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Getting Started:
A Guide for
New Chairpersons and Members of
Boards of Referees

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Foreword

Welcome to the Employment Insurance Board of Referees. As a new member or chairperson, you will be participating in an integrated orientation and training program over the next year.

This guide is intended to help you get started and ready to function on the Board of Referees. In addition to providing important information on your responsibilities, it offers clear guidance and insight on the conduct of hearings as well as on reaching and writing decisions, two of your most important roles. It also includes a series of tips to help you while you advance through the different steps of the training program, when you might not yet have all the tools you need to feel completely comfortable in your new role as an adjudicator.

We are pleased that the Continuing Professional Education Institute agreed to develop this practical guide in response to the recommendations of members and chairpersons of Boards of Referees.

We hope that you will find this guide useful and invite you to send us comments and suggestions for future editions.

May Morpaw

Director

Employment Insurance Appeals

ROLES AND RESPONSIBILITIES

Officials of the Government of Canada make decisions every day on individual applications for Employment Insurance benefits and less frequently on questions related to employers. Both EI claimants and employers have the right to appeal when they are dissatisfied with these decisions.

Role of the Board of Referees

The first level of appeal is to the Board of Referees. The Board of Referees is an independent administrative tribunal established pursuant to section 111(1) of the *Employment Insurance Act* to hear these appeals. Its role is to examine, within the limits of its powers and responsibilities, whether the decisions made by employees of the Commission in performing their duties comply with the ***Unemployment Insurance Act and Regulations*.** In exercising their role, Boards of Referees decide questions of law or of fact and law.

Obligations of the Board of Referees

The Board of Referees is independent of the Government and of any individual or body responsible for appointments to the Board. Boards of Referees must not act or be seen to act on behalf of the claimant, the employer or the Commission, and neither must its individual members. They must protect and project their independence, regardless of their background or affiliations.

Once appointed, members of an administrative tribunal are expected to maintain the public trust. They must avoid any conflicts of interest as well as any bias or appearance of bias. Board chairpersons, employer and worker members must be impartial and not place themselves in a situation where they can be perceived as biased or in a conflict of interest. In addition, as part of a respectful and professional work environment, they act in a collegial manner.

In order to serve appellants and parties, Boards of Referees are expected to be available for the full day of hearings and to take the time needed to prepare for, hear, deliberate and decide on each individual case.

Boards of Referees are required to protect and safeguard any personal information to which they have access. They must also refrain from discussing any cases outside of the hearing room.

Board of Referees Service Pledge Commitment

Board members developed and have committed to respecting their Service Pledge which states they will:

- come to the hearing with an open mind;
- read the appeal docket in advance of the hearing;
- give all parties an opportunity to provide additional information and explain their case;
- treat the appellants and interested parties fairly and with courtesy;
- make the hearing as informal as possible; and
- make an impartial well-reasoned decision and communicate it to the appellants and interested parties in writing a few days after the hearing

Powers of the Board of Referees

The Board of Referees is empowered to:

- uphold a denial of benefit, terminate a disentitlement or allow the appeal in its entirety, with or without new facts;
- assess the arguments for and against the decision;
- assess the credibility of witnesses' statements, both written and oral; and
- give the benefit of the doubt in favour of the claimant only in cases of loss of employment by reason of misconduct or voluntary leaving, when faced with equally balanced evidence.

The Board does not have the authority to:

- investigate, other than to ask that further information related to the issue under appeal be placed before it;
- review a claimant's past history of entitlement if it is unrelated to the issue under appeal;
- subpoena witnesses;
- require evidence under oath;
- charge anyone with contempt of court;
- determine if employment is insurable - who constitutes the employer – the length of insurable employment - the amount of insurable earnings – and what premiums were, or ought to have been, paid;
- write off an overpayment;
- refer claimants to courses of instruction under section 25 of the Act; or
- create precedents or bind any other Board of Referees.

The Role of the Chairperson of the Board of Referees

The Chairperson of the Board of Referees is in charge of the proceedings and must ensure the professional conduct of the hearing. It is also the responsibility of the Chairperson to write the decision after the Board has completed its deliberations.

The Role of the Board of Referees Assistant

At Board Centres, Board of Referees assistants provide support in the administration of the appeals process. Their services are available to the Boards on hearing days.

PREPARATION FOR THE HEARING

Your Duties

As part of your service pledge, you promised to read the claimant's appeal docket, come to the hearing with an open mind, and make an "impartial, well-reasoned decision". Fairness to claimants (and respect for your colleagues) demands thorough preparation because appellants expect you to treat their case as if it is the only one that matters that day. They will be familiar with the material in the docket; they expect you to have command of it also.

For your first days of hearings, preparation will take 50% more time than in later preparation sessions because so much is unfamiliar to you. Many Board members say that it takes one day of preparation to get ready for one day of hearings.

The Chair's preparation may take longer because the Chair has responsibility for the written decision. This can begin at the preparation stage because you are permitted to write three segments of the decision in advance:

- Parties
- Issue(s)
- Information from the Docket

Preparation Tips: Know the Issues and Read the Law

Do this step before you start reading the docket evidence in detail. You want to be able to read with a focus on relevant parts of the story. You can't do that without knowing how the issue and the law should guide your review.

The Commission will usually state the issue in their submissions. Your job is to convert it to a neutral statement and connect it to a section of the Act or Regulations.

Example: "Whether or not the claimant had "just cause" for leaving his job under sections 29 and 30 of the E.I. Act." By using "whether or not" you have avoided taking sides.

Has your issue been the topic of a Quick Reference Guide? The common appeals have been covered by the Guides. Go to them right away to gather the statute sections, legal tests and main case law.

Your job of research does not stop with the Quick Reference Guides. You should use the Technical Resources that you have been trained to use – all available through the BOR web site. Here are some things you can do:

- Select some of the cases the Commission used in its arguments and decision. Look them up. Are they similar to your case facts? Is a quote taken out of context?

- Are there cases that are contrary to the Commission arguments?

- If you have not recently read the statute section, look it up and read it carefully. Make notes of the "elements" that make up the legal rule – and the exceptions. A good decision will review evidence in relation to each element in the rule.

Preparation Tips: Information from the Docket

Although the docket is organized by exhibit number, do not organize your note taking this way. Chairs should start a chronological chart or "time line" and begin to organize a narrative "story" from the first event in time to the most recent. Use the exhibits to fill in relevant detail along the time line (and put the exhibit number source in brackets beside your note). This will make it easier for you to write a chronological, balanced account of what happened leading to this appeal and what each side says about the appeal. This account will be called Information from the Docket. Members should also prepare this way, because you are going to hear the appellant's story, not an exhibit review.

Pay particular attention to the Commission submissions about the factual evidence and the appellant's appeal letter. In comparing the two, what are the points of contradiction? These will be the areas you will need to resolve through an eventual "finding of fact" – after the hearing. Knowing where to expect the contradictions helps you with questioning and possible credibility findings.

In preparing, you should keep a separate "questions list" for the worker and employer appellants. You will hold back these questions until the appellant has given most of his or her evidence at the hearing. Cross off the questions already answered, and then begin asking your remaining relevant questions.

Many of you will begin to form an opinion about the result as you complete preparation in a case. This is a common human tendency. Nevertheless, as an adjudicator, you must remain open to new evidence, open to legal persuasion, and open to your colleagues on the Board after all the evidence is heard. The best practice before a hearing is to "keep your own counsel" about the result you may favour or predict. Your opinions before getting to the deliberation stage will be perceived as bias.

Finally, are there any missing pieces in the docket? If it seems clear that pages are missing or an exhibit has been dropped, you may contact the Board Assistant, who will supply the missing pieces to all members.

