

WORKERS' COMPENSATION APPEAL TRIBUNAL (WCAT) – CASE STUDY

What is WCAT?

WCAT is the final level of appeal for most decisions made by the Workers' Compensation Board (which operates as WorkSafeBC) respecting compensation, assessments, and occupational health and safety. WCAT also hears appeals from WorkSafeBC decision concerning prohibited actions taken by employers against workers who raise health and safety concerns, and provides certified determinations to the court (and now the Civil Resolution Tribunal) concerning the status of parties to legal actions.

PUBLIC ACCOUNTABILITY MEASURES AT WCAT

At the 2017 annual conference of the Council of Canadian Administrative Tribunals then Chief Justice Beverley McLachlin spoke about the challenge of maintaining the rule of law in the modern regulatory state, where “most legal decisions are not made by legislatures, the executive, or the courts – the traditional branches of governance – but by a host of administrative tribunals exercising delegated executive power.”

The Chief Justice's focus was on the relationship between the courts and administrative tribunals as embodied in the judicial review process. Undoubtedly, judicial review is one way in which administrative tribunals are held accountable for their decisions, but important as it is, only a very small fraction of tribunal decisions are reviewed by the courts.

To put that in perspective, the 109 judicial review decisions WCAT has received since the beginning of 2007 represents less than one sixth of one percent of the appeal decisions made by the tribunal in the same period.

ONTARIO LEGISLATIVE APPROACH

Ontario has taken a “one-stop shop” legislative approach with the *Administrative Tribunals Accountability, Governance and Appointments Act*. The ATAGAA requires all administrative tribunals to develop and publish “Public Accountability Documents” including:

- Mandate and mission statement
- Consultation policy (whether and how tribunal will consult the public when considering changes to rules or policies.
- Service Standard policy
- Ethics Plan
- Member Accountability framework (including code of conduct)

The ATAGAA also requires every adjudicative tribunal to enter into a Memorandum of Understanding with its responsible minister that addresses:

- The financial, staffing and administrative arrangements for the tribunal;

- The accountability relationships of the tribunal, including its duty to account to its responsible minister;
- The recruitment, orientation and training of the tribunal's members;
- The committee structure, if any, of the tribunal;
- The tribunal's planning and reporting requirements.

Although British Columbia has not adopted similar legislation, some similar requirements may be found in the *Administrative Tribunals Act* and the enabling statutes of specific tribunals. Many BC tribunals have developed analogous accountability tools.

Before we talk about specifics, we must acknowledge accountability's constant companion, independence. Measures that promote accountability must not be allowed to erode the substantial independence needed to ensure that tribunals discharge their functions impartially.

This is recognized in section 1 of ATAGAA which states that the purpose of the Act "is to ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making.

Easy to say. Harder to do.

PUBLIC ACCOUNTABILITY MEASURES AT WCAT

I am going to talk about the public accountability measures at WCAT

Transparency

The Ontario ATAGAA does not explicitly identify transparency as an accountability measure, but it forms part of the conceptual underpinnings of the accountability documents.

A number of accountability measures fall under the broad heading of transparency.

Public access to decisions

Public access to the tribunal's decisions is arguably the most important accountability measure for WCAT.

WCAT hearings are not open to the public in order to protect the privacy of parties. Decisions are written without identifying information for the same reason. But section 234(g) of the *Workers Compensation Act* requires the chair of WCAT to provide public access to decisions of the tribunal.

Obviously, the parties to an appeal have the greatest interest in any particular decision, but anyone with an interest in understanding how WCAT goes about making decisions has unfettered access to a vast, searchable archive of WCAT decisions (more than 60,000) on WCAT's website and on CanLII.

Reporting

Section 59.2 of the Administrative Tribunals Act requires tribunals, including WCAT, to submit information to the responsible minister including:

- Performance indicators
- Details of the time from filing an application to decision
- Results from any surveys carried out by the tribunal
- Plans for improving tribunal performance

Accountability to the responsible minister is an indirect form of public accountability.

WCAT publishes a quarterly report on its website in which it provides information about:

- Intake and output of appeals
- Appeal outcomes (percentage of appeals allowed, denied)
- Top 5 issues in allowed appeals
- Time to make decisions
- Number and location of oral hearings held (the majority of oral hearings are held in Richmond, but WCAT periodically holds hearings in 12 other cities around the province.

WCAT also publishes an annual report in which it provides similar information as well as

- The number of reconsiderations allowed on the grounds of jurisdictional error (including procedural fairness) and on new evidence grounds.
- Summaries of all judicial review decisions received during the year.

WCAT publishes plain language guides on how to apply for reconsideration or judicial review of its decisions.

Freedom of Information and Protection of Privacy Act

For WCAT the need to protect the privacy of personal information precludes us from sharing a great deal of information respecting particular matters, but FIPPA can and occasionally is used to obtain information about the tribunal's performance.

