

Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period

January 1 through March 31, 2003

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The Quarterly Report

The Workplace Safety and Insurance Appeals Tribunal (“WSIAT” or “Tribunal”) considers appeals from final decisions of the Workplace Safety and Insurance Board (“WSIB” or “the Board”) pursuant to the *Workplace Safety and Insurance Act, 1997* (“the Act”). The Act, replacing the *Worker’s Compensation Act*, came into force January 1, 1998. The Tribunal is a separate and independent adjudicative institution. It was formerly known as the Workers’ Compensation Appeals Tribunal, until the name was changed pursuant to section 173 of the Act.

This Report provides a summary of the Tribunal’s activities and achievements of the past quarter, January through March 2003. It includes information on recent decisions, judicial review activity, and Tribunal administration. The Report also provides an update on recent activities with the Workplace Safety & Insurance Board, the Tribunal’s community involvement of the past three months and caseload production.

Key Tribunal Activities

A) Highlights of Decided Cases

Entitlement: Decision No. 303/02 considered a claim made on behalf of a deceased miner who had been diagnosed with Chronic Obstructive Lung Disease (COLD). The worker was exposed to dust and silica dust during the course of his working life in the mines. He also smoked between one pack and one-and-a-half packs of cigarettes a day for over 45 years prior to the date of diagnosis of COLD in 1988. In cases involving COLD and smoking, the Panel characterized smoking as a non-compensable co-existing factor that contributes to COLD independently from exposure to dust at work. The Panel suggested that, in these cases, apportionment of permanent pension benefits between the co-contributing factors may be appropriate. This approach was not considered to be inconsistent with the legal test of “significant contribution” because the question to be asked is whether a component of a worker’s impairment could be said to “result from” the workplace injury. It was not necessary to decide this issue as the evidence did not establish that the workplace exposure made a significant contribution to the worker’s permanent impairment.

Decision No. 1856/02 involved a worker who sustained compensable knee and shoulder injuries. He argued that he was inactive as a result of his injuries and this caused him to become obese. The worker claimed entitlement for the condition of obesity. The Panel found that the evidence did not suggest a causal relationship between the worker’s injuries and his weight gain. For example, there were periods following his injury when the worker was able to return to work but he decided not to. Much of the weight gain occurred long after the worker’s injuries. The Panel was unable to conclude that the worker’s weight gain resulted from his knee or shoulder injuries. However, the Panel recommended that the Board sponsor a weight reduction program for the worker.

Earnings basis calculations: A few decisions of the Tribunal have considered the application of Board policy 05-02-02 (“Calculating Temporary Total Disability Rate”) that was amended effective April 2001. The current version of the policy indicates that Employment Insurance benefits are not earnings for the purposes of determining a worker’s average earnings, except for federal work-sharing or job creation programs. Most appeals decided under the former policy found

that Employment Insurance benefits may be included in an earnings basis calculation where the benefits were an integral part of a worker's earning pattern. Decision No. 184/03 found that under the new policy Employment Insurance benefits could not be used in the calculation of the worker's pre-accident earnings.

Decision No. 1426/02 considered the application of policy 05-02-02 in a case involving personal coverage for a self-employed worker. The current version of the policy states that the guidelines for determining the average earnings of a worker with personal coverage apply to claims with accident dates prior to January 1, 1998. The policy provides that the average earnings of a worker with personal coverage are the worker's actual earnings at the time of the injury. Decision No. 1426/02 found that the "decision" regarding the worker's average earnings referred to the initial decision of the Board at the time of the original claim, and not the appeal decisions. The Board was directed to recalculate the worker's benefits using the amount of his personal coverage as his pre-injury earnings.

LOE and Notice of Co-operation Obligation: Decision No. 47/03 considered the Board's policy of providing notice of non-co-operation before terminating LOE benefits and the difficulty in applying it to short-term absences. The fact that the Board had not provided notice to the worker in the short time interval did not reduce the worker's obligation to co-operate. It was a question of fact as to whether a worker and an employer act reasonably in co-operating to facilitate an early and safe return to work. Decision No. 2474/0013 has asked for submissions from the parties and intervenors on a number of issues related to the Board's policy, including the Board of Director's response to the Tribunal's section 126 referral.