THE PRINCIPLES OF NATURAL JUSTICE

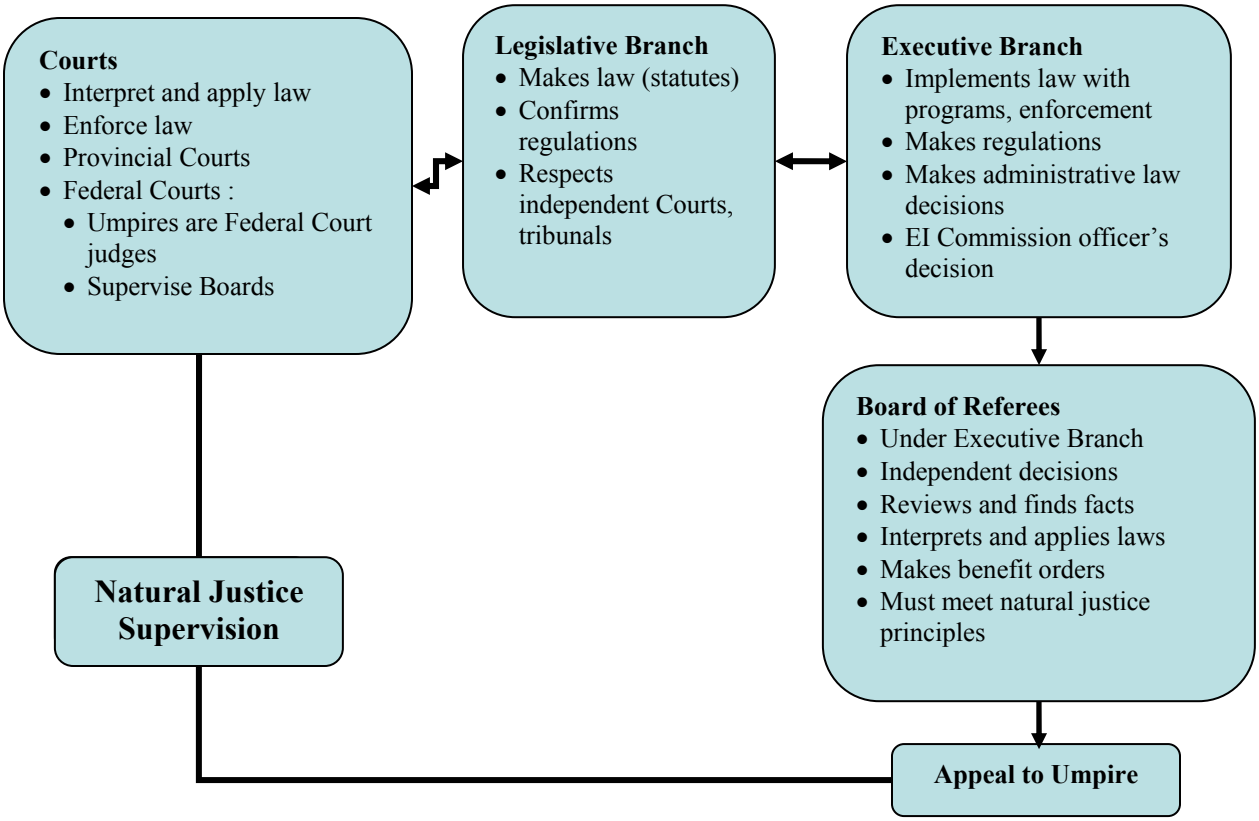
The Place of Administrative Tribunals in Government Structure

Administrative Tribunals are often compared to courts because they resolve disputes in a similar way. Many tribunals, such as the Board of Referees, are adjudicative bodies. The standard for how a tribunal should behave is often the standard for a court. Nevertheless, there are important differences. First, a tribunal is part of the executive branch of government, as illustrated in the chart below. The executive, through the legislation and regulations has delegated adjudicative functions that it wants to be administered in a fair, non-political and neutral manner.

It is sometimes said that tribunals like the Board are “more informal”. When one observes the physical settings and the traditional procedures compared to courts, this is true. It is also true to say that a tribunal like the Board of Referees admits evidence (e.g. hearsay, unauthenticated documents) that would not be admitted by a court. Yet, this informality does not relieve a Board from behaving in a fair, neutral manner. Therefore, it should only take into account relevant evidence. A Board should make factual findings, not personal assumptions about facts. It should apply the law, not its feeling about the right legal standard.

These expectations that a Board must act fairly are contained in the “principles of natural justice” to be discussed later. All tribunals are supervised by the courts. One main form of supervision is to apply the principles of natural justice to the Board of Referees. Therefore, Board decisions can be appealed to an Umpire (a federal court judge). Beyond the Umpire, the decision can be appealed to the Federal Court of Appeal. For example, if a Board denied an employer the right to be heard concerning an appellant’s case of misconduct, this would be a mistake which denied natural justice. An Umpire would overturn a Board’s decision and send the case back for re-hearing.

Definition of Natural Justice



According to Justice Cattanach in CUB 6020:

> "The rules of natural justice are those very basic principles of fair procedure which demand a deciding authority free from bias in the legal sense and the right to a fair hearing by those affected by the decision. A fair hearing preconceives adequate notice of the hearing, the opportunity to be heard, the right to know what is alleged against a party and the opportunity to answer those allegations."

The principles of natural justice are part of a larger concept called "fairness". The courts have said that the principles must be fluid and flexible because there are so many administrative law settings. Therefore, any application of natural justice must achieve "fairness" for the parties. For Boards of Referees, we have identified five principles of natural justice:

1. the right to know the case against you;
2. the right to meet the case against you (to be heard);
3. the right to an impartial and unbiased decision-maker;

4. the person who hears the case must decide the case; and
5. the right to a decision and to reasons.

The "right to be heard" is a broad expression that includes the first two and fourth principles; that is, the right to know the case, meet the case, and the person who hears the case must decide the case. All these relate to the hearing process.

The right to an "impartial hearing" is the same as bias (principle three). There should be no bias in the decision makers before or during the hearing.

With respect to a "right to a decision" Subsection 83(4), *EI Regulations* indicate that an appellant has *"the right to a decision once the case has been heard".* There is a right to a decision under the principles of natural justice, but there is not an absolute right to receive reasons in all tribunals. However, the long-standing practice of giving reasons and the existence of an appeal to the Umpire make the right to reasons a fundamental part of any Board of Referees decision.

In your independent hearing skills training, you will review the five principles of natural justice. The legal authority for the principles is found in section 115(2)(a) of the *Employment Insurance Act.* This section *indirectly* imposes a duty on the Board of Referees to observe the principles of natural justice. Section 80 of the *EI Regulations* expressly confers a right to request a hearing before the Board. The right to request a hearing belongs to the claimant, the employer of a claimant, and any other person who is the subject of a decision of the Commission.

The principles of natural justice, especially the *"audi alteram partem"* rule ("I hear the other side"), require that an interested party have an opportunity to be heard and to make his or her arguments. In the case of the Board of Referees, a hearing is mandatory when the individual in question expressly requests one in writing beforehand, when the appeal is filed or within seven days of receipt of the notice of appeal, as appropriate.[1]

Let us examine the five principles now.

1. The Right to Know the Case Against You

[1] *Tribunal Proceedings* - Garant

The principle "the right to know the case against you" means that the appellant is aware of the issues, the evidence and the rationale for the Commission's decision against him/her.

The principle right to know the case also implies that:

- all the interested parties are notified of the hearing within a reasonable time; and

- advance documents about the hearing are provided to all parties who are entitled to notice.

Concerning the element "all the interested parties are notified of the hearing within a reasonable time".

This means the appellant is aware of the date, time and place of the hearing.

A reasonable period of time for notification of the hearing is not stipulated in the *Employment Insurance Act* or *Regulations;* however, Section 80 does indicate that appellants may apply for a hearing when they lodge their appeal and interested parties to the appeal may apply for a hearing within seven days of receipt of the notice of appeal.

In order to allow the other parties sufficient time to meet the requirements of Section 80, Board Assistants send the notification of hearing to all the interested parties to the appeal approximately 10 days prior to the date of hearing to allow for postal delivery.

Concerning the element "advance documents about the hearing are provided to all parties who are entitled to notice".

This means that all the evidence the Commission used to make its decision is provided to the interested parties to the appeal. This is contained in the material we call "the appeal docket". Note that Commission evidence (e.g. ROE, interview findings, etc.) is different than Commission decisions or arguments. The arguments are persuasive statements addressed to you – the Board of Referees. They simply argue why the facts or law support the decision the Commission made. You are usually being asked by the appellants to find that the Commission findings and arguments are wrong, and should be overturned

It is the responsibility of the Board Assistant to ensure that all the interested parties to the appeal receive a copy of the appeal docket. Your job is to make sure that the notice was “adequate”. There is not a fixed standard for how many days is “adequate notice”. A notice might have been sent 10 days in advance, but only received yesterday at 5 pm. This would not be adequate.

These are some of the problems that Board Assistants and Boards have to face in this area:

- appellants and interested parties do change addresses during the appeal process;
- mistakes occur when recording the names and addresses of the interested parties; and
- appellants do decide to bring in a representative before the hearing but after the appeal docket has left the local office.

Review Questions

- What would you do if one of the parties to the appeal complains on the day of the hearing that he or she only got the appeal docket the day before the hearing?

- What would you do if the Board Assistant advises you that an appellant or an interested party's copy of the appeal docket was returned to the Board Centre by the Post Office?

2. The Right to Meet the Case Against You (to be heard)

The principle "the right to meet the case against you" refers to the appellant's right to be heard and to be able to respond to the case/decision(s) against him/her.

The principle right to meet the case (to be heard) implies that:

- the "hearing" includes the review of written documents and/or the oral hearing;

- all parties must receive a copy of all the documentation, which will be produced before the hearing or at the hearing;

- all parties are allowed to provide relevant information and evidence at the hearing; and

- all parties must be heard in the presence of the other parties and all the

adjudicators except when there are allegations of harassment.

Concerning the element the "hearing includes the review of written documents and the oral hearing".

A "hearing" can sometimes happen with paper only. For example, if the parties do not show up and we know they have been notified, a hearing on the paper evidence can still proceed.

A telephone hearing for one or more parties is still a hearing.

When Board Members are reading dockets in advance, they are not in "the hearing" so they must be careful that they do not discuss the evidence before the appellant has had a chance to appear and make submissions. For example, it would be wrong for two members to speak by telephone and discuss the weight of the written evidence in advance of the hearing date.

Board members, especially Chairs, should never "pre-write" a decision. The only sections of a decision that you may write before the hearing are the sections titled Parties, Issues and Information from the Docket (to be reviewed in the Decision Writing section of this Guide). If you write down any other reasoning, you are starting to decide before hearing the evidence. This denies the parties the "right to meet the case" and "be heard".

Concerning the element, "all parties must receive a copy of all the documentation which will be produced before the hearing or at the hearing".