For example, last year we had a request for:

- Work descriptions for Chair, Vice Chairs, Assessment Officer.
- Names of all persons employed with WCAT, position name and rank, and salary for last reporting period.
- Policies for recruitment of Vice Chairs.
- Information on job postings for Vice Chairs for the last two competitions, including advertisements for positions and any communication given to candidates for the process.

Individuals sometimes request access to records related to their appeals such as emails and internal memoranda. I think they are often looking for some deep secret that will

provide grounds for reconsideration or judicial review. The reality is that parties receive copies of everything of any significance in their appeals, so there is generally nothing very interesting disclosed as a result of an FOI request, but the fact remains that if such information did exist, FIPPA might allow a party to gain access to it and hold the tribunal accountable.

Mandate and Mission

WCAT's mandate is not conveniently set out in a single statement. In essence, WCAT's mandate is defined by the *Workers Compensation Act*.

WCAT's Manual of Rules of Practice and Procedure includes a statement of Guiding Principles that is essentially a form of mission statement. It says that WCAT will strive to provide:

- Predictable, consistent, and efficient decision making;
- Independent and impartial decision making;
- Succinct, understandable, and high quality decisions
- Consistency with the *Workers Compensation Act*, policy, and WCAT precedent decisions.
- Transparent and accountable management
- Integration and communication within the workers' compensation system while safeguarding WCAT's independence
- Accountability through performance management
- Appropriate balance between efficiency and effectiveness
- Prompt, knowledgeable and responsive client service.
- Interpretive guidance for the workers' compensation system.

Consultation policy

WCAT has not published a detailed consultation policy. The Manual of Rules of Practice and Procedure states that proposed revisions to the rules or practice directives will be posted on WCAT's website, and the community will have an opportunity for input.

WCAT has an informal policy of inviting specific representative groups to provide comments on proposed rule or practice directive changes.

Service Standard

The Guiding Principles I mentioned contain elements of a service standard, which are supplemented by more detailed statements and policies.

Predictable and consistent decision making is supported by maintaining a collection of Noteworthy Decisions. These are WCAT decisions that are not binding precedent but have been identified as notable because they

- provide significant commentary or interpretive guidance, or comment on important issues related to WCAT procedure;

- or they may serve as general examples of the application of legislation, policy or adjudicative principles.

Succinct, high quality decision making is supported by expressly articulating the “Hallmarks of Quality Decision Making” in the MRPP.

A good decision:

- Clearly identifies the issues at the outset;
- Identifies a clear set of relevant findings of fact fairly drawn from the evidence;
- Where there is conflicting relevant evidence, explicitly identifies the findings of fact on which the conclusion is based and why some evidence was preferred over other evidence;
- Responds to the relevant submissions and arguments;
- Identifies and applies relevant law and policy, including WCAT precedent panel decisions;
- Strives to be consistent with the general approach in other WCAT decisions affecting similarly situation parties and issues, or provides a rationale for not being consistent with other WCAT decisions affecting similarly situated parties and issues;
- Uses plain language where possible and uses technical and legal terminology in a manner consistent with other decisions;
- Makes the panel’s reasoning clear and understandable and leads to a logical conclusion that resolves the issues, and;
- Is written without identifiers.

Ethics Plan

The ATAGAA is not specific about what the contents of an Ethics Plan should be. I looked at the Ethics Plan of the Ontario equivalent to WCAT (Workplace Safety and Insurance Appeals Tribunal).

The main components of the plan consists of the ethical conduct and political activity rules of the Public Service Act of Ontario, and the WSIAT members code of conduct.

Although WCAT does not describe it as an “ethics plan,” essentially the same components are in place here.

The Standards of Conduct for Public Service Employees applies to WCAT staff.

The WCAT Code of Conduct for members, applies to vice chairs. Compliance with the code of conduct is a condition of appointment.

Member Accountability.

Code of Conduct for Members

The code of conduct for members establishes rules of conduct governing professional and ethical responsibilities of members to enhance public confidence in their integrity and fairness. The code of conduct includes rules respecting:

- Decision-making responsibilities
- Confidentiality, and protection of privacy.
- Collegial responsibilities
- Skills and training
- Personal relationships between members
- Use of WCAT assets
- Outside activities
- Outside remuneration and volunteer work.

Members have a duty to report any situation they believe contravenes the law, misuses public funds or assets, or represents a danger to public health and safety, or is a significant danger to the environment.

Members who are concerned that the conduct of another member may threaten the integrity of WCAT have a duty to discuss the issue with the other member, and the chair, tribunal counsel or registrar.

The chair is required to investigate allegations of misconduct.

Breach of the code of conduct may result in discipline, up to and including termination of appointment.

Performance management

Accountability through performance management is supported by a robust merit-based performance evaluation program for WCAT vice chairs which is mandated by the *Workers' Compensation Act* as a requirement for reappointment.