Employer Classifications: Decision No. 1738/02 involved an employer that had been audited in March 2001 and was later reclassified from Rate Group 477 to Rate Group 411 effective January 1, 2001. The Board amended Rate Group 411 in November 2001. The amendment was effective from January 1, 2001, however the employer did not receive notice of the change until February 1, 2002, when the amendment was included in the Employer Classification Manual. The Panel applied the Board policy on retroactivity and concluded that the Board Minute did not have the effect of changing the employer's classification for the earlier time period.

Jurisdiction to consider Access: Decision No. 1354/02 considered the Tribunal's jurisdiction over an employer appeal that concerned access to a worker's claim file. The issue in dispute was the relevance of information in the file. Decision No. 1354/02 cited Decision No. 1956/01 for the proposition that the specific authority for the Tribunal to consider "access" appeals is found under section 59 and not under section 123 of the WSIA. The Board had made a decision to deny access and this decision was appealable to the Tribunal. In this case, there was evidence that the information in the worker's claim file could be relevant to the SIEF issue in dispute and access was granted to the employer.

B) Judicial Review Activity

The first quarter of 2003 again demonstrated an increase in judicial review activity at the Tribunal. The following is a list of the current status of judicial review applications at the end of March 2003. The judicial reviews listed at number 9 and 10 were received during the first quarter.

1. In November 2002, an application and counter-application for judicial review under s. 17 of the *pre-1997 Workers' Compensation Act* were dismissed by the Divisional Court. The issue was whether a worker's right to sue had been taken away. The worker had a compensable injury, and alleged that a knee operation subsequent to his injury caused further disability. The Tribunal's *Decision 1902/01* took away the worker's right to sue as against the hospital, the nurse, and a student nurse, but not against the doctor or the college the student nurse was attending. The worker brought the application for judicial review.

This application was unusual in that the Tribunal had not released a decision at the time it was served with the judicial review. The Tribunal subsequently released *Decision 1902/01*.

Following service of the Tribunal's factum, counsel for the doctor brought a counter-application for judicial review. It was the doctor's position that the right of action against the doctor should have been extinguished.

Counsel for the doctor (counter-applicant) served a notice of motion for leave to appeal to the Court of Appeal. Counsel subsequently served a Notice of Abandonment of the leave application, so this judicial review is now concluded.

2. A paralegal consultant who represents injured workers at the Tribunal was suspended from representing clients on any new appeals at the Tribunal. The decision to suspend was made by the Tribunal Chair, acting pursuant to the *Act*, the Tribunal's Code of Conduct for Representatives, and a related practice direction. Counsel for the consultant brought an application for judicial review of the decision to suspend. The Workplace Safety and Insurance Board, which has also suspended this consultant from representing parties in its appeal process, is a co-respondent in the application. The Board and Tribunal are filed responding materials. It was expected this application would have been heard in March in Sudbury. However the application was postponed, and will likely be heard in the fall.

3. The application for judicial review of *Decisions 1095/01* and *1095/01R* is scheduled to be heard in early April 2003. These Decisions denied a worker's appeal for entitlement for bilateral carpal tunnel syndrome. Counsel for the Applicant has raised a number of arguments, including that the Decisions were wrong to rely on a Tribunal medical discussion paper on carpal tunnel syndrome.
4. In 2001 the Tribunal was served with an application for judicial review of the Tribunal *Decision 1105/99*. The worker was a co-owner of a trucking company, who had taken out personal coverage. The Vice-Chair denied the worker's appeal of a FEL sustainability award, finding the worker was still capable of earning the amount for which he had taken out personal coverage based on the worker's earnings potential. The Tribunal filed its factum in late September. The Divisional Court is scheduled to hear the application in London on May 5, 2003.
5. An application for judicial review was filed for Tribunal *Decision 2185/01* and *2185/01R*. These decisions denied an employer's appeal that its operations were controlled by and ancillary to another firm, and should be classified in the same Board rate group as that other firm. The parties have exchanged factums, and the application is scheduled to be heard on May 26, 2003.
6. The Tribunal has received an Application for Judicial Review of *Decisions 466/01* and *466/01R*. The worker withdrew her appeal on the advice of her former representative at the hearing. She retained new counsel, and when her application to reconsider the withdrawal was denied, she brought a judicial review application. The Tribunal has filed its record and is awaiting the applicant's factum.
7. Tribunal *Decision 866/97* denied a Schedule 2 employer's appeal of a Board decision to pay a worker benefits for a specified period of time. However, the Panel also found that in the circumstances it was unfair for the employer to be fully liable for the cost of the benefits. The Panel directed the Board to credit the employer for the cost of some of the benefits.