This means that all the interested parties to the appeal must receive copies of the appeal docket and any additional information provided before or during the hearing. This principle is modified according to who shows up at the hearing. For advance documents (the docket), all parties must receive the written material.

For information produced at the hearing, the parties in attendance are entitled to copies. The Commission does not usually attend hearings; therefore, it forfeits the right to receive new documents and to reply to them. Likewise, the claimant who does not appear would give up the right to receive an employer's new evidence, produced at the hearing.

The Board does have the discretion if they feel that a party (especially a claimant) would be seriously prejudiced by not receiving a document. In this case the Chair (who makes procedural rulings) may adjourn the hearing and order that a copy be sent to the claimant (or other party).

Note that this element speaks about "produced at the hearing". Parties, including the Commission, are not permitted to submit material after the hearing unless the Board invites all parties to see that material before the Board deliberates.

For example, a late-arriving fax from an employer could not be given to the Board (at the deliberation stage) unless the Board decides to share it with all parties and possibly reconsider the case. If the Board members see material favourable to one side only, this violates the "meet the case" principle.

There is one other alternative for interested parties to the appeal when there is relevant, late-arriving material. It is called a Request for Reconsideration under Section 120 of the *Employment Insurance Act.*

Appellants or interested parties may submit new facts and can request the Board reconsider their case. In these circumstances, if new material is received, the Board Assistant will forward it to the Commission (usually to an Appeal Writer) so that the appeal can be prepared as a Request for Reconsideration and then sent back to be scheduled. The hearing would take place in front of the original Board of Referees that heard the case.

Concerning the element "all parties are allowed to provide relevant information and evidence at the hearing".

This means that during the hearing each party was given an equal opportunity to present their arguments in favour of upholding or reversing the decision - to express their point of view or voice their disagreement. Although cases are scheduled for a standard time, a Board Assistant can schedule more or less time (and fewer cases for the day) in circumstances like this:

- complexity of the appeal or volume of the docket;
- a representative or lawyer appears for a party; or
- parties have indicated they will not appear.

Note that the information or evidence must be "relevant". The Board will be the final judge of what is "relevant" and therefore admissible. Board members can certainly ask the question: "How is this relevant to your appeal"?

For example, suppose a claimant arrives at the hearing with extensive documents related to a workers' compensation hearing or a past criminal trial. A Board, through the Chairperson may decide that the new material is not relevant as evidence.

Review Questions

- What would you do if you receive late documentation from an employer, after the appeal docket has been sent on a case, where the appellant is advising that he/she cannot attend the hearing? You know the employer is waiting outside for the oral hearing to begin.

- If the appellant brings in new, relevant documentation for his/her oral hearing, is every party entitled to a copy?

Concerning the element "all parties must be heard in the presence of the other parties, except when there are allegations of harassment".

This means that all discussion takes place while everyone is present either in person, by telephone or via video conferencing.

There is an exception to "all parties heard in the presence of the other parties" and that is in cases of voluntary leaving or misconduct where there is an allegation of sexual or other harassment. The appellant or employer can apply to have the other party excluded from the hearing while he or she is presenting evidence [section 111 *(5)(b)* of the *Employment Insurance Act* and section 81 (2) of the *Employment Insurance Regulations].*

Review Questions

- What should you do if an interested party to an appeal said they would be attending the hearing but when the hearing is about to commence they have still not arrived?

- What should you do if an interested party to an appeal shows up well after the hearing has commenced?

- Suppose the Chairperson asks the Board Assistant to bring in "an expert" from the Commission staff to speak to the Board after the oral hearing but during the Board's deliberations. You are a member. What would you do?

3. The Right to an Impartial and Unbiased Decision Maker

Impartiality refers to a state of mind or the attitude of the Board of Referees in relation to the issues and the parties involved in the appeal[1].

An impartial and unbiased decision maker implies:

- there was no actual bias or appearance of bias (in advance) on the part of the Board of Referees members were considering the issues(s);

- there was no appearance of bias that arose during the hearing or in connection with the hearing.

Concerning the element "there was no actual bias or appearance of bias (in advance) on the part of the Board of Referees members who were considering the issue(s)

Actual bias means that you have a direct interest in the outcome of a case. For example, a Board member who is a co-owner of a business should not sit in a case where the employer is that same business. You could also have actual bias if you made a clear statement about the outcome in advance of the case. Saying that “this man is obviously self-employed” before you have heard one point of evidence would be bias.

However, you should be aware that "bias" includes the "appearance of bias". A Board Member may feel that he or she is impartial, but the legal test is what the reasonable outsider might think. Perhaps a Board member wrote a recent article in a union newsletter, expressing strong views on “voluntary leaving” adjudications. The Board member might say (and truly believe) that he or she can be impartial for future individual cases. But the test is an *appearance* of impartiality, and the Board Member may have to decide whether to step aside. This is the individual member's

[1] *Tribunal Proceedings* – Garant & Garant

decision, not the decision of the Chairperson or the three of them. A wrong decision is open to appeal.

Concerning the element "there was no appearance of bias that arose during the hearing or in connection with the hearing".

This means that the tribunal decision-maker has no actual interest in the outcome and no apparent interest in one outcome, or any favour toward one party.

The appearance of bias is more than conflict of interest. A conflict of interest is a political concept - a conflict may prevent a potential appointee from taking an office. For example, cabinet ministers are required to declare their financial holdings to ensure that there is no conflict of interest in their decision making.

Bias or the appearance of bias is a legal concept. The goal of the natural justice rule about bias is to preserve the impartiality in a Board. Bias can arise just before or at a hearing. In this way, it also differs from conflict of interest.

A biased remark may occur during the hearing or a member may say something careless in the waiting room. Any remark that would indicate that the member's mind is made up before hearing all the evidence may be bias before or during the hearing.

For example, before the afternoon hearings begin, a member says: "I can tell from the dockets that a lot of claimants should win today." This is an example of bias during the hearing day. It is also an example of "deciding without hearing" which breaches the right to a fair hearing.

Review Questions

- What should you do if you become aware of some bias on the part of a Board Member colleague from your advance knowledge of that Member?

- What would you do if you hear biased comments by a Board Member prior to or at the hearing?

4. The Person Who Hears the Case Must Decide the Case

This means that only the three Board Members who heard the case may decide it. Otherwise, there may be decision-makers involved who did not hear all the evidence and all the arguments. In some ways, this is another version of the "meet the case" requirement. If an appellant has to "meet" the arguments of an unseen Board Member or person, it is not fair.

The two common examples of this are:

1. Consulting Board Members who are not panel members. In larger Board Centres, two or three panels may be sitting at one time. During breaks, they may be tempted to discuss their cases and hear the views of other members. A member who is not on their panel might influence them. This violates the principle "the person who hears the case must decide the case".

2. Two Board Members of three decide cases while one takes a break or leaves for the day. This means that *all* the persons who heard the case are not deciding the case. All three must be together for all deliberations and all review of the evidence.

When the Chairperson is writing, however, all three do not have to be present.

Review Question

- What should you do if you return from a break and hear the other two Board members discussing the merits of the evidence in a docket (where you have not yet heard the evidence)?

5. The Right to a Decision Once the Case has been Heard

Board Chairs have the responsibility to write the decision of the majority in each case. Unless a member agrees to write, or decides to write a minority decision, the Chair cannot delegate this function. This also means that you should not defer to a Board Assistant who offers to “clean up” your decision and use “common practices”. You own all of the decision and all of the responsibility.

Not all the Board of Referees decisions are "unanimous". Sometimes a Board of Referees will have a split decision; that is, two of the members write a "Majority" decision while the third member writes a dissenting (Minority) decision or a

concurrent decision (same decision for different reasons). The dissenting member can be any member, including the Chairperson.

Board members who agree with a majority must read and sign each page of a decision. This is a good opportunity to proof read the decision and check for complete and defensible reasoning. We will review the components of a complete decision later in this Guide.

THE HEARING AND DELIBERATIONS

Opening the Hearing

In your service pledge, you committed yourself and the Board to come to the hearing with an open mind, to make the hearing as informal as possible and to treat the parties fairly and with courtesy. You also promised to give the parties a chance to explain their case. One good way to cover all these commitments in every case is to have Chairs use a well-practiced "opening statement". There is a suggested opening statement template in this Guide.

Experienced Chairs recognize the following:

- Many appellants have never appeared before a court or tribunal before; they do not know what to expect.
- Because so much contact with the E.I. "system" is through telephone or electronic means, the Board can be the first "people contact" point; therefore, you are likely to be seen as part of the Commission.
- You may need to repeat several times that you are independent of the Commission and that your decision will be impartial.
- You need to balance informality with your very serious role as an adjudicator; too much empathy or familiarity can mislead an appellant.
- You may need to ask the appellant for their questions about the process more than once.

Members also play an important role during the opening. Chairs should give them a brief opportunity to speak – if only to have them introduce themselves. Members (and Chairs) also have to be aware that their body language can speak negatively. If you are reading papers, looking aside, whispering to a colleague, or leaning back from the table, you are expressing disinterest to the appellant. Sitting forward and making eye contact are important at this stage and throughout the proceeding.

Collegial Work Environment

Even before the hearing begins, Board members must commit themselves to working together in a collegial, respectful manner. You are now impartial adjudicators – who may have legitimate differences in the review of the cases. You must be able to "agree to disagree" in some cases, yet respect your colleagues in future cases. Adjudicators should be guided by the provable facts and the law more than by their appointment source, personal preferences or empathies. This atmosphere of respect will show up in the hearing and in the deliberations.

