

**Noteworthy Decision Summary**

<b>Decision:</b>	WCAT 2004-03362	<b>Panel:</b>	Heather McDonald	<b>Decision Date:</b>	June 24, 2004
	WCAT-2004-03429		Heather McDonald		June 28, 2004
	WCAT-2004-03430		Heather McDonald		June 28, 2004
	WCAT-2004-03431		Heather McDonald		June 28, 2004
	WCAT-2004-03445		Heather McDonald		June 28, 2004

***Effective date for Resolution 2003/02/1-06 which created a new classification for resort timeshare operations – The lack of consultation with the employer, other resort timeshare employers, or stakeholders did not render the Resolution patently unreasonable, nor give rise to a breach of natural justice or procedural unfairness - The Resolution, including its interim effective date, was the exercise of a quasi-legislative function (or a policy-making function) by the board of directors and as such the board of directors was not required to engage in a process of direct consultation with each employer who fell into the new classification***

The employer operated in the resort timeshare industry. In 2003, a manager applied Resolution 2003/02/1-06, dated February 11, 2003, which created a new classification for resort timeshare operations, to change the employer's classification from classification unit CU 761008 (Cabin, Cottage, Lodge, Resort, etc.) to the new classification unit, which had a lower base rate for assessment premiums. The Resolution set January 1, 2002 as the interim effective date. The employer appealed, submitting that the Workers' Compensation Board (Board) ought to have applied an earlier effective date.

The appeal was denied. (1) The review officer erred in finding he had no authority to review the Resolution on the basis that the Board officer did not purport to deal with a specific case as required by section 96.2(1)(b) of the *Workers Compensation Act* (Act). The Board officer's decision did apply the Resolution to a specific case, namely that of the employer, and therefore WCAT had jurisdiction under section 239(1) of the Act to deal with the employer's appeal of the Review Division decision, including the legality of the Resolution itself with respect to the specific case. (2) The panel characterized the Resolution as policy, and hence, pursuant to section 251, WCAT must apply it unless it is so patently unreasonable that it is not capable of being supported by the Act and its regulations. (3) The Resolution was not patently unreasonable because of a lack of adequate consultation with the employer, other resort timeshare employers, or an industry association representing the employer. In the context of the continuum between a quasi-judicial function or a legislative function, the panel found that the Resolution, including its aspect relating to the interim effective date of January 1, 2002, was the exercise of a quasi-legislative function (or a policy-making function) by the board of directors. As such employers who fell into the new classification did not, as individual firms, have legal procedural rights requiring the board of directors to engage in a process of direct consultation with each employer or a designated representative of each employer. The employer had argued that the appropriate industry association the classification committee should have consulted with was the Canadian Resort Development Association (CRDA); however, it did not complain to the committee about the lack of participation by the CRDA before the December 2002 meeting, and it was too late for it to complain in these proceedings. Moreover, the CRDA did not initiate an appeal complaining of lack of consultation, nor seek intervenor status in the present proceedings. There was no breach of natural justice or unfairness in the way the Board developed the Resolution. (4) As an ancillary matter, the

panel noted that when it requested disclosure of relevant documents related to the consideration and development of the Resolution, the Board voluntarily complied by sending it copies of the freedom of information disclosure it had earlier provided to the employer. The panel considered section 247(4) and said that continued cooperation from the Board in response to WCAT's requests for disclosure of evidence would be helpful to achieve the best interests of both the Board and the public to meet the goal of sound appellate decisions.

**WCAT Decision Number :** WCAT-2004-03362  
**WCAT Decision Date:** June 24, 2004  
**Panel:** Heather McDonald, Vice Chair

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## Introduction

The employer is a corporation that operates in the resort timeshare industry. It is appealing an August 8, 2003 decision by a review officer in the Review Division, Workers' Compensation Board (Board). In that decision, the review officer confirmed a March 10, 2003 decision by the manager, Classification and Rate Modification Programs, Assessment Department.