The WSIB requested the Tribunal reconsider *Decision 866/97*. In *Decision 866/97R* a differently constituted Panel found the Tribunal had no jurisdiction to direct the Board to provide the Schedule 2 employer with relief from the costs of the claim.

The employer has brought an application for judicial review of *Decision 866/97R*. The Tribunal has filed an appearance, and when the employer obtains a copy of the transcript, the Tribunal will file its record with the Court.

8. The Tribunal has been served with an application for judicial review of *Decision 770/98IR*, which denied the worker entitlement for traumatic vertebrobasilar ischemia (TVBI). The Tribunal has entered an appearance and is preparing its record of proceedings.

9. The WSIB granted entitlement to a letter carrier for skin cancer resulting from exposure to sunlight during the course of her employment. An appeal to the Tribunal was denied in Decision 1489/98. The employer has brought an application for judicial review, not to challenge the finding of work-relatedness, but arguing that this disablement is not incorporated by the Government Employees Compensation Act. There are currently negotiations between the parties about the contents of the record.

10. Tribunal Decision 1858/98 denied a worker entitlement for a s.147(4) supplement. The worker has now served an application for judicial review, and the Tribunal has entered an appearance. When the worker has ordered the transcript the Tribunal will file its record.

C) Administration

Following the evacuation of the basement premises at 505 University Avenue, the Tribunal's Records and Reproduction Departments were located in various areas throughout the Tribunal. The Tribunal acquired additional space in December 2002 at 505 University Avenue. Records and the Mailroom were able to relocate in February 2003.

A Tribunal training day for Order-in-Council appointees and staff was conducted in early March. The morning medical topic was anatomy and physiology of the spine and the afternoon session reviewed the morning's NEL examination and discussed NEL evaluations generally.

D) Communications

Public Information Sessions – During the first quarter of 2003, the Tribunal conducted 3 Public Information Sessions; two took place in downtown Toronto and one occurred in St. Catharines in March. These sessions are organized in co-ordination with the Tribunal’s regional hearing schedule and attended by Tribunal staff, a Vice-Chair, a Member representative of workers, and a Member representative of employers. Topics included process developments, the Notice of Appeal process and e-services, notably the publicly available decision search feature.

Tribunal staff and OICs participated as speakers at the OBA Institute 2003 for the Workers’ Compensation Section’s half-day session, titled “Essentials of Workers’ Compensation Law, Practice and Process”. The annual Institute is the OBA’s primary educational forum.

E) WSIAT/WSIB Activities

Representatives from the Board’s appeals branch and legal branch met with Tribunal staff in February for a Quality Loop Meeting. Topics discussed included appeal time limit cases and the status of various policy projects at the WSIB. The next meeting is planned for May 2003.

The Tribunal is working with the Board to study the feasibility of an electronic exchange of Board file information. The kick-off meeting was held in early September 2002. A focus group comprised of interested Board and Tribunal staff met with the consultant twice. A draft report was provided to the WSIB for comments in late December.

In February, D. Revington, General Counsel, organized an Experience Rating Training Day for Tribunal staff and OICs. Staff from the WSIB presented a full day program on terminology and how to read experience rating cost statements, and reviewed NEER claim cost calculations.

Tribunal Director, M. Faubert, and S. Adams, Counsel, attended an information session presented by the Legal/Policy Analysts of the Board’s legal Branch to the Board’s Complex Case and Industrial Disease Section. The session is

presented to advise adjudicators about the various roles of the Legal/Policy area, in particular their role in relation to the Tribunal.