Diversity

In a very short time, you will see that the appellants reflect the mosaic of Canadian society – diverse in language race, culture, religion, dress, and behaviour in front of authorities. In your training, you will learn more about how to respond to the challenges this may present.

While getting started, you will need to check your assumptions and inquire of colleagues in order to be fair to all appellants, whatever their heritage or culture may be. The stakes are high – no Board panel or member wants to be publicly accused of bias. Respect and open-mindedness will prevent this from happening.

Deciding Whether to Adjourn and Other Preliminary Issues

A Chair has the power to *adjourn* an appeal or *postpone* an appeal or *recess* during an appeal. Each of these powers has a different result. If a Board member recognizes a need for an adjournment, the member should raise it with the Chair immediately. This can be done by asking the Chair to *recess* the case briefly. A recess is like a school recess – a short break in the normal proceedings of the day. It is normally proposed by the Chair or a member. The parties leave the room (or the Board does) so the Board can confer.

A Chair may choose to *postpone* the case to a different time on the same day. For example, the Board Assistant may advise that an appellant is late, but can appear after lunch. Instead of hearing the case without the appellant, the Chair will postpone.

If the case is to be moved to another day, this is an *adjournment.* An adjournment is one example of a *preliminary issue.* A preliminary issue is any type of procedural question that can be resolved before you hear the actual evidence in the case. For example, will upcoming witnesses be excluded from the room? Is there new documentary evidence that will be tabled? Is there a Charter of Rights question to be resolved? If the need for an adjournment (or other *preliminary issue*) is spotted before the Board hears evidence that case can come back before any trio of Board members. Chairs should try to identify adjournments before hearing evidence, because that practice gives Board Assistants maximum flexibility. For example, if an appellant states that an important witness has not arrived, or the appellant is clearly struggling with English comprehension, you would adjourn.

However, if the need for an adjournment (or other procedural question requiring adjournment) comes up *after* the appellant starts giving evidence, this particular Board will be seized with this case. The case has to come back, on a future date, to the same three individuals. For example, an appellant may mention important, available evidence that he/she wishes to obtain and bring back to the Board.

Your training and the Garant text cover reasons for adjournment and typical preliminary issues and motions that lead to adjournments. Without going into that detail, the best guideline is this: "Would it be unfair to a party if we were to go ahead right now instead of adjourning?" The failure to grant an adjournment can be a natural justice mistake.

During the Hearing

1. Listening

A good maxim for hearings is: "Listen first, question later." Many appellants will not gain confidence unless they can "get rolling" with their submissions to you. Try to hold your questions until they have given a full explanation – even though it is tempting to jump in when they reach your prepared question topic.

You can demonstrate that you are listening. Eye contact, slight nods of the head and note-taking are all signs of "passive listening". As the story develops and you are interacting with the appellant, you can also use "active listening". This can be something as simple as a neutral paraphrase of something the appellant has just said. Example:

Appellant: "I went to the doctor about my back and he said I would have to stop heavy lifting for two weeks."

Board member: "So you have some medical proof that you could not do some of your job requirements."

Active listening is one of the skills you will learn in your independent training.

A particular challenge in listening arises when a party does not speak either official language well. You may need to slow down, repeat questions, or work through a family friend who attends. The key will be to make sure the party confirms their understanding – not just the friend. If there is very little comprehension apparent, you should adjourn and ask the Board Assistant to help the party obtain interpretation services.

2. Questioning

Your questioning skills will also be developed in training. One common problem for Board members is the overuse of leading questions. It can happen because you think you know something from the docket and you want to narrow in on it. Example:

Board member: "You didn't say anything on the Teledec about working for two days that week, did you?"

A leading question is essentially a statement or accusation that is converted into a question. Unfortunately for the Board member, the question is going to be heard as an accusation – and therefore a sign that the member has made up his/her mind. Try to mentally rehearse your questions and restate them as more open or even narrow questions. Example:

Board member: "What did you say on the Teledec system?" (Open question) or "Can you explain further what you meant when you reported that you had no work that week?" (Narrow question).

Board members are allowed to "test the evidence" of a party that comes before them. However, you are encouraged to be a neutral inquisitor, not a cross-examiner.

Although it occurs rarely, a party may cross-question another party about evidence, according to Garant & Garant. This would normally happen only when two or more parties attend (e.g. employer and employee). The Chair must control this questioning to ensure that it is relevant to the issues.

3. What is "evidence" compared to other things you hear or read?

What are we listening for and what questions are important? You can look at your task as a funnel, moving from information, to relevant evidence, to facts that you can find.

Information from docket and all communication
given at the hearing

Admissible, relevant evidence
in relation to the legal issue

Evidence for or against a
finding of fact

The Board finds
as a fact…

You have to screen out information that is not evidence. For example, personal opinions, judgments and speculation are not evidence. To say "I thought the doctor might support my claim" is speculation and opinion. To say "I have here a letter from my doctor, who I visited last month" is evidence.

Both the Commission and the appellants will use argument and persuasion as well. This is not evidence. This is only argument about the facts or the law. If the Commission states that the evidence in this case is "not equally balanced", you will not treat that as evidence.

Evidence is usually something that *helps to prove a fact in issue.* For example, did Ms. Smith have "just cause for leaving" because she moved across the

province to care for her aging mother? There are several facts in issue here. Did she move? Was that the primary reason she quit the job? Was there no reasonable alternative?

The appellant's evidence might include her own explanation of the alternatives she explored, a letter from her mother's doctor and an account of a conversation with her boss. This is all relevant, admissible evidence about a fact in issue – why she quit.

The Commission evidence might be that the boss does not recall the reason given for quitting, that the ROE states that she quit for personal reasons and that she should have explored assisted living for her mother. Note that this last point is not evidence – it is argument. The first two points are evidence because they help to prove a fact in issue.

As you listen to the evidence, you will begin to look for contradictions and seek help in explaining those contradictions – through skilled questioning. This will help you later (in deliberations) when you have to weigh the evidence and find facts. Your job in getting to fact-finding is to answer: "What happened here?" You have to accomplish that task with only the admissible evidence in front of you – not speculation or argument.

4. Weighing the Evidence

In your decision, you will have to justify your fact finding by explaining to the reader what evidence was most persuasive to you. This is called "weighing the evidence" and it should be an explicit part of decision writing. Therefore, during the hearing, you have to listen for the evidence that is most persuasive. In legal terms, the most persuasive evidence is reliable, direct evidence. This means that the person giving the evidence is doing so from his or her five senses. Indirect evidence can be admitted, and may be persuasive, but you should be prepared to give it lower weight.

For example, the Commission may produce signed report cards that it says demonstrate false and misleading statements. This is direct evidence of the fact that statements were made. The appellant's wife may testify that the appellant was distressed due to the death of his mother when he sent in those report cards. This is indirect evidence, not the appellant's evidence. Furthermore, it does not contradict the fact that statements were made. It may only explain a state of mind at the time. In listening to evidence, you should be constantly aware of this direct vs. indirect distinction.

Another concept in evidence is known as "best evidence". You want to choose the most reliable evidence available if there are two or more sources. This concept often works to the disadvantage of the Commission because they do not send agents or witnesses to the hearing. For example, the Commission agent may have written a summary of her conversation with the appellant. That summary is quoted in the docket and states that the "appellant admitted that he lost his temper". At the hearing, the appellant denies that is what happened and

also states that his words were taken out of context. The appellant provides his own notes of the conversation, taken down on the day of the conversation. The "best evidence" here is the verbal testimony, backed by notes compared to the written summary (with no Commission live witness). Why? It is because you have two sources for the appellant's evidence – testimony and notes.

This does not mean that you can discount or ignore Commission evidence, just because it is written and not "live". Indeed, you must show that you have thought about the Commission evidence and down–weighed it for some good reason. Remember that a key test for evidence is reliability. Written documents (e.g. a Record of Employment) may be highly reliable. On the reverse side, an appellant may have great difficulty overcoming written Commission evidence – something they said in previous correspondence, a transcript of a Teledec report, etc. In these circumstances, the "best" or most reliable evidence may back the Commission's finding and you would not be able to down-weigh it. Above all, you cannot just resort to empathy or "gut reaction" – you must be able to find facts from the evidence (or lack of it) before you.

5. Credibility Observations

Finally, you may need to make observations during the hearing that help you with a credibility finding. You will only have to make this type of finding if there are two contradictory stories and only one version can be accepted to make a finding of fact. For example: Did the employee strike a blow during a dispute with the boss? The employer says "yes". The employee says "no". You will be looking for internal contradictions in the verbal evidence, or perhaps hesitation in answering questions. The assessment of witness demeanour is very unreliable in judging credibility. Nevertheless, the courts will accept your assessment if you give a specific reason for holding that a witness "lacked credibility".

6. Controlling a Hearing

In conducting a hearing, a Board faces two types of control issues – controlling parties and controlling Board members. In both situations, the Chair has the legal power to run the procedures, but members have indirect power – by asking the Chair to call a recess.