In the March 10, 2003 decision, the manager had applied *Resolution 2003/02/1-06* of the board of directors to change the employer's classification from classification unit CU 761008 (Cabin, Cottage, Lodge, Resort or other overnight rental accommodation – not otherwise classified) to CU 761055 (Resort Timeshare Operations). CU 761008, in the year 2003, had a base rate of \$1.94 per \$100.00 of assessable payroll. For 2003, CU 761055 had a base rate of \$0.89 per \$100.00 of assessable payroll. Thus the reclassification significantly reduced the employer's annual base rate for assessment premiums.

The Board's reclassification of the employer into CU 761055 would be effective January 1, 2003. Effective January 1, 2002, the Board would be assigning the employer a "holding" CU with a base rate of \$0.89 per \$100 of assessable payroll. The "holding" CU was not representative of the employer's industrial undertaking, but was merely a method of providing the employer with an appropriate rate for the year 2002. The Board also transferred the employer's experience rating data to the new classification units.

The employer did not appeal the change in its classification to CU 761055 (Resort Timeshare Operations). Rather, the issue on appeal to the Review Division was whether the Board correctly decided that January 1, 2002 should be the effective date for the employer's classification change with its "rate down" impact on the assessments the employer was required to pay the Board. The employer's position was that the Board should have decided on an earlier effective date.

In confirming the manager's March 10, 2003 decision, the Review Division decided that the manager's decision had simply applied the board of directors' Resolution to the employer. The Review Division stated that it had no jurisdiction to review the board of

directors' Resolution. It referred to section 96.2(1)(b) of the *Workers Compensation Act* (Act), which states that a person may request a review officer to review, "in a specific case," a Board decision respecting an assessment or a classification matter. The review officer stated that the Resolution in question was not a decision in a specific case and, in fact, was specifically stated on its face to be a "policy" decision. The review officer stated that under section 99 of the Act, the Review Division and the Board were bound by such policy decisions. He went on to say:

The Review Division cannot form judgements as to the adequacy of the information presented to the BOD [Board of Directors] or process followed by the Assessment Department before the BOD reached its decision or the fairness of its decision. Any challenges to the decision for such reasons would have to be directed to the Finance Division of the Board or the Chair of the BOD.

The review officer noted that the employer did not dispute that the Board of directors' Resolution applied to its situation, but that it wanted a change in the effective date of the "rate down" change. The review officer stated that only the Board of directors could make that change. As a result, the review officer denied the employer's request for a review of the manager's March 10, 2003 decision.

In its notice of appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer submitted that the Review Division's decision was incorrect because the review officer chose not to obtain and review all of the relevant documents. The employer further alleged that the Review Division decision did not deal with a fundamental basis of its appeal which was that the March 10, 2003 decision, applying the board of directors' Resolution, improperly applied existing published Board policy (as opposed to developing or creating policy) by relying on the wrong provision in Assessment Policy AP1-37-3. In a written submission dated April 26, 2004, the employer also alleged that the board of directors' Resolution was flawed and "perhaps illegal (patently unreasonable)" because there was no consultation with any of the employers, or their industry association, affected by the Resolution. Further, the employer stated that in formulating the Resolution, the board of directors relied on information provided by the Financial Services Division, and the information contained several material errors of fact and omission.

Before WCAT, the employer argued that had the board of directors been provided with full and accurate disclosure of the facts, it would have properly applied the "Board error" component of Assessment Policy AP1-37-3 and made the classification adjustment retroactive to January 1, 2000, when the Board introduced its new classification system. The employer submitted that at that time, the Board should have identified the resort timeshare industry and properly classified the employer in that industry.

By way of remedy, the employer requested an earlier effective date for the classification change.

**Issue(s)**

What is the scope of WCAT's jurisdiction in reviewing a board of directors' Resolution? Was *Resolution 2003/02/1-06* patently unreasonable because of a lack of adequate consultation with the employer, other resort timeshare employers or an industry association representing the employers? Was *Resolution 2003/02/1-06* patently unreasonable because it relied on inaccurate and incomplete information? Was *Resolution 2003/02/1-06* patently unreasonable because it improperly applied Board policy? Did the Review Division err in confirming the March 10, 2003 manager's decision that applied board of directors' *Resolution 2003/02/1-06*?

