages, fees, commissions, bonuses and tips.<br><br>(2) For greater certainty, a worker's remuneration includes<br>(a) earnings received by the worker for overtime or piece work; and<br>(b) the value of board and lodging, store certificates, credits or any remuneration in kind or other substitute for money provided to the worker.<br><br>(3) For greater certainty, a worker's remuneration does not include<br>(a) unemployment benefits or employment benefits received by the worker under the | The last several years has seen the Board before the Courts on the issue of Employment Insurance benefits being considered in the determination of remuneration. The Legislative Review Panel in its December 2001 Act Now report recommended that EI benefits be included as remuneration. In light of the number of seasonal workers in the Territories, the inclusion of EI benefits would assist many injured workers.<br><br>The present legislation includes a provision for board and lodging being included in the calculation of remuneration. The proposed legislation would exclude workers in remote camps from this benefit. It is submitted that differentiating benefits based only upon the location of employment seems discriminatory. It is recommended that this distinction be eliminated. |

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| | *Employment Insurance Act* (Canada); or<br>(b) the value of clothing, materials, transportation, board or lodging provided to the worker, either in kind or as an expense payment, because of the remote nature or location of the employment. | |
| **61** | **61.** (1) In fixing the amount of compensation, the Commission may deduct any payment, allowance or benefit that the worker will receive from his or her employer in respect of the period of his or her disability, including any pension, gratuity or other allowance provided wholly at the expense of the employer. | This section represents a grossly unfair reduction in a Claimant's economic circumstances. The benefits a Claimant receives as a result of a workplace injury are intended to replace lost wages. This section would see the Commission reduce a Claimant's benefits for such items as heating fuel subsidies, housing allowances, and other benefits not related to the actual monies received by the Claimant as wages from the employer. |
| **65(12)** | 65 (12) If the judgment clearly awards the worker damages for pain and suffering, the Commission may, after deducting its legal costs incurred in recovering the money, pay to the worker from the money received an amount in the same proportion to the remaining money as the portion of the award attributable to pain and suffering bears to the total award. | This section addresses the issue of third party actions conducted by the Commission on behalf of an eligible claimant. One of the guiding principals of the Workers' Compensation system is the workers give up their right to sue. Where the Commission conducts an action on behalf of a Claimant, section 65(12) would limit the amount the claimant would realize to a percentage of the total award. It is submitted that the total "pain and suffering" award should go to the Claimant without reduction. This amount is further limited by subsections (13) and (14) to an amount not exceeding 25% of the total award. |
| **92** | **92.** (1) A decision to be made by the Commission under this Act must be made by a member of the staff of the Commission whose position is assigned or delegated that function by the President.<br>(2) The Commission shall<br>(a) decide each matter according to the justice and merits of the case, without being bound by its previous decisions; and<br>(b) draw all reasonable inferences and presumptions in favour of the claimant when determining any matter related to compensation. | This "Benefit of the Doubt" section is, for the most part, unchanged from the present legislation. The Board's policy 03.04 illustrates how the Board presently interprets this section:<br><br>03.04 In circumstances where the weight of evidence is evenly balanced, the decision shall be in favour of the claimant. Benefit of the doubt should not be used as a substitute for evidence.<br><br>It is submitted that this interpretation is narrower than the legislation contemplates. It is recommended that this section include a clarifying statement as to the specific intent of the legislators. |

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| 106 | **106.** (1) The Commission shall prepare an annual report regarding its administration of this Act and other enactments for which it is responsible.<br>(2) The Commission's annual report must contain<br>(a) a report, prepared in accordance with the regulations, on the sufficiency of the Safety Fund to meet its liabilities;<br>(b) any information required to be included under Part IX of the *Financial Administration Act*; and<br>(c) any other information the Governance Council considers necessary or advisable. | It is recommended that provision be included allowing for the Minister to direct specific information be included in the annual report. |
| 115 | **115.** A request for a review of a decision of the Commission must be made within one year after the day of the decision, unless the Review Committee considers that there is a justifiable reason for the delay and allows an extension. | It is proposed that a time limit of one year be introduced for the filing of appeals before both the Review Committee and the Appeals Tribunal. Presently, 25% of the jurisdictions in Canada do not have such limits. The establishment of a time limit would have the greatest impact on those who are least able to defend themselves. It is my experience that individuals seeking appeals after one year are the least educated, and without the resources to advance claims. It is recommended that there continue to be no time limit or in the alternative a limit of three years. |
| 129 | **129.** The Commission shall supply the Appeals Tribunal with any documents in the possession of the Commission that relate to a matter under appeal. | As the Appeals Tribunal has exclusive jurisdiction of any matter before it, The Commission should be required to provide all materials on a claims file. The proposed wording could be interpreted as meaning only the materials in a file dealing directly with the matter under appeal should be transmitted to the Appeals Tribunal. Further, the term "documents" may preclude other materials such as video surveillance media. |
| 130(1) | **130.** (1) The Appeals Tribunal shall, in determining an appeal, give the appellant, the Commission and any other interested person an opportunity to be heard and to present evidence. | Presently, the Board has no standing before the Appeals Tribunal. The inclusion of the Commission in the section would provide the Commission standing before the Appeals Tribunal as a matter of right. Normally, an administrative tribunal does not have standing before an appellant tribunal. |