Dealing first with parties, the Chair can prevent many problems by outlining the process and ground rules in the opening statement. For example, assuring the appellant that you have read the appeal docket, including the letter of appeal, may head off repetitive evidence. If parties begin to interrupt each other, the Chair should intervene and restore a speaking order. If a witness is too emotional to continue, you may need to recess. If the Chair does not recognize this, a member can ask to confer with the Chair or make the suggestion in a note. In extreme cases, where the parties will not accept the directions of the Chair, there is no power to order them in contempt (as a judge could do). The Chair can only stop the proceedings, adjourn the case to an indefinite date and advise the board centre manager of the problems.

Board members (or Chairs) may need to be controlled or redirected at times also. If a member's questioning is too aggressive or appears to be biased, a Chair may have to interrupt and try a re-phrased question, or call a recess. Chairs might also act improperly on occasion. Suppose a Chair wants to end a hearing before a party has submitted all its evidence. A member may have to ask the Chair to continue the case briefly or ask for a recess to challenge the Chair.

The Deliberation Phase

This is the part of the hearing when only the Board members meet to discuss their findings and prepare a written decision. This session must take place with all three present – and no one else. You are not permitted to consult other persons. You may leave to get manuals, legislation or jurisprudence and bring them back. No member can opt out or delegate responsibility in this phase. All must remain until all the reasoning on the case has been worked out. If one person takes a break, the others must refrain from discussing the case. Mistakes in this area could be mistakes of natural justice, as discussed elsewhere in this Guide.

How should the process run? The Chair generally starts the process by asking for a review of the evidence (pro and con) on each issue that the Board faces. From there, you can proceed to the findings of fact that you are prepared to make. There is a temptation to ask all members for their win-lose result right at the beginning. This should be avoided because you want all members to maintain an open mind until the group has reviewed the evidence.

Next, review the statutory rule and the case law tests that apply. These often come from the Quick Reference Guides or from the docket submissions. Make sure that you have supporting evidence to connect to the legal tests. For example, if misconduct has to be "wilful or reckless", what evidence tells you that the conduct was one of those two types? And why do you give weight to some of that evidence over other evidence? The losing party will want to know.

Finally in deliberations, help the Chair by articulating reasons as if you were the writer. For each issue, the Board should be able to:

- state the statute section and case law legal tests;
- state what evidence supports your finding of fact and why you gave it weight over other evidence; and then…
- make clear findings of fact for all relevant elements of the statute;
- state how the law applies in this case; and
- state whether the appeal is denied or allowed.

LEGISLATION AND JURISPRUDENCE

You have many other resources beyond this Guide to help with the legislation and case law. The *Tribunal Proceedings (Garant & Garant)* booklet is a thorough overview. The BOR web site has up-to-date case law and external links to statutes. The Quick Reference Tools are a "get-started" means to get into the law (but are not sufficient by themselves). This section of the Guide has only some key points for you to get acquainted with a world that can take years to master.

First, there are hierarchies to understand. The law of employment insurance has the *Employment Insurance Act* at the top of the legislative hierarchy. If the rule is in the Act, that is where we often start and end the case. Case law can only interpret existing rules; it cannot invent new rules. Therefore, you will often find yourself saying: "We have to apply the law". Courts are also bound to implement the existing rules, so statute law stands first even for the courts.

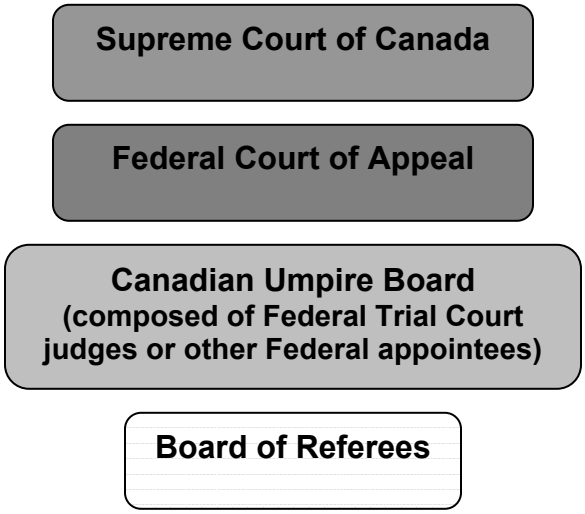
Next in the pecking order are the *E.I. Act Regulations*. Regulations have to be made under the authority of the Act. They are usually more specific than the Act. It is also easier to achieve changes in Regulations because the executive branch of government can make regulations. Legislation has to be passed by the Commons and Senate. If you find that the meaning of regulation is in conflict with a section of the Act, you should give preference to the language of the Act.

You will sometimes note that Commission agents refer to the Benefits Manual or to "Commission policy". Unless they are quoting the Act or Regulations, these documents do not have the force of law. Although the policies sometimes are cited as "the authority" they are not law – and you are entitled to give preference to the language of the Act or Regulations over any quoted policy. Policy is written up in order to promote uniform or best practices, but it is not a legal requirement.

In summary, learn where to find the main provisions of the Act, beginning with the Quick Reference Tool. Be prepared to go back to the Act over and over again, rather than rely on Commission submissions or brief quotes from Umpire decisions.

Case law, or jurisprudence, also has a hierarchy. The strength of a case law authority does depend on who wrote it – so long as the case is "on point" (i.e. highly relevant and on the same Act provisions and similar facts).

From strongest to weakest authority, the order is:



When you look up jurisprudence, you want to locate the most recent case from the highest authority. Just because you have found a CUB from 1995 that says what you would like to quote, it does not mean you have good authority. A later finding by the Federal Court of Appeal may have overruled that case.

Sometimes jurisprudence gets summarized and turned into regulations or a new section of the Act. For example, the eligibility of self-employed persons is subject to their degree of involvement in a business. That used to be found in case law, but now there is a detailed regulation that summarizes those same factors.

Could you use the Board of Referees web site to find the regulation discussed in the last paragraph? That was the focus of your technical training and it will not be repeated here.

When do you get to interpret the legislation or regulations? The simplest answer to that question is: "Only when the Act or Regulations are ambiguous." If the Regulations say that a claimant in this region needs 720 hours of insurable employment, there is no ambiguity. However, if the Act says that a person gets no benefits if that person lost a job due to "misconduct", the Board may have the interpretive task of deciding what "misconduct" means. That interpretive question is a question of law. Then, with a better understanding of what "misconduct" means, you have to apply that meaning to particular facts in your case. This process is called "applying the legal test". A "legal test" is a standard composed of both statute and authoritative case law rules. In "misconduct" cases, for example, the standard has been elaborated in case law to mean conduct that is "wilful or reckless". When you apply the meaning of misconduct to particular facts, that is a question of fact.

The text *Tribunal Proceedings* will help you use general rules of interpretation when you are reading the Act and Regulations. Two of the most important rules are:

"Social welfare legislation, as a whole, is considered remedial" (Garant & Garant, s. 4.1). When faced with competing interpretations, this allows you to choose meanings that would advance a remedy or benefit, rather than a meaning that would suppress the benefit.

The "ordinary meaning rule" means that you must use a word in its ordinary and grammatical sense, and in context (not some special or unusual meaning). (Garant & Garant, s. 4.2)

Umpires or higher courts may have interpreted many ambiguous terms of the *EI Act*, so your job is to look up the jurisprudence. With newer Regulations, however, you may have to take on the interpretive task. If you do, make it explicit in the written decision that you found some language ambiguous and you are now about to interpret its meaning in context. You can use a dictionary and you can decide what the words mean in the context of the whole Act, the Regulations and the remedial purpose of the Act.

DECISION WRITING

Most Chairs use a template for writing decisions. The template only gives you the headings. The real quality in a written decision appears in the reasoning. At the same time, most Boards admit that is hard to achieve quality when you have little time to write. For this reason, in your independent training, you will learn about a "formula approach" to decision writing. This does not mean you can write in advance, nor does it mean that your results always look the same. It is simply a method for "touching all the bases" of a good decision when you have limited time. In this section, we briefly review the formulas available to you. In the last section of the Guide, you will find an annotated decision and a checklist to measure your own decisions by.

Decision Writing Template

Heading		Contains
1.	**PARTIES**	Who attended, taping, etc.
2.	**ISSUES**	Neutral, cite statute.
3.	**INFORMATION FROM THE DOCKET**	Chronological story, neutral account of both sides' evidence and arguments.
4.	**EVIDENCE AT THE HEARING**	Verbal evidence, new written evidence, questioning.
5.	**FINDINGS OF FACT, APPLICATION OF LAW**	Legal test (statute, case law), weigh evidence, find facts, apply legal test.
6.	**DECISION**	State decision

Background

Boards of Referees receive independent training in Hearing Skills and Decision Writing. Decision writers are independent. They are not compelled to use headings or formats suggested by the Commission. In fact, Chairs (or members) could decide to use any format, so long as they identify the issues, weigh the evidence and give reasons that relate the findings of fact to the law. Nevertheless, the headings used in training are commonly used now across the country. Umpires will overturn decisions which do not give substantial reasons.

Each heading (bold, all capitals) below is a heading that will appear in your decision form. Each annotation has an explanation of what should be addressed under that heading. *Where italics are used, those are specific words that are recommended* for a good "formula approach" to writing.

PARTIES

Identify the parties. State whether they are present in person or by telephone; if represented, state by whom. If parties are not present, state how they were notified (from the docket). State whether the hearing was recorded.