F) Tribunal Production

The Tribunal's Production Plan for 2003 set targets and projections for caseload intake, production, and remaining caseload inventory.

The Tribunal implemented its Notice of Appeal (NOA) process on March 15, 2001. The NOA process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory also includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management, and most are expected to close as abandoned during the two-year period parties are allowed to remain in the NOA stage.

The following points summarize the Tribunal production achievements in the first quarter of 2003.

- The active inventory totalled 4,070.
- Incoming appeals numbered 1,214; of these, 958 were appeals from the WSIB decisions and 256 appellants advised they were ready to proceed to hearing following a time in inactive status.
- Dispositions numbered 1,106; this includes 656 decisions from adjudicators, 230 case closures in the pre-hearing areas, and 179 cases that were not ready to proceed to hearing.
- Since December 31, 2002, the inactive inventory reduced by 655 cases to reach 5,192.

Productivity in Relation to Case Management Objectives

The Tribunal's active inventory at March 31, 2003 totalled 4,070 appeals.

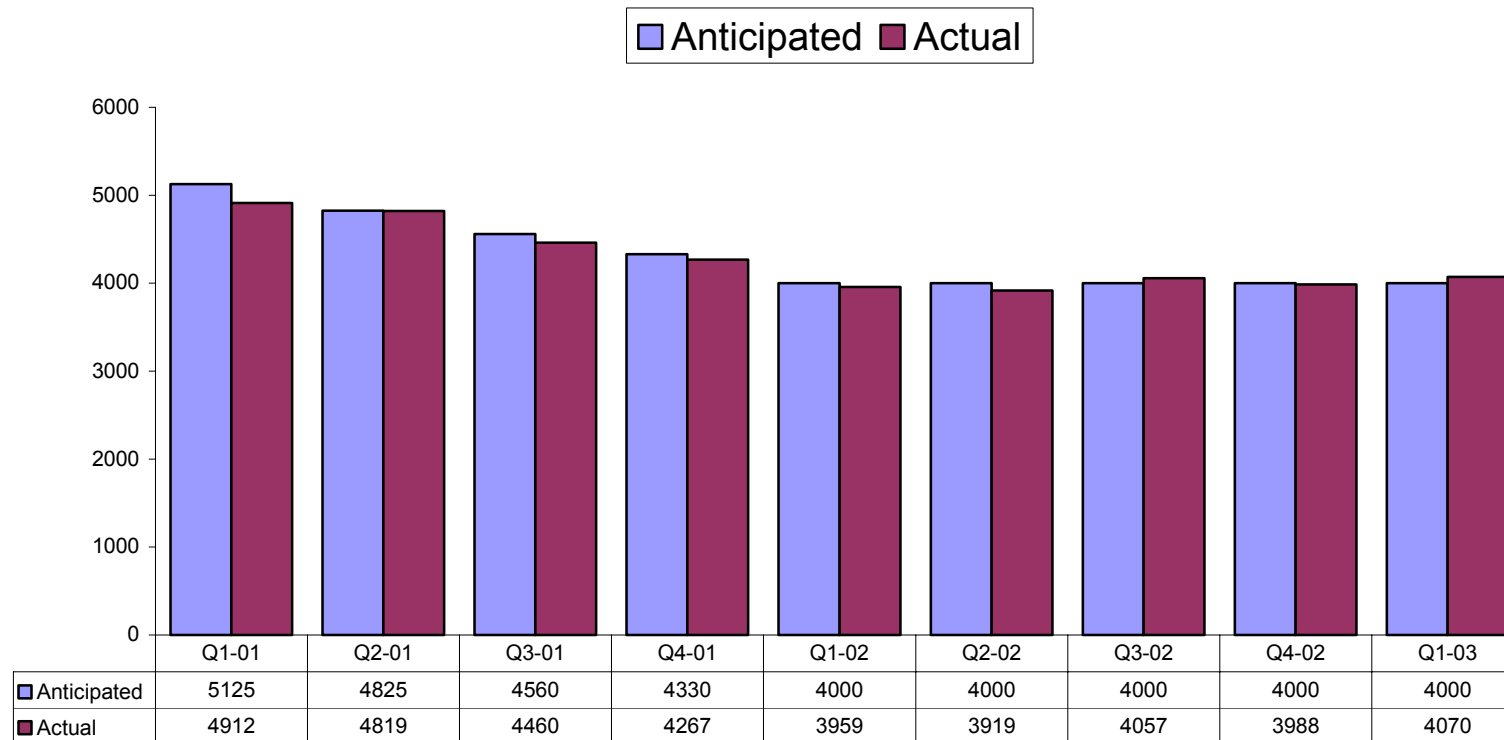


Figure 1. Appeals Inventory, Anticipated vs. Actual

The Tribunal received 958 appeals from Board. Also, the Tribunal monitors appeals that return or “reactivate” from the inactive inventory; in this period, 256 appellants were ready to proceed after a time in inactive status.

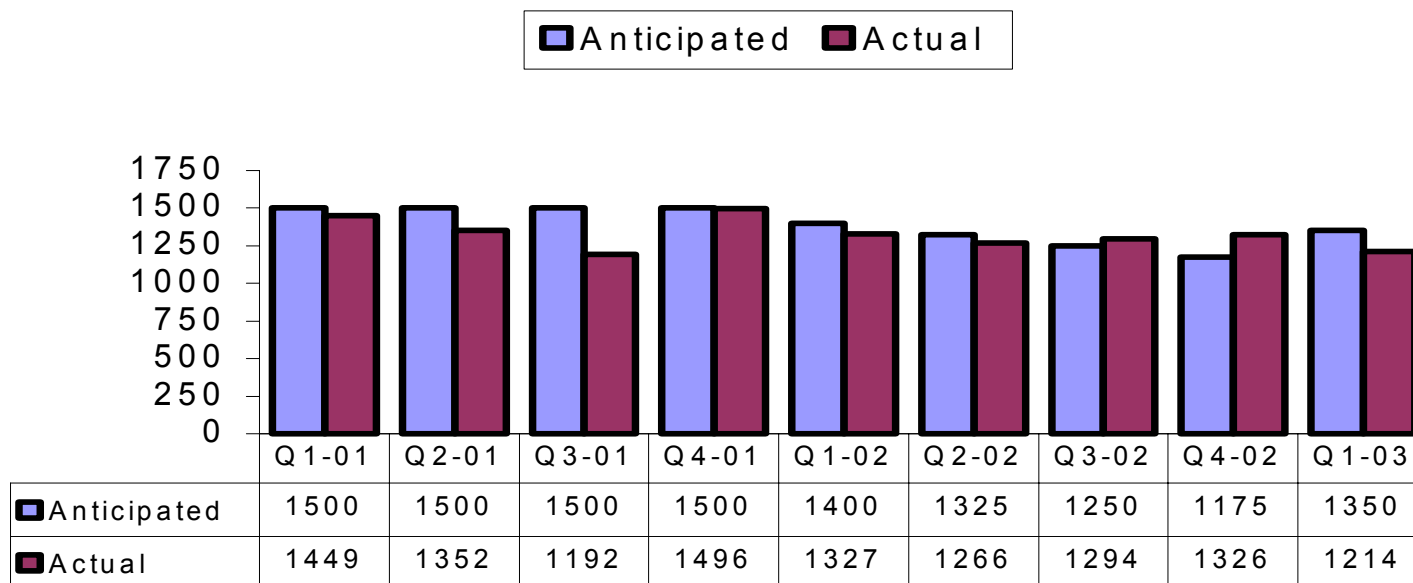


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the first quarter of 2003, Tribunal dispositions totalled 1,106.