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| **130(3)** | 130 (3) If the Appeals Tribunal considers that it would assist in hearing the appeal or an application under section 63, it may, in relation to a matter in issue,<br>(a) request the Commission to authorize, under subsection 104(2), an inspector to investigate, inquire into and report on the matter;<br>(b) in the case of an appeal, refer the matter to the Commission for a decision;<br>(c) request a representative of the Commission to appear before it to provide information or an explanation in relation to the matter;<br>(d) request the Commission to determine whether a policy of the Governance Council applies; and<br>(e) request the Governance Council to make an exemption from the application of a policy of the Governance Council or to reconsider the reasonableness of the policy. | Several sections of the proposed legislation erodes the independence of the Appeals Tribunal. Section 130(3)(d) permits the Appeals Tribunal to request of the Commission a determination if a policy applies to a specific case. The Appeals Tribunal has exclusive jurisdiction in its hearing a matter. This includes the determination of the applicability of policy. The very inclusion of this section undermines the Tribunal's perceived if not actual independence. The NWT Supreme Court has stated in several cases that the Tribunal has this authority. To imply that the Tribunal should seek clarification from the Commission supports the notion that the Tribunal is answerable to the Commission.<br><br>Similarly, subsection (e) suggests that the Tribunal could seek the Commission's exemption from the application of policy. Again, this section reinforces the view that the Tribunal is without the authority to make that determination itself. Although the Tribunal would and should normally have such jurisdiction, these subsections actually create doubt as to the Tribunal's jurisdiction. |
| **131(4)** | 131 (4) The Governance Council may make a direction under subsection (1) more than once in respect of a single appeal or application and may stay the decision of the Appeals Tribunal until it is satisfied that the Appeals Tribunal has properly or reasonably applied the policy of the Governance Council or complied with this Act or the regulations. | The proposed inclusion of this section no doubt arises from a recent matter which resulted in the Nunavut Court of Justice directing that matters could not be repeatedly returned to the Appeals Tribunal by the Governance Council. Again, the inclusion of this section would result in the diminished authority of the Tribunal. Further, it opens the possibility for a Claimant's appeal to be repeatedly sent back and forth between the Governance Council and the Appeals Tribunal on a seemingly endless cycle of appeals. It is recommended that this section be amended to specifically prohibit the Governance Council from referring a matter to the Appeal Tribunal more than once. |
| **150** | **150.** (1) No employer or person acting on behalf of an employer shall prevent or attempt to prevent a person from making a claim for compensation. | The use of the term "prevent" in this section would suggest the prohibition of an individual actively barring the making of an application. It is suggested that this section be expanded to include language such as discourage, inhibit, interfere, and intimidate. |

## Additional Recommendations

**Duty to accommodate**

It has been suggested that since a duty to accommodate on the part of employers is found in the *NWT Human Rights Act*, that the *Workers' Compensation Act* need not contain such a provision. It is submitted that it is important for the new act to contain such a provision. The Act should not rely upon other legislation for the application and enforcement of workers' rights. Its exclusion from the Act forces injured workers to seek remedy through the *Human Rights Act* rather than compelling the Board to ensure an employer is providing accommodation for disabled workers. It is recommended that the Act include a duty to accommodate provision.

**100% disablement**

The new Act eliminates the proscribed 100% disability benefits and have all claims adjudicated based upon individual circumstances. Such disability awards are presently made in proscribed situations such as the loss of sight in both eyes, or the loss of both hands or feet. (Section 22(2) of the Act)

It is submitted that the elimination of such awards would have two results; i/ Claimants with such injuries would be required to prove entitlement. This will lead to increased administrative costs as appeals of lesser awards would result, and ii/ Claimants would, on top of suffering a life-changing injury be required to justify receiving benefits where now they do not. It is recommended that this proposal be rejected.