ISSUES

State the issues in your language, not the language of a party. A neutral statement usually begins: *"Whether or not...".* This is also a good place to note the relevant section of the Act.

Example:
"*Whether or not* the claimant made a false or misleading statement about his earnings, and therefore should have a penalty imposed under s. 38 of the Employment Insurance Act?"

INFORMATION FROM THE DOCKET

This information is not "the facts." There are assertions or evidence put forward by the Commission and the claimant. Nothing will become "a fact" until you find it as a fact during the deliberation phase. Normally, you review this by party, chronologically. In a "formula approach" each paragraph begins with either "The Commission" or "The Claimant" (or Appellant). You use this formula to preserve neutrality at this stage. You do not want readers to think that the view expressed is yours – it belongs to someone else. This section should be a narrative "story", although you could use some bullet points to list a sequence of like events.

Do not organize the docket evidence by summarizing each exhibit (Ex. 1 states, Ex. 2 states,) this is very difficult for a reader to follow. Remember that the appellant and other readers will not always have the docket to refer back to. Your decision has to stand on its own.

Example:
"*The Commission states* that ... (first event, second event, etc.).

The claimant, in his reply letter, *states* that... (first event, second event, etc.)"

The Commission decision reasoned that the claimant must have known that he was required to declare all earnings, etc.

The claimant has argued that he did not understand the Teledec questions….

EVIDENCE AT THE HEARING

Summarize relevant, new evidence. Usually, this is the claimant's evidence. Do not weigh the evidence. Just state what evidence was offered, and by whom.

Example:
At the hearing, the claimant stated….

In reply, the employer stated …….

FINDINGS OF FACT, APPLICATION OF LAW

1. State the Legal Test

A "legal test" consists of the power-granting words of the statute, plus any authoritative case law that has interpreted the E.I. Act. You should always quote words from the Act here first, then add any case law to the legal test. The Quick Reference Guides can assist you. Do not assume that the reader has the docket or the Act in hand to consult the section. Two useful sentence "leads" will be:
Section ___ of the Act states …..
The case law has held that ……

Section 38 *of the Act* allows the Commission to impose a penalty if it determines that the claimant "knowingly failed to declare to the Commission all or some of the claimant's earnings…"
The case law has held that "knowingly" is determined on a balance of probabilities based on the evidence in each case (GATES A-600-94).

2. Discuss and Weigh the Evidence in this Case

In this section you discuss the most relevant evidence, the evidence you want to put weight upon, and credibility factors. "Weighing the evidence" asks you to demonstrate why you preferred some evidence over other evidence. For each contested area, you make a finding of fact. A good sentence lead is:
In this case….

Example:
"*In this case*, the claimant received a "Rights and Obligations" sheet which advised him that all work and earnings have to be reported. He answered a Teledec telephone system question about any work or earnings between May 1 and May 15 by saying "no". At the same time, the ROE from Acme Corp. showed that he had earnings of $800. during that period. The claimant, on the other hand, says that he did not mean to fail to report his earnings. He found the

Teledec system confusing and did not know how to repeat questions on it. He did acknowledge that he read his "rights and obligations" some three months ago. Since this is the claimant's third experience with a failure to report earnings, and since he acknowledged his understanding of his obligations, we prefer the evidence of the Commission – that he must have known his duty to report earnings.

We find as a fact that the claimant knew his obligation to report earnings at the time of the Teledec report."

Use the phrase "*find as a fact*" to make this last stage clear. Here, you are answering the question about "What happened?" At this point, try to avoid the "legal conclusion" words such as:
(a) "He knowingly …."

INSTEAD: "We find that he understood the questions of the agent and answered them."

(b) "The behavior was misconduct…."

INSTEAD: "We find as a fact that he was drinking during his working hours while operating heavy equipment."

(c) "Her statement was false and misleading…."

INSTEAD: "We find as a fact that she stated that she had no earnings, when she had made $800. in that period."

You are trying to make a finding about specific behavior in this case, and not lump it into a larger legal concept. You will get to the legal conclusion in the next paragraph.

3. The Legal Conclusion

The "legal conclusion" words come next. You want to connect the law to the findings of fact.

Example:
"In this case, the claimant 'knowingly' failed to declare $800. in earnings in a period in which he was receiving benefits. Therefore, the Commission was justified in imposing a penalty.
We now turn to the amount of the penalty and the legal test for determining that question…."

DECISION

This is a simple statement about whether the claimant' s appeal is "allowed," "dismissed" or "dismissed with modification." If unanimous, state that. There is no need to state the decision twice (e.g. Allowing the Commission decision and dismissing the appellant's appeal). If there is a dissenting (minority) view, the dissenting member must write reasons.
Example:

" The appeal is allowed unanimously."

Plain Language

In your independent training, you will learn more about plain language usage in your decisions. Chairs should enlist their members to proof read decisions. A surprising number of decisions contain spelling errors, non-sentences, omitted words, etc. A "spell-check" program does not catch everything.

In addition, you should run a "plain language" review. Are there technical terms that require explanation? Are there lengthy, run-on sentences? Should paragraphs be broken up?

You readers will prefer short declarative sentences. Use the active voice, since this will show the subject of the sentence:

Instead of: "It was decided that the penalty would be 50%."

Say: "The Commission decided to impose a 50% penalty.

Use more common words, like "case law" instead of "jurisprudence".

Be careful when expressing empathy for the claimant. Normally, you want to restrict yourself to the claimant's efforts in the hearing, not the outcome.

Example: "The claimant gave a very thorough explanation of the circumstances and expressed his frustration about the denial of benefits."

Unnecessary Statements

Some decision writers have a habit of using "stock sentences" that are not necessary unless a specific concern came up in a hearing.

Two of these unnecessary sentences, with explanation, are:

1. "The Board reviewed all of the docket information and listened carefully to all of the evidence at the hearing. We have applied the law and jurisprudence."

Explanation: You are really just trying to tell the reader that you are doing your job. This is not necessary and it adds nothing to the legal weight of the decision.

You may want to say “We read the docket” in a case where the appellant did no show up. Everything else is unnecessary.

2. “We listened to the appellant and found him to be credible.”

Explanation: This is a credibility finding where none is required. Your goal is to assure the appellant that he was heard, but do not use the word ‘credible’ unless you truly have to make a credibility finding.

A credibility finding is reserved for situations where you have two contradictory accounts of the same set of circumstances. Only one can emerge as a finding of fact. Most often, these are inconsistent verbal statements.

Witness one: “He hit the foreman”
Appellant: “I shouted at the foreman. I was about 3 inches from his chest, but I did not shove him or make contact.”

In these circumstances, you will make a finding that one witness is more credible. You must give a reason for that finding. In your independent training materials, there is a paper on Making Credibility Assessments that provides typical reasons that justify a finding.

Minority Decision

Any member, including the Chair, is entitled to dissent from the majority view during deliberations. If the other two members disagree, the Board should not attempt to reach a consensus or force a majority outcome. Each member is independent and free to exercise separate judgement about the facts and law.

But what is the process if you are in the minority? First, you should be prepared to write down your minority views, using your reasoning about evidence, facts and law. If you are not prepared to write, you should accept the majority and sign the decision. If you “dissent by not signing”, this is unfair to the losing party (appellant or Commission) because they have no reasoning that might assist them in an appeal to the Umpire. Furthermore, the Umpire is going to dismiss your unsigned dissent as insignificant.

Second, a minority writer is entitled to know the views of the majority writers before he or she finishes writing the minority. This is not a formal regulation, but it is the well-accepted practice of dozens of administrative tribunals and all appeal courts. The majority should share their principal reasons (such as facts found, evidence relied upon and legal rules) during deliberations. This will allow the minority writer to get started and not delay the decision writing. When finished, the majority writer (usually the Chair) should immediately give his or her draft to the minority writer. The minority writer can then make any final edits or additions to the minority decision. It is important to remember that you are serving the interests of all the parties and the appeal bodies above you. Secrecy within a panel or withholding decision drafts does not serve these interests.

Third, a minority decision writer carries all the same burdens as a majority writer. You may accept the majority's description of Information from the Docket or Evidence at the Hearing in a single line. However, you should weigh evidence, find facts and use legal tests as described in the decision writing template. It is not enough to simply describe a different legal conclusion.

APPEALS TO THE UMPIRE

Along with the Board of Referees Decision the appellant will receive a leaflet on "How to Appeal a Board of Referees Decision". You need to know what grounds lead to an appeal so that your behaviour in the tribunal and your written decisions will not be appealed.

There are three grounds for an appeal to the Umpire outlined in the leaflet. The first ground is:

- **The Board of Referees did not give them an impartial hearing or reasonable opportunity to present their case or did not operate within the limits of their jurisdiction.**

Opportunity to Present their Case

The first ground relates to natural justice issues. Appeals result when appellants feel their hearing rights have been breached. This is often a question of real or perceived unfair, impatient or discourteous behaviour by a Board member. When the appellant reads about appeal rights, he or she immediately recalls that behaviour and wishes to appeal further.

An example might occur if a Board cuts the appellant's explanation short by saying the time is up, even though a minute or two of extension might have concluded the case. The appellant might then appeal, stating he/she wasn't given an opportunity to fully state his/her case. It may have been true that the allotted 20 minutes for the hearing was up; but the appellant's perception of the Board behaviour is what triggers the appeal to the Umpire.