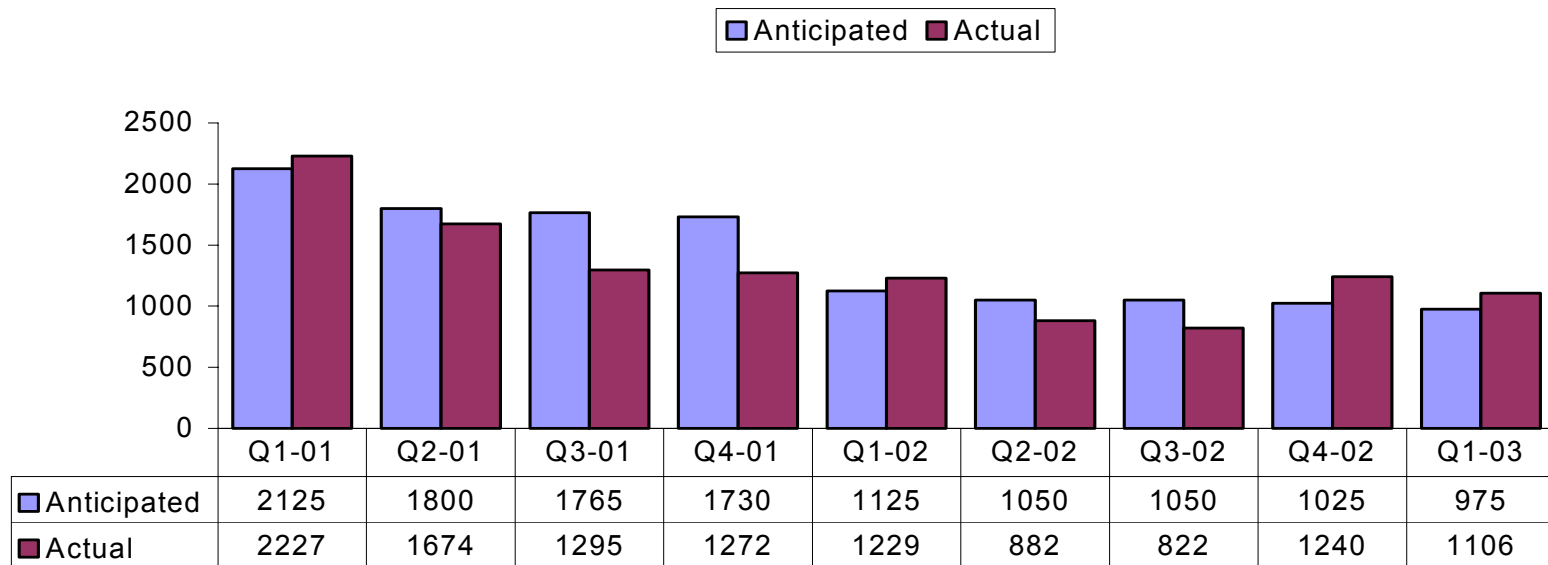


Figure 3. Dispositions, Anticipated vs. Actual

During January through March 2003, the Tribunal disposed of 409 appeals prior to hearing. This figure consists of appeals resolved through alternative dispute resolution, including mediation, early intervention and file review to confirm hearing-ready status.