**Retroactive Policy**

The proposed legislation is silent on the issue of retroactive policy development. Some other jurisdictions include in their legislation that the Board may not develop policies retroactively if it adversely affects injured workers. It is recommended that such a provision be included in this Act.

**Obligation to investigate**

A great number of disputes occur between the Board and Claimants in situations where a Claimant's doctor has opined that the Claimant has a specific condition or restrictions yet has failed to provide "objective medical evidence" to the standards imposed by the Board. This situation often results in denial of benefits, as the Board does not normally seek further information from the doctor. Where the Board receives a medical opinion without supporting evidence, the Board should have an obligation to enquire into the matter, provide the attending physician with the Board's standard of proof, and request clarification from the attending physician.

**Use of surveillance video**

The Board makes use of video surveillance of Claimants suspected of misrepresenting themselves. This issue has both legal and ethical ramifications. It is recommended that the Board's use of such investigative processes be defined in legislation. Limitations should be placed on the weight such evidence can be given regarding the level of impairment.

**Appeals Tribunal**

One of the challenges faced by stakeholders of the workers' compensation system is the continuing "oversight" of the Appeals Tribunal by the Governance Council (GC) as provided for by section 7 of the present Act. As long as the decisions of the Tribunal may be questioned by the Governance Council and returned to the Tribunal for rehearing, the Appeals Tribunal is not a truly independent body. The issues that come before the Tribunal are often complicated cases both from a legal and medical perspective. Although there is merit for a lay tribunal in many circumstances, it is submitted that workers' compensation is not one of them. It is submitted that a truly independent and professional tribunal would better serve the needs of stakeholders. What follows is an option for an Appeals Tribunal that would be independent of the Board and provide for timely hearing of appeals.

## Proposed Workers' Compensation Appeals Panel

**1.** (1) An appeals panel is established composed of at least three persons appointed by the Minister on the recommendation of the Legislative Assembly.
(2) The Minister, on the recommendation of the Speaker, may appoint a person as a member of the appeals panel if

(a) the Legislative Assembly is not in session; and
(b) the chairperson of the appeals panel advises the Speaker that an appeal has been filed with, the appeals panel and every member of the adjudication panel is absent or unable to act with respect to the appeal.

(3) A person appointed as a member of the appeals panel must have experience and an interest in, and a sensitivity to, workers' compensation issues and

(a) be a member, of at least five years good standing, of a law society of a province or territory; or
(b) have at least five years experience as a member of an adjudicative administrative tribunal or a court.

(4) A member of the Board or Governance Council may not be appointed to the appeals panel.
(5) A member of the appeals panel holds office, during good behaviour, for a term of four years.
(6) A member of the appeals panel may be reappointed on the expiration of his or her term.
(7) Except in the case of resignation, a person holding office as a member of the appeals panel continues to hold office after the expiry of his or her term of office if, before the expiry, the member was designated to hear an appeal, and had commenced the hearing in respect of the appeal.
(8) (a) The remuneration of the appeals panel members shall be prescribed and shall be paid out of the Accident Fund.; and

(b) reimbursed for reasonable traveling and other expenses necessarily incurred by the member under this Act, subject to any restrictions in respect of the amount or type of expense that may be provided or adopted by the regulations.

(9) The Minister may appoint a registrar and other employees that the Minister considers necessary for the proper conduct of the business of the appeals panel.

**1.1.** (1) The Registrar, in addition to discharging his or her other responsibilities under this Act, shall, in accordance with the policies and directions of the Appeals Panel,

(a) act as a registrar of appeals filed or initiated under this Act;
(b) maintain a public register of orders made by appeal panel members under this Act;
(c) supervise and direct the work of the appeals panel employees and panel advisors;
(d) oversee the work carried out by panel advisors;
(e) give the panel a written report on the status and disposition of appeals every three months; and
(f) generally carry out the administration of this Act.

(2) An employee appointed under subsection (9) is an employee in the public service.
(3) The appeals panel may contract for the services of medical and legal advisors and other professionals that it may require to assist it in the hearing of an appeal.
(4) The costs of administering the appeals panel, including the remuneration of the employees appointed under subsection (9), as approved by the Governance Council, shall be paid out of the Accident Fund.

**1.2.** The appeals tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of a review committee under section 24 or 64, and it may confirm, reverse or vary a decision of the review committee.

**2.** (1) A member of the appeals panel may resign at any time by notifying the Minister in writing or, if the Minister is absent or unable to act or the office of the Minister is vacant, by so notifying the Clerk of the Legislative Assembly.
(2) The Minister, on the recommendation of the Legislative Assembly, may remove a member of the appeals panel for cause.