**Procedural Matters and Jurisdiction**

A management representative represented the employer in these appeal proceedings. Four other resort industry employers affected by *Resolution 2003/02/1-06* appealed similar Review Division decisions in their cases to WCAT. Those other employers were represented by the same management consultant as the employer in these appeal proceedings. Although the appeals for all five employers are similar, each has somewhat different circumstances and the Review Division issued separate decisions for each employer. Accordingly, the appeals to WCAT by the five employers have been treated as separate appeals. All of the appeals were assigned to me to decide.

The employer did not request an oral hearing. On its notice of appeal, it indicated that it wanted its appeal to be dealt with on a "read and review" basis, and advised that it would provide written submissions and evidence in documentary form. In preparation for its Review Division proceedings, the employer had made a freedom of information request from the Board and had obtained documents relating to *Resolution 2003/02/1-06* and the employer's reclassification effective January 1, 2002. The employer provided me with a copy of those documents.

I requested the Board's Policy & Regulation Development Bureau to send me a copy of all records relating to the consideration, development and decision by the board of directors in issuing *Resolution 2003/02/1-06*. The director general of the Bureau responded by advising that the Resolution was prepared and presented by the Board's Finance/Information Services Division, and therefore she had referred my request to the vice president of that Division. The vice president referred the request to the director of the Assessment Department, who advised that he was "unable to accede" to the request as in his opinion there was "no established nexus between the Board's alleged failure to consult and a breach of natural justice." He also referred to

section 247(4) of the Act, which states that WCAT cannot compel a Board officer to give evidence or produce documents respecting the development of or adoption of policies of the board of directors. In the letter, however, the director provided information by way of a brief statement that “the Board did afford each of the B.C. and Yukon Hotel Association and the B.C. Lodging and Campgrounds Association the opportunity to discuss and opine on the Resolution.” Despite the Board’s initial resistance to responding to my request for relevant documentary evidence, the Assessment Department’s policy manager then arranged for the Board’s Freedom of Information Department to send me the same disclosure it had provided to the employer some months earlier when it made its freedom of information request.

I had initially indicated to the director of the Assessment Department that after receiving the employer’s written submission on the merits of the appeal, I would be inviting the Board to participate in the appeal. Participation by the Board in WCAT appeal proceedings is contemplated by section 4.32 of WCAT’s *Manual of Rules, Practices and Procedures* (MRPP), and is grounded in WCAT’s statutory authority under section 246(2)(i) and 247(3) of the Act. A WCAT panel has the discretion to invite such participation if it believes it would be of assistance in deciding issues in an appeal. However, after reviewing the employer’s firm file, the other documents disclosed to me in evidence, and the employer’s written submissions, I decided that it was unnecessary for the Board to participate in the appeal. I did not require the assistance of the Board to fully consider the merits of the appeal.

Section 253(1) of the Act states that on an appeal, WCAT may confirm, vary or cancel an appealed decision or order. Section 250 of the Act provides that WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. Further, WCAT must make its decision based on the merits and justice of the case, but in so doing, it must apply a policy of the board of directors that is applicable in that case. Section 251 of the Act provides that WCAT may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If a WCAT panel considers that a policy should not be applied, that issue must be referred to the WCAT chair, and the appeal proceedings must be suspended until the procedure described in section 251 (involving the referral to the WCAT chair and/or a referral to the board of directors) is exhausted.

Section 247 of the Act provides WCAT with wide powers to compel the attendance and examination of witnesses, and to compel the production and inspection of books, papers, documents and things. As previously mentioned, however, under subsection (4) of section 247, a member of the board of directors or an officer, an employee or a contractor of the Board may not be compelled to give evidence or produce books, papers, documents and things respecting the development or adoption of the policies of the board of directors.

## Background and Evidence

The employer's appeal, although it stems from an appeal of the decision of a Board manager, in effect constitutes a direct challenge to the legality of a board of directors' Resolution. This is because the Board manager simply applied the Resolution. Accordingly, it is important to understand the background to the Resolution and the manager's decision. Therefore, I will set out in detail the background to this appeal.

On December 28, 2001, the employer's representative sent a fax to the Assessment Department requesting a classification review for the employer and four other employers. December 28, 2001 was the penultimate working day of that year, toward the end of the holiday season. Not all of the other employers mentioned in the fax were involved in the resort timeshare industry. The fax message was brief, essentially consisting of a simple request for a classification review, without background information or supporting submissions. An employer classification specialist acknowledged the request by a return fax on January 10, 2002, indicating that the representative should forward the request for classification review to the Assessment Department's employer service centre. She provided him with the appropriate address and fax number.