Jurisdiction

Boards of Referees are "creatures of statute". This means that they only have the powers conferred by the E.I. Act. If a Board strays outside the powers of the Act, it has "exceeded its jurisdiction". This is a clear ground for a successful appeal. This could happen if a Board makes an interpretation of the statute that unreasonably stretches the language or powers in the Act.

Jurisdiction is not usually a principle of natural justice unless a Board greatly exceeds its jurisdiction. When this happens, a court might say that the excess of jurisdiction was a breach of natural justice because the Board's action was "patently

unreasonable" or just "unreasonable". This is a court's way of adding insult to injury. Not only did you exceed your jurisdiction, it was also a breach of natural justice.

An example of the Board exceeding its jurisdiction might occur where the discretionary power to make certain decisions belongs to the Commission or to Canada Revenue Agency and the Board makes a decision on one of these issues. Examples include:

- write-off of an overpayment;
- rules on a course referral; or
- rules on insurability.

The Board has no authority in these areas. The importance of jurisdiction is also discussed under Decision Writing in this Guide.

The second main ground for an appeal to the Umpire is:

- **The Board erred in law in making its decision.**

A Board of Referees is said to "err in law" when it makes a decision, which is contrary to the *Employment Insurance Act* and *Regulations.*

For example, the Board of Referees might allow a special benefits claim when the claimant has insufficient insured hours to qualify. The Commission could appeal this decision to the Umpire, even though the Board sympathized with the claimant.

A Board could also "err in law" by making no reference to the statute or relevant legal tests whatsoever. Every decision you have to make is governed by the Act or Regulations and by case law. You have to mention these legal tests in order to write a proper decision. This is discussed more fully under Decision Writing.

The third ground for an appeal to the Umpire is:

- **The Board based its decision on a misinterpretation of the facts**

This means the finding of fact is wrong and made in an arbitrary manner against the weight of evidence. Almost every decision requires one or more "findings of fact" based on the evidence. An example of this mistake would be a Board allowing a claim for sickness benefits when there is very little written or verbal evidence that the claimant was sick.

You must look at the whole of the evidence as well. If there is evidence that you want to rely upon for a finding of fact, what contrary evidence stands against that? If there is some, how do you explain it away or "down weigh" it?

Finally, there must be some evidence and findings upon which to rest your legal conclusion. You cannot assume that the Umpire understands how you connect the docket material or hearing evidence to your result. You have to spell it out under the heading Findings of Fact, Application of Law. A surprising number of flawed decisions do not weigh the evidence and make clear findings of fact. This problem is more fully reviewed under Decision Writing.

As a general rule, the courts will defer to the Board on questions of fact finding (if the facts are clearly found from a solid base in the evidence). On questions of law, the courts often prefer to substitute their expertise in legal interpretation. The typical judicial reasoning is that the tribunal had a chance to see the evidence and the oral witnesses "in person" and the Umpire does not. Therefore, the Board is in a better position to find facts reliably. This places an onus on Boards to conduct effective, careful fact-finding.

Review Questions

- If a Board refuses to admit a claimant's piece of relevant evidence (e.g. a medical certificate from a nurse concerning illness as a reason for leaving a job), what is the basis for an appeal to the umpire?

- A Board looks at the *EI Act* to determine the meaning of the phrase "immediate family member". They cannot find any case law on the point. They decide that the meaning of "immediate" includes a first cousin. What is the basis for an appeal?

SOME USEFUL CHECKLISTS AND RESOURCES

The Do's List for Boards of Referees

The Don'ts List for Boards of Referees

Board of Referees Hearing

Notes on Questioning Skills

Decision Essentials Checklist

Natural Justice: Review Questions and Answers

The “Do’s” List for Boards of Referees

1. Do keep informed of employment practices and labour conditions in your area.

2. Do remain up to date on legislation changes and recent jurisprudence.

3. Do come to the hearing having read and researched each appeal docket.

4. Do come to each hearing with an open mind, ready to listen to the presentations of all interested parties.

5. Do come to the hearing ready to treat all parties and board members courteously and fairly, respecting differences of opinion.

6. Do ensure that the hearing is informal.

7. Do attend all training sessions in their entirety.

8. Do choose evidence relevant to the case and distinguish information from facts when deliberating and deciding.

9. Do apply the law and jurisprudence to the facts of the case.

10. Do state the legal tests, show the weighing of evidence and find the facts before drawing legal conclusions in your written decision.

The "Don'ts" List for Boards of Referees

1. Don't leave yourself too little time for preparation or writing preparation notes.

   Chairs: Don't stop preparation until all your Information from the Docket sections are written.

2. Don't write any part of the decision, beyond Information from the Docket, until after the hearing and deliberations.

3. Don't forget that, whoever appointed you, you are now a neutral, impartial adjudicator, not an advocate for a party.

4. Don't make up your mind or discuss the results or merits of a case with your Board colleagues before you have all heard all the evidence.

5. Don't discuss your cases with anyone, before a hearing.

6. Don't reveal, outside the Board center, any appellant information that is protected by privacy law.

7. Don't accept rude, intolerant or unfair behavior by a Board member or party during a hearing. Seek a recess to discuss it and stop it.

8. Don't permit anyone to contribute to deliberations of the three Board members unless you are ready to re-open the hearing to all parties.

9. Don't accept new evidence or arguments after the hearing has ended. (You may look up the law).

10. Don't jump to legal conclusions in your written decision until you have stated the legal tests, shown the weighing of evidence and found the facts.

Board of Referees Hearing

Introduction Script – Suggested text

(January 2006)

	"Good morning/Good afternoon Mr./Mrs./Ms. ***** (appellant) Thank you for coming, please have a seat."
Board member introduction	"My name is XXXXX. I am the chairperson of this Board of Referees. The other board member(s) is(are) to my right XXXXX and XXXXX to my left (board members to identify themselves)."
Attendees (if applicable)	"Would you please introduce yourself and explain your relationship to the appellant."
Addressing parties (Optional)	"How would you like us to address you? Mr./Mrs./Ms. XXX, by your first name?"
Taping Procedures	"We have a number of things to explain to you about the role of the Board of Referees and your hearing today. However, I would first like to explain the Employment Insurance Board of Referees taping policy. The purpose of taping Board of Referees hearings is to have a record of the proceedings in the event either you or any other interested party does not agree with our decision and appeals to a higher level (Umpire)."
Taping requested	
Taping requested	"You have requested that the hearing be taped." "Do you have any questions about the taping? We will now begin taping of the hearing."
Taping NOT requested	
Taping not requested	"<u>No one</u> has requested the taping of this hearing. Do you wish to have it taped?" "Do you have any questions about the taping? We will now begin taping the hearing."
For taping purposes only	
Case Identification	"This is a Board of Referees hearing. The case concerns (name of appellant)". Today's date is XXXXX, it is XXXX o'clock and we are located in XXXXX (City)."
Attendees	"Mr./Mrs./Ms. XXXX is accompanied by XXXXX, XXXXX,

	etc. (parties to identify themselves)" I, XXXX, am the Chair of this Board of Referees and the other member(s) is(are) XXXX, XXXXX (members to identify themselves)."
Role of Board of Referees	"The Board of Referees is an independent, impartial tribunal consisting of three members from the community. We are not employees of the Department. We are trained to provide fair hearings and are knowledgeable in the Employment Insurance legislation. Our role is to apply the *EI Act* and render a decision and we will not disclose any information you provide, including personal information, except to the parties to the appeal."
Optional	"We will: • keep an open mind; • give you an opportunity to provide additional information and to explain your case; • make the hearing as informal as possible; • render a decision."
Optional (If required) When both employer and claimant attend the hearing	"I would ask you to address the Board of Referees and not each other. I also would appreciate if you would avoid interrupting the speaker. It is a good idea to write down your questions or comments and you will have a chance to respond later when it is your turn. You will all be given the opportunity to speak."
	"Any questions before we continue?"
Contents of the appeal docket (**Optional** – Information on exhibits and new information)	"We have received and read the material that was sent to you. Did you receive this material? Our copy has XXX exhibits. An exhibit is a document used as evidence in a hearing and you will notice that each page is marked for identification in the appeal docket (bottom right hand corner of each page). Do you have the same number of exhibits? When you refer to a document, we would appreciate it if you could give us the exhibit number so we can follow along. We will do the same." "Do you have any questions about the docket information?" "In addition, appellants sometimes submit additional written

	information at a hearing. Do you have additional written information to give us today?" "Any questions before we continue?"
The case under appeal	"We are now prepared to proceed with your case. What we are here for today is to listen to you and gather any relevant information you can give that would help us in our deliberation and decision making process."
	"Do you have any questions?"
Issue under appeal	"The issue(s) before us today is(are): XXXX. In the appeal docket, the Commission states XXXXXX."
Invite appellant to speak first	"We are now asking the appellant to speak first."

Ending Script

	"We have no further questions at this point, but is there anything else you wish to add?"
Decision	"The Board will discuss your case after you leave and we will arrive at a decision. That decision will be sent to you in writing and you should receive it within the next week."
Closing	"On behalf of the Board of Referees, I would like to thank you for participating in the appeal hearing. This concludes the hearing." *(Turn off tape recorder and stand up)*
Note to Chairperson	Rewind tape to beginning and check that the hearing was properly taped. Note in the decision if the tape recorder malfunctioned or if the hearing was not recorded.