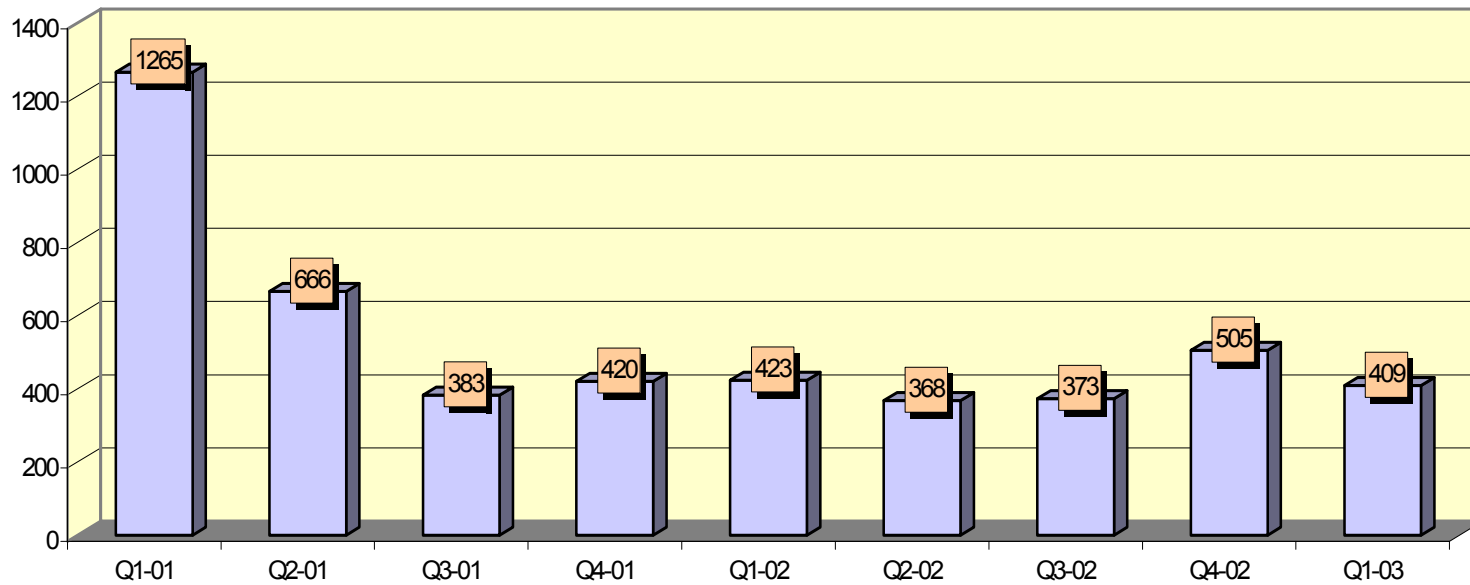


Figure 4. Dispositions from Pre-Hearing processes, including ADR

After hearing dispositions included 656 final decisions from Vice-Chairs and Panels, and 41 other dispositions, typically achieved from Inactive status pursuant to interim decisions. At the end of the first quarter, 2003, the median time to decision release was 29 days.