The next document in the chronology of events was a letter dated April 10, 2002, which the employer's representative sent by express post to the manager of the employer service centre. The representative stated that on the employer's behalf, he was requesting a review of its industry classification. The letter included copies of schedules and background documents: revenue summary of operations in 2000 and 2001, analysis of assessable payroll, Board auditor's 1993 payroll examination report, and a copy of the current CU descriptions for CU 762033 (Real Estate Agency) and CU 761008 (Cabin, Lodge, Rental Accommodation). These documents were provided to support the employer's position, put forth in the letter, that since 1994, prior to the Board's new classification system introduced in 2000, the Board had incorrectly classified the employer in CU 067203 (Resort/Rental Accommodation), rather than in CU 330404 (Real Estate Agency). The employer's position was that its principal business activities clearly fit the real estate agency industry, but did not fit cabin, lodge and rental accommodation in which it was currently classified. The representative concluded his letter by submitting that the Board had inadvertently been placed in an incorrect classification, requested that the Board correct the error "in accordance with Policy 30:20:40," by assigning the employer to CU 330404 (Real Estate Agency) from January 1994 and then "to CU 713028 (Cabin, Lodge, Rental Accommodation) from January 2000." In reading the final sentence, I am of the view that the representative made an error and what he intended to request was a reclassification for the employer from January 2000 to the new Real Estate Agency CU 762033, because his argument on the employer's behalf was based on the premise that the employer's business activities were those of a real estate agency.

This request prompted a review by the Board's classification committee on the issue of the appropriate industry classification for employers operating resort timeshare businesses. This review was broad in scope, potentially affecting not just the employer in this case but all employers operating in the resort timeshare industry. The classification committee meets from time to time to deal with difficult classification issues. It is composed primarily of Finance Division personnel with expertise in classification matters, but it also has representatives from the Prevention Division and Compensation Services Division.

The evidence is that the committee began to review the matter in July 2002, and its deliberations culminated in a recommendation to the board of directors in February 2003.

On July 19, 2002, the committee met to review the issue of "vacation timeshare operations." With respect to this employer, the minutes of the committee meeting state that the employer was registered with the Board since 1990 but "did not request a classification review until April 2002." It is obvious that the committee was aware of the representative's letter dated April 10, 2002, but did not understand that the representative had initially sent a brief fax to the Assessment Department on December 28, 2001 requesting a classification review.

The committee minutes noted that the industry of sales of vacation timeshare operations was not identified in the Board's current industry classification structure. Three classification units were presented for consideration: CU 762033 (Real Estate Agency), CU 761008 (Cabin, Lodge, Resort or other overnight Rental Accommodation), and CU 761033 (Property Management, Building Rental or Mobile Home Parks and Strata Corporations). The committee minutes stated that before the committee could make a determination on the correct classification for resort timeshare employers, it would need more information, such as how employers obtained their contracts to manage property – by bid or by inheritance. Further, it would need financial statements and notes for the years 2000 and 2001, as well as a legal interpretation regarding ownership.

The administrator of the Board's employer classification system sent an e-mail to the employer's representative on July 19, 2002, requesting further information on behalf of the classification committee regarding the operations of the employers he represented. (At that time he was representing only two of the time share employers, including the employer in this case). The representative responded by letter dated July 25, 2002, providing the most recent audited financial statements of the other time share resort employer (X Ltd.) he was representing. The representative also provided responses to questions regarding who developed the properties of which X Ltd. sold timeshares, who owned the properties, and how X Ltd. obtained the contract for the selling of timeshares and other business operations.



The committee held a discussion meeting on October 7, 2002 at which several options were reviewed. Some factors supported classifying timeshares in the property management classification whereas other factors supported a resort classification. The notes of the discussion state that "All attendees at the meeting agreed that timeshares should be classified in the most appropriate and fair class. The need for a new CU was evident to all effective January 1, 2004," but "There were opposing views on where to classify timeshare operations in the interim."