**3.** (1) The Minister, on the recommendation of the Legislative Assembly,

(a) shall designate a chairperson of the appeals panel from among its members; and

(b) may designate a deputy chairperson of the appeals panel from among its members.

(2) The Minister may designate one of the members of the appeals panel to be an acting chairperson if

(a) the Legislative Assembly is not in session;

(b) the chairperson is absent or unable to act; and

(c) the deputy chairperson is absent or unable to act or the office of deputy chairperson is vacant.

(3) An acting chairperson designated under subsection (2), for the period of his or her designation, has all the powers and shall perform all the duties of the chairperson.

(4) Where an agreement under subsection 82.1(1) has been entered into, the Minister shall consult with the Minister of the Government of Nunavut responsible for the *Workers' Compensation Act* (Nunavut) prior to appointing members of the appeals panel under section 1.

**4.** The chairperson of the appeals panel shall designate one member of the appeals panel, including the chairperson, on an appeal to the appeals panel, to hear the appeal.

**5.** The Board shall supply the appeals tribunal with any documents in the possession of the Board that relate to a matter under appeal.

**6.** (1) The appeals tribunal shall

(a) sit at the times it considers necessary to perform its duties under this Act; and

(b) conduct its proceedings in a manner it considers appropriate.

(2) The appeals panel may

(a) make rules respecting its procedure and the conduct of its business;

(b) cause depositions of witnesses residing in or outside the Territories to be taken in a manner similar to that set out in the Rules of the Supreme Court before any person appointed by the appeals panel.

**7.** (1) Subject to this Act and the regulations, the appeals panel may make rules governing the practice and procedure in hearings and pre-hearing matters.

(2) Subject to this Act, the regulations and any rules made under subsection (1), the appeals panel member may determine the practice and procedure for the conduct of the hearing and pre-hearing matters that the he or she considers appropriate to facilitate the just and timely resolution of the appeal, as the case may be.

(3) Without limiting the generality of subsection (2), appeals panel member may

(a) require the parties to the appeal to attend a pre-hearing conference in order to discuss issues relating to the appeal, the possibility of simplifying or disposing of issues and the content of the record for the appeal; and

(b) determine the practice and procedure respecting

(i) the disclosure of evidence, including but not limited to pre-hearing disclosure and pre-hearing examination of a party on oath or solemn affirmation or by affidavit,

(ii) the form of notices to be given to a party, and

(iii) the service of notices and orders, including substituted service.

**8.** (1) The parties to an appeal referred for an appeal hearing are

(a) the appellant;

(b) the accident employer where the appellant is a worker;

**9.** Where, the appellant files two or more appeals together for hearing, the appeals panel member may hear the appeals at the same hearing if the appeals panel member determines that it is fair and reasonable in the circumstances to do so.

**10.** The parties to an appeal are entitled to appear and be represented by counsel at a pre-hearing conference and at a hearing.

**11.** (1) Evidence may be given before an appeal panel in any manner that the appeal panel member considers appropriate and, subject to subsection (2), the appeal panel member is not bound by the rules of law respecting evidence in civil actions or proceedings.

(2) The appeal panel member may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

**12.** The appeal panel member may, on proof of service on a party of a notice of the hearing, proceed with the hearing in the absence of the party and determine the appeal, in the same manner as though that party was in attendance.

**13.** A hearing before the appeal panel shall be in private.

**14.** For the purposes of hearing an appeal, an appeal panel member has all the powers of a Board appointed under the *Public Inquiries Act.*

**15.** The appeal panel member may state in the form of a special case for the opinion of the Supreme Court any question of law arising in the course of the hearing and may adjourn the hearing until a decision is rendered on the stated case.

**16.** (1) After the completion of the hearing of an appeal, the appeal panel member shall decide whether or not the appeal has merit in whole or in part.

(2) The appeal panel member may, on hearing an appeal,

(a) make an order that affirms, reverses or modifies the appealed decision of the board; and

(b) provide any direction that he or she considers necessary.

(3) The adjudicator shall

(a) cause the parties to the appeal, to be served with a copy of the order, including the findings of fact on which the order was based and the reasons for the order.

**17.** (1)Any person may, on request made to the Registrar, inspect and obtain a copy of any decision or order made by an appeal panel member, including the findings of fact on which the order was based and the reasons for the order, that is included in the public register.

(2) Where a request is made by a person other than the parties to an appeal, the decision and reasons provided should have the names of the parties to the appeal removed.

**18.** The appeals tribunal may vary a decision made by it and may, on its own motion, rehear an appeal.

**19.** A decision of the appeals tribunal on an appeal may not be questioned or reviewed in any court.