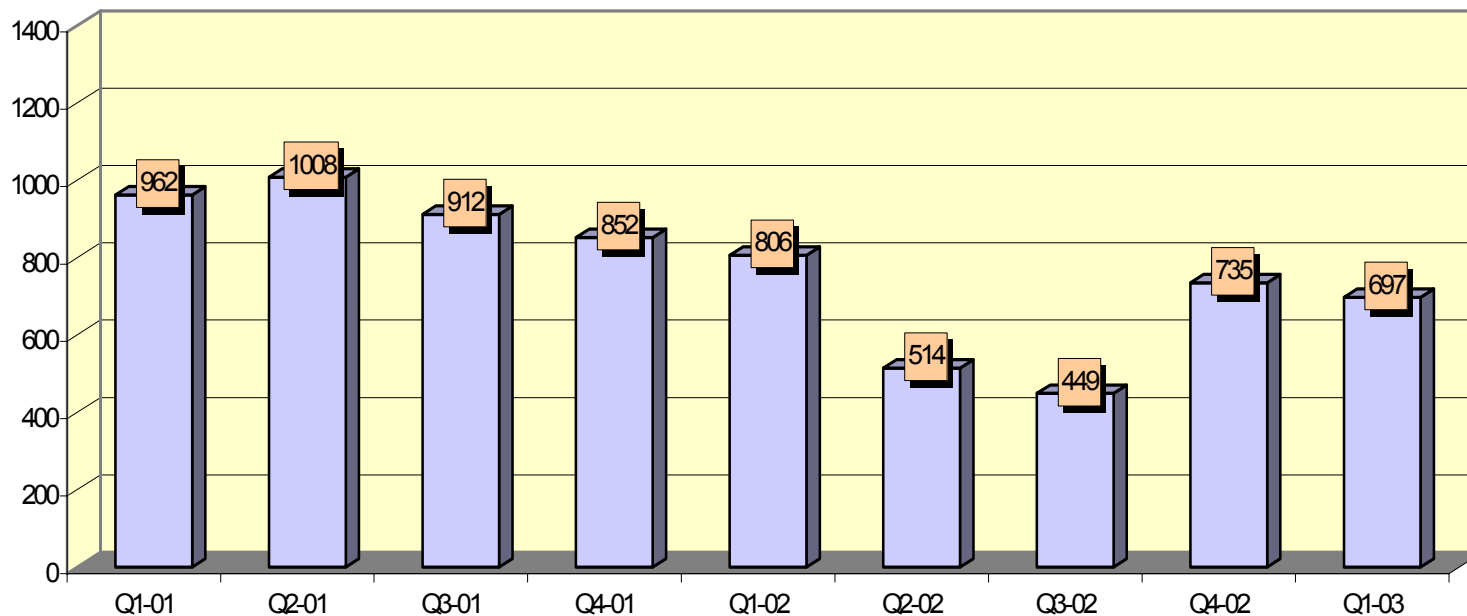
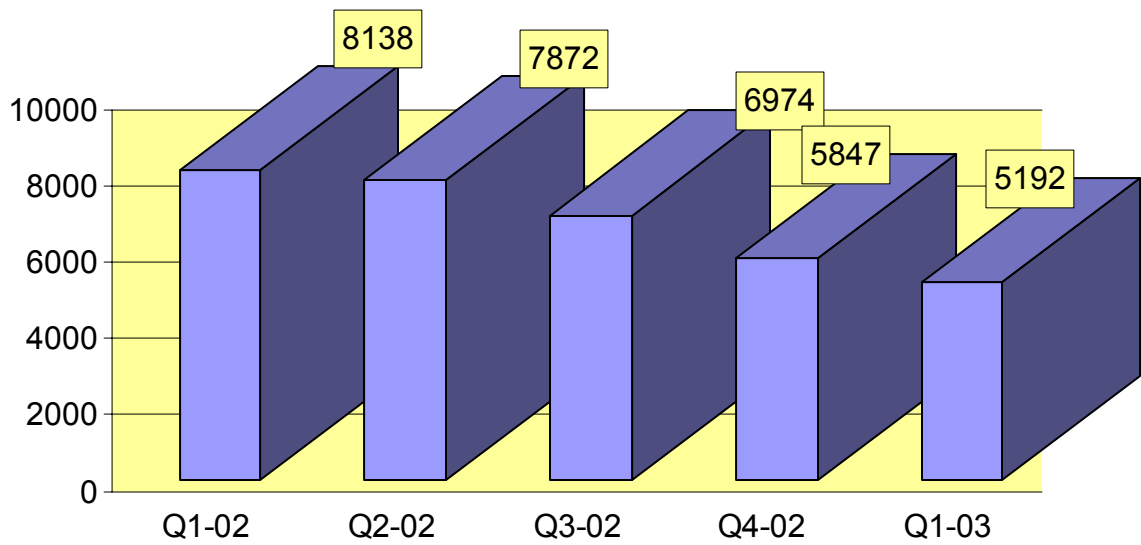


Figure 5. Dispositions from After Hearing processes.

Inactive Inventory: At the close of the first quarter 2003, the Tribunal's inactive inventory numbered 5,192, a reduction of 655 from the previous quarter.

During the 1st quarter, 256 appellants contacted the Tribunal to continue or re-activate their appeal, representing 4% of the previous quarter's inactive inventory of 5,847. During this quarter, 118 of the reactivations involved cases in the inactive inventory reduction project. Reactivations are taken into account in the Tribunal's business planning, and expected reactivations are included in projections as incoming appeals. In the first quarter of 2003 deactivations numbered 217 cases.

Inactive status was created in 1997 as a case management approach to provide appellants with time to prepare their appeal prior to hearing. This process is subject to the Tribunal's Practice Direction on Inactive Files. This is the 7th quarter where the inactive inventory has decreased. Over 75% of the inactive cases are over 2 years old. It is unlikely that these appellants are planning to proceed with their appeal.



Inactive Inventory Q1 2002 to Q1 2003

Inactive Inventory Reduction Project: Since commencing the project to reduce the inactive inventory in January 1, 2002, 2,400 cases have been closed. Further reductions in the inactive inventory were achieved through re-activations.