On October 21, 2002, the manager of Classification & Rate Modification met with the vice president of the Board's Finance Division. The manager provided an overview of the October 7, 2002 discussion. A summary of the meeting discussion stated as follows:

The option of creating a classification for timeshares was discussed. Even though the classification would be large enough to form its own industry group, this option would not resolve the issue of timeshares competing with hotels/resorts.

[The vice president] found value in having industry experts speak to the classification committee. Representatives from a timeshare company and from a hotel association will be attending the December 2, 2002 classification committee meeting. The intent is to provide a balanced set of perspectives to the Committee.

Board notes indicate that X Ltd. had filed a submission similar to the employer's submission, in requesting a classification review. The entire submission was included in a package for committee members for the next committee meeting, which was scheduled for December 2, 2002.

For the Board's classification administrator, the employer's representative identified a website that contained examples of sales and re-sales of both the employer and X Ltd's timeshares. He also advised her that timeshare companies advertised extensively in real estate newspapers in the Whistler area. On November 27, 2002, the classification administrator forwarded all this information to the classification administrator to committee members.

The classification committee invited the president of the B.C. and Yukon Hotel Association and the president of the B.C. Lodging and Campground Association to attend the December 2, 2002 classification committee meeting. Although they initially accepted the invitation, ultimately they decided not to attend. However, the employer's representative attended. The minutes of the December 2, 2002 meeting indicate that the representative was in attendance as the representative for the employer and X Ltd. Legal counsel from a private law firm also attended as a representative for X Ltd. As well, X Ltd.'s senior vice president (Finance) attended.

The committee meeting minutes state that the intent of the meeting was to “first gain further clarity about the timeshare industry from the above-noted representatives” and secondly, “to determine the appropriate approach to classify time-share operations.” At the meeting, X Ltd. submitted background information regarding the business model of its timeshare operations. The committee and X Ltd. discussed a list of approximately 14 questions previously submitted to the representative of the employer and X Ltd. These questions dealt with the structure and operation of the timeshare business. The meeting minutes indicate that additional questions arose during the meeting, which were answered by the representatives. The minutes describe some of the discussion as follows:

[X Ltd.] advised that the reason they take the position that they should be classified in real estate is that real estate constitutes the majority of revenue. They do not deny that they are also in property management (“for lack of a better word as an ancillary part of their operations”), but when reading the classification description for real estate, property management is one of the supportive activities allowed. The consultant representing [X Ltd.] recognized that this may not have been the intention of that detail in the classification unit description and also suggested that it would be possible to have two classifications, depending on the intent of the wording in the Real Estate Classification Unit.

The consultant continued to observe that a solution to have two classifications, one for real estate and one for property management would hinge on whether the property management is a supportive or ancillary part of the operation. This is a judgment that would have to be made.

With the background previously submitted and the new information put forward at the meeting, the committee then discussed what alternatives could be used in classifying timeshare operations. The minutes of the meeting indicate that the committee decided that effective January 1, 2004 and subject to approval by the board of directors, a new classification unit would be created for all vacation timeshare operations. As an interim measure, effective January 1, 2002 to December 31, 2003, timeshare operations would be classified in two classification units to be determined at a later date, taking guidance from the Board’s multiple classification policy. The classification team would prepare a list of options with pros and cons for each, and send the choices to classification committee members for a vote. Regarding the date to apply the interim measure, the committee minutes state as follows:

Regarding the date to apply the interim measure the classification committee accepted that the date would be Jan 1 2002 and that [X Ltd.] (and the employer) had first notified us of their desire to be reclassified

only in 2002 – and misrep. policy dictates a date of Jan 1 of the year that the Board became aware. Both [the employer] and [X Ltd.] had sufficient opportunity prior to 2002 to inform the Board that they should be in a different classification. Neither responded in 1999 when we sent them a letter advising them of their classification unit for 2000 and beyond. A previous classification committee decision incorporated a similar approach to dealing with what at that time was a shortcoming in the classification structure...In the case before us now, the decision is to apply the 2 CUs as an interim measure until the new CU for timeshares is created – an additional memo which discusses options related to both the classification issue and the date issue will be distributed to the classification committee members.