The *Workers' Compensation Act* requires the Chair to evaluate vice chairs based on standards for:

- Quality adjudication,
- Productivity, and
- Performance.

The precise nature of the performance evaluation process is clearly communicated to all new vice chairs. The goal is to ensure that the process is fair, transparent and accountable.

The performance evaluation covers required performance competencies:

- Knowledge of the workers' compensation system, legislation and policy,
- Knowledge of administrative law and its application,
- Written and oral communication skills,

- Sound analysis and decision-making,
- Interpersonal skills
- Organizational skills
- Willingness.

WCAT's performance standards cover:

Quality:

- Written decisions reflect the Hallmarks of Quality Decision-Making.
- Conduct of oral hearings is consistent with WCAT practice guidelines and rules of natural justice.
- Professional, ethical, and collegial conduct.

Efficiency:

- Decision output reflects ability to organize and priorities caseload.
- Productivity is based on "points" system that reflects the number of decisions issued, but takes into account additional work associated with joined appeals, investigations, and withdrawn appeals.
- Evaluation also takes into account work undertaken by the vice chair outside of their regular decision-making, such as, training, mentoring, or special projects.
- Vice chairs are given weekly updates on their productivity so they know where they stand at any given time.

Performance evaluation process

- Four decisions and two oral hearing recordings are randomly selected.
- Each decision and each recording is anonymized and then assessed by a peer team leader (other than the vice chair's team leader) against the standards.
- The Vice chair Quality Assurance notes any quality issues that have arisen during the evaluation period.
- WCAT Director of Operations evaluates productivity.
- At the request of the vice chair, the vice chair's team leader provides comments
- Chair reviews the performance evaluation and makes comments.
- Vice chair is invited to provide input.

Cautions and concerns

- Performance evaluation should involve evaluators who are independent of the appointment/reappointment process.
- Performance evaluation must respect the independence of decision-makers and not evaluation "correctness" of decisions.
- Important to provide an opportunity for the vice chair to have input before finalizing the evaluation.

Recruitment, orientation and training of the tribunal's members.

Appointment

Vice-chairs of WCAT are appointed by the Chair in consultation with the minister. Individuals are not eligible for appointment unless they have successfully completed a merit-based process established and approved by the Chair.

The selection process applies principles established by the former Board Resourcing and Development Office (now called the Crown Agencies and Board Resourcing Office)

Stage 1

Candidates are initially screened to ensure they meet basic requirements for education, experience, knowledge and skills.

Stage 2

Selected candidates are then required to complete a written case study exercise at the WCAT offices (arrangements are made for out of town candidates to write the exercise at a government office or equivalent).

Two experienced vice chairs mark each case study independently following a marking guide, then compare and discuss the results and rank the candidates.

Stage 3

Stage 3 starts with an oral hearing role play exercise followed by a panel interview with three experienced vice chairs.

The interview questions are mostly "behavioural" questions, but also include one or more questions on administrative law.

The panel assesses the candidates using an Assessment Marking Guide, and ranks the candidates. Candidates who do not consistently exhibit the required competencies or who exhibit weakness in several competencies are not recommended for further consideration.

The chair interviews candidates recommended by the selection panel.

The chair, in consultation with the selection panel, determines which candidates will progress to the reference check stage. Candidates are required to provide names of at least two current or recent employers or supervisors as references.

Stage 4

The chair does a final overall assessment that integrates information from all previous stages.

Operational requirements of the tribunal may be taken into consideration.

Potential nominees are required to complete a Tribunal Candidate Profile and Declaration.

The chair consults the minister and makes appointments.

Orientation and training

Newly appointed vice chairs:

- Participate in a two-week period of orientation and training overseen by the Vice-chair Quality Assurance, and presented by experienced vice chairs.
- Each new vice chair is assigned to a team leader and another vice chair to act as mentor.
- Vice chairs start with appeals conducted in writing.
- A team leader and the Vice-chair Quality Assurance read every decision and provide feedback.
- Vice chairs observe one or more oral hearings and then start conducting oral hearings.
- Increasingly complex appeals are assigned over a period of time.

Continuing training

- Vice chairs are required to attend nine meetings each year at which various training topics are covered. In 2018 the topics included:
 - Decision writing
 - Ethics, Procedural Fairness and the Apprehension of Bias
 - Expert Evidence in WCAT appeals
 - Assisting Distressed Clients, and Navigating Difficult Conversations.
 - Credibility and Reliability of Witnesses.
 - Chronic Pain and Depression
 - Approaches to Decision-making in Complex Regional Pain Syndrome cases.

Ombudsperson

WCAT is subject to the jurisdiction of the Ombudsperson, who has the authority to investigate complaints of unfairness.

The Ombudsperson cannot interfere in the decision-making process or change the outcome of a decision. The Ombudsperson could make recommendations with respect to WCAT's process.