Notes on Questioning Skills

Board members require questioning skills to explore preliminary issues, seek facts from the parties, and confirm their understanding of the dockets. Questioning skills can be practiced and learned. At worst, an ineffective question can produce the appearance of bias: "So you don't have a case here, do you?" At best, a poor question just disrupts the flow of a party's explanation. In general, Board members should withhold their questions until the party giving evidence has completed his or her explanation. When you do intervene to help a reluctant individual, your questions must be clear and helpful.

Four Types of Questions

1. Open Questions

These questions allow the party to select the topic to describe or select information the party believes is relevant. They tend to produce longer, narrative explanations.

"What are you trying to establish in your appeal?"
"What else do you think is important?
"Who did you contact during your job search?"

These questions have few restrictions. The party can answer broadly.

When open questions are producing relevant information on the issues, it is a good idea to stick with them until they produce less helpful information.

2. Narrow Questions

With a narrow question, the questioner selects the subject and a particular feature of the subject. At the same time, the respondent has room to answer.

"What did you say to the Commission agent when she asked you about that report card?"

Notice that both topic (what did you say) and time (when..) are restricted. These questions have the advantage of producing some narrative in relation to the questioner's concerns. They work well to fill gaps, and to keep the respondent talking.

"When did you write the letter?"
"Who gave you the explanation about the employment record?"

Board members should use these questions to fill gaps and probe parties or witnesses who seem to be vague or inconsistent . For example, when the

member knows the elements of a statutory section that must be proved by a party, the member can ask narrow questions to touch on any missing elements.

Remember that narrow questions place the first emphasis on the member's concerns, not those of the party or witness.

Narrow questions, can be altered to inquire about three different features on an event: Actor, Action and Scene.

"Who gave you the explanation?" (Actor)
"When you applied with an incomplete employment record, what happened next?" (Action)
"Tell us what happened in the first five minutes of the interview." (Scene)

This is a more advanced questioning skill, but modifying questions does have a logical system.

3. Yes/No Questions

These questions sometimes bring a narrative to a halt. For example, an experienced police officer witness can listen for a long-winded question that concludes as a yes/no question and answer the lawyer: "No." We sometimes get a longer answer from these questions, but the question itself more often restricts the response.

"Did you quit the job the same day?"
"Did you make a rude answer to your boss, as the docket suggests?"
"Have you talked to anyone else about his incident?"

The best use of yes/no questions is to confirm your understanding of something you have already read or heard. They are less effective when you are exploring new facts.

With yes/no questions, you risk the appearance of being the cross-examiner and the dominant talker. The party may leave thinking: "I never had a chance to explain."

4. Leading Questions

Leading questions are essentially a statement with a phrase attached that converts the assertion into a question:

"You didn't admit to working during that month, did you?"
"Isn't it true that you failed to complete a job search record?"
"You made up this plan with your brother, didn't you?"

Leading questions are the favourites for cross-examining lawyers. They present a point of view, an assertion that the respondent must say “yes” or “no” to.

Board members should avoid leading questions. Although meant to be “probing” the questions can produce an appearance of bias or “deciding without hearing.”

If you need to confirm or summarize, yes/no questions work well. Furthermore, leading questions are easy to convert:

“You made up this plan with your brother, didn’t you?” (leading)
“Did you make up this plan with your brother?” (yes/no)
“Can you explain how this plan came about?” (open)

Conclusion

When Board members get the opportunity to question a party or witness, they want to be fair, but analytical and probing. They can accomplish this with skilled questions - normally open or narrow questions. Questions need to be short. Use simple vocabulary. Ask just one at a time - then listen fully. Finally, do not hesitate to withdraw an awkward or ineffective question. Excuse yourself and ask it again.

Decision Essentials Checklist*

Use this checklist to question yourself for every decision. Enlist a colleague to help you check the quality of the decision. The checklist matches the independent training that you will receive about writing. The italicized words below should appear in your decision if you maintain a reliable "formula" approach.

PARTIES

- ❑ Identify all parties; those present; by telephone; taping or not

ISSUES

- ❑ Neutral (*Whether or not*…); number each; state section of Act

INFORMATION FROM THE DOCKET

- ❑ A chronological narrative; stands alone; exhibits noted in brackets
- ❑ Each paragraph starts with "*The appellant stated*" OR "*The Commission stated*"

EVIDENCE AT THE HEARING

- ❑ Identify who gave the evidence; note evidence that differs from docket or document statements
- ❑ Neutral account; no weighing; no "credible" statement

FINDINGS OF FACT, APPLICATION OF LAW

- ❑ State *legal test*: statute words; case law additions (cite case)
- ❑ *In this case:* discuss the evidence concerning both sides of each the issue; make weighing statements (what evidence you prefer and why); credibility finding only where needed (contradictions)
- ❑ *We find as a fact that:* State conclusion about what happened specifically in this case without using a "legal test" word
- ❑ *In this case:* state the legal conclusion (misconduct, left without just cause, made a misleading representation, etc.)

DECISION

- ❑ State that Board *allows the appeal* or *denies it* (not both)

GENERAL CONSIDERATIONS

- ❑ Did not write more than Information from The Docket in advance
- ❑ All Board members present for all of deliberations
- ❑ Plain language used; spell checked; proof read; numbers and dates checked
- ❑ Complete reasons are in the Findings of Fact, Application of Law (not implied or assumed from Docket)
- ❑ Any dissenting member has written reasons for minority view
- ❑ Any credibility finding has a reason
- ❑ No unnecessary statements (e.g. “We listened to the evidence..)

Natural Justice: Review Questions and Answers

Review Questions	Answers	Page
1. What would you do if one of the parties to the appeal complains on the day of the hearing that he or she only got the appeal docket the day before the hearing?	The party has a justified complaint that they do not "know the case" against them. A Chair can offer an adjournment (to another day, another Board) or a postponement (later that same day).	13
2. What would you do if the Board Assistant advises you that an appellant or an interested party's copy of the appeal docket was returned to the Board Centre by the Post Office?	The Chair should not proceed in the absence of the appellant. There may be a lack of fair notice and thus no right "to know the case". Ask the Assistant to inquire with the Commission about a recent address and resend the docket.	13
3. What would you do if you receive late documentation from an employer, after the appeal docket has been sent on a case, where the appellant is advising that he/she cannot attend the hearing? You know the employer is waiting outside for the oral hearing to begin.	First, you should ask if the Commission has seen the material. If it would cause them to re-consider, you may want to suggest an adjournment to the appellant. However, material that simply aligns with the Commission case does not have to cause an adjournment. The appellant, by not showing up at the hearing, forfeits the opportunity to confront and explain new evidence. The same is true for the Commission, since its representatives do not appear.	16

4. If the appellant brings in new, relevant documentation for his/her oral hearing, is every party entitled to a copy?	Yes. Part of “know the case” and “meet the case”.	16
5. What should you do if an interested party to an appeal said they would be attending the hearing but when the hearing is about to commence they have still not arrived?	The usual practice is to wait 15 minutes and proceed with another case if you can. Check to docket to make sure notice was given.	16
6. What should you do if an interested party to an appeal shows up well after the hearing has commenced?	The party has no real opportunity to “meet the case”, especially if other witnesses have testified. The late party has no entitlement to an adjournment, but if all parties agree, the Chair could postpone or adjourn the case and re-start. If you are in deliberations, you should not re-open the case.	16
7. Suppose the Chairperson asks the Board Assistant to bring in "an expert" from the Commission staff to speak to the Board after the oral hearing but during the Board's deliberations. You are a member. What would you do?	You need to remind the Chair that the Commission is a party and that this step would violate the “meet the case” principle because the appellant is not there to hear the technical expert. You would have to re-open the hearing and invite all parties to hear this evidence. Chairs should continue deliberations without the expert evidence.	16

8. What should you do if you become aware of some bias on the part of a fellow Board Member from your advance knowledge of them?	Raise the matter in the presence of all three Board members, but without any parties present. The apparently biased member may step aside for this matter. If he or she does not, you may choose to step off the panel because you believe that bias may occur.	18
9. What would you do if you observe some biased comments by a Board Member prior to or at the hearing?	Same answer as in #8, but here you should have a meeting with all three before the hearing begins. Do not wait until deliberations.	18
10. What should you do if you return from break and hear the other two Board members discussing the merits of the evidence in a docket (where you have not yet heard the evidence)?	Remind the members of two principles: bias and the "deliberating mind" of the Board. Discussing merits before you hear the evidence may set up a bias and reduce your open-mindedness. Furthermore, any deliberations about the merits or the result must be the product of all three working together for all the deliberation period.	19

Appeals to the Umpire: Review Questions and Answers

1. If a Board refuses to admit a claimant's piece of relevant evidence (e.g. a medical certificate from a nurse concerning illness as a reason for leaving a job), what is the basis for an appeal to the umpire?	This is a natural justice mistake; the Board denied an opportunity to present the full case, or "meet the case". The matter would be sent back to the Board with directions.	39

2. A Board looks at the E.I. Act to determine the meaning of "immediate family member". They cannot find any case law on the point. They decide that the meaning of "immediate" includes a first cousin. What is the basis for an appeal?	This is an error of law. The Umpires might say that the Board's choice of meaning was not within the plain meaning of "immediate family". The Umpire might substitute his interpretation and decide the case.	39