The classification administrator sent a memorandum dated December 17, 2002 to the classification committee. Three decisions were before the committee: (1) to determine the CUs to apply for the interim solution; (2) to determine the effective date for the interim solution and, (3) to determine the application of experience rating. On the first issue, the memorandum stated that subject to a new CU for timeshare employers being implemented effective January 1, 2004, the classification team proposed that the classification committee “exercise an extraordinary use of discretion to permit vacation timeshare operations to receive multiple classifications; one classification to deal with the sales component of the timeshare operations, the other to deal with the accommodation component.”

The memorandum indicated that the effective date for the change to the permanent reclassification should be an operationally feasible date, which would be January 1, 2004. The memorandum stated that the effective date for the interim solution needed to be fair and reasonable. There were three options for the interim effective date.

Option 1 was the preliminary decision made by the committee on December 2, 2002. That decision was to provide an effective date of January 1, 2002 without a transfer of experience rating. This decision was based on *Assessment Policy 30:20:40* (Misrepresentation). When a firm misrepresents its operations inadvertently, a rate down change becomes effective January 1 of the year the Board became aware of the need to reclassify the firm. The memorandum stated that in this case, the Board became aware of the issue in April 2002, and therefore the effective date would be January 1, 2002. The policy *30:20:40* did not provide for the transfer of experience rating.

The second option was to provide an effective date of January 1, 2003, and to transfer the experience rating. The memorandum noted that policy *30:20:40* listed five main reasons why a firm’s classification would change (Board error, a distinct change in a firm’s operations, evolutionary change in a firm’s operations, a change in Board

classification policy, and misrepresentation). The memorandum stated that it was important to realize that the policy did not provide an exhaustive list of reasons why a classification would change, but rather, it listed the main reasons. Another reason for a change in a firm's classification might be because it is part of an emerging industry, which was the case with respect to timeshare operations. Taking guidance from an earlier case, the effective date for the time share operations interim solution would be January 1, 2003, which was January 1 of the year following the year the decision was made. Experience rating would continue under the interim CU.

The third option would be to recognize that Assessment policy did not provide for a situation such as an emerging industry and the need to create a new CU. Thus the committee could choose to implement a new CU effective January 1, 2004 and leave the timeshare employers in the status quo of their current CUs until that date. That would eliminate the need for an interim solution.

The classification team recommended the second option, and requested classification committee members to vote on the interim solution by email to the classification administrator by December 18, 2002.

The classification committee met again on December 20, 2002. The committee revisited its earlier decision to establish the new resort timeshare CU effective January 1, 2004. It determined that it would be more appropriate to establish the new CU effective January 1, 2003, subject to approval by the board of directors. That matter would be submitted to the board of directors at its February 2003 meeting.

Regarding the interim solution, the committee also revisited its previous decision regarding the date to implement the interim solution. Members of the committee unanimously agreed to a January 1, 2002 effective date. In doing so, the committee referred to *Assessment Policy 30:20:40*, item 4 (Change in WCB Classification Policy) as the reason for the classification change and effective date. Regarding the effective date to change the classification assigned to individual firms, policy *30:20:40*, item 4 stated:

#### B. Rate Down

Change effective January 1<sup>st</sup> of the year the definitions/parameters were clarified/changed or when the firm fell within the new definition/parameters, whichever is later.

The December 20, 2002 meeting minutes stated:

The new Timeshare CU does not exist until 2003. Therefore it is not possible to apply the letter of policy 30:20:40 (item 4). The 2003 rate for

the Timeshare CU will be lower than the 2003 rate for Hotels and Resorts (which is where vacation timeshare operations are currently classified). The 2002 for rate group CC (the host rate group for the Vacation Timeshare CU) is lower than the 2002 rate for rate group AL (the host rate group for Hotels and Resorts). Therefore, to apply the spirit of policy 30:20:40 (item 4), the Committee decided to assign Property Management (CU 761033 – the most appropriate classification within rate group CC) to all vacation timeshare firms for the period Jan 1, 2002 to December 31 2002.

The committee meeting minutes also stated that the classification definitions/parameters regarding timeshare operations were clarified in 2002, and since the change affected a rate down result for the timeshare employers, the effective date would be January 1, 2002.

The committee also revisited its previous decision to apply multiple classifications. The committee was satisfied that so long as it directed its mind to the applicable policy issues, it would not commit jurisdictional error by ultimately deciding that the facts warranted a deviation from published policy. Further, it recognized that to do otherwise, that is, to follow policy blindly without consideration of individual circumstances, would be a fettering of discretion. The committee discarded the multiple classification option for 2002 for the following three reasons:

1. awarding multiple classifications would be a contravention (albeit defensible) of policy.
2. multiple classifications are assigned to qualifying firms engaged in more than one industry, whereas the timeshare employers were not engaged in two or more industries but rather in one industry that appeared to be a hybrid of existing industries.
3. The committee recognized that its decision for the interim period from January 1, 2002 to December 31, 2002 needed to be consistent with the permanent solution. Since the permanent solution recognized that timeshares represented a discrete industry, and that all timeshare operations should be assigned to the new Timeshare CU effective January 1, 2003, the interim solution should also recognize that timeshare operations represented a discrete industry and that all employers should be assigned to the same classification unit.

For those reasons, the classification committee overturned its earlier decision to apply multiple classifications. Instead, it determined that a single classification for 2002 would be a “holding” classification until the new CU became effective January 1, 2003.

The committee also decided that experience rating would transfer to the Property Management CU effective January 1, 2002 and then to the Timeshare CU effective January 1, 2003.

The secretary of the classification committee wrote to the employer's representative on December 20, 2002 to advise that the committee had made a decision regarding the correct classification for his client X Ltd. The secretary stated:

At this time I cannot disclose the decision to you. This matter will be going before the Board of Directors at their February 2003 meeting. I will have a decision to you by the end of February 2003, pending a decision by the Board of Directors.

Thank you for your patience as we work towards a resolution for your client.

The classification committee prepared a 14 page written submission entitled "Executive Summary" for the board of directors' meeting of February 11, 2003. I will not review the entire submission, but refer to aspects that are relevant to the issues in this appeal. The final committee recommendation to the board of directors was slightly different than the recommendation formulated by the committee as stated in the meeting minutes of December 20, 2002.

The executive summary noted that resort timeshare operations did not "fit" well into the definitions of any one of the 617 classification units published in the 2003 Classification and Rate List (which constituted published policy of the Board). Depending on the way in which these types of firms represented themselves to the Board upon initial registration, they ended up in four different classification units: CU 761008 (Cabin, Cottage, Lodge, Resort or over overnight rental accommodation); CU 761017 (Hotel); CU 761033 (Property Management) or CU 762033 (Real Estate Agency).

The summary stated that two timeshare firms, the employer and X Ltd. had requested a classification review in 2002. The firms wanted reclassification from CU 761008 (Cabin, Cottage, Lodge, Resort etc.) into CU 762033 (Real Estate Agency) with a retroactive effective date of January 1, 1994 (when coverage became mandatory for the real estate industry). Alternatively, the firms had requested multiple classifications.

The committee advised that the real estate industry classification was examined and rejected as an option, as it did not reflect the operational realities of operating a resort. As well, the cost experience of vacation timeshare firms and firms in the real estate industry was quite different. The committee also advised that the multiple classification

option was not appropriate, as it would contravene published policy and there was not enough evidence in this situation to justify a departure from multiple classification policy.

As of January 1, 2003, the Board had revised its assessment published policies with the publication of a new *Assessment Manual*. The executive summary referred to the new policy item numbers in this new *Assessment Manual*. In regard to effective date for a classification change, the executive summary stated as follows:

Where it is deemed that a firm's classification unit must change, policy AP1-37-3 guides the effective date of such a change. This policy provides that where a classification must change due to a change in Board classification practice (the issue on which the Board of Directors is being asked to decide), the effective date will vary depending on the base rate of the new classification assigned. In cases where the base rate goes up, the effective date will be "January 1<sup>st</sup> of the year following the year the Board was aware of the need to change the firm." In cases where the base rate decreases, the effective date will be "January 1<sup>st</sup> of the year the definitions/parameters were clarified/changed or when the firm fell within the new definition/parameters, whichever is later.

It should be noted that the firms brought this issue to the board in early 2002. The Board of Directors is deciding this matter in 2003, (thus, in a rate-down scenario, a January 1, 2003 date follows the letter of policy), but a January 1, 2002 effective date could be seen to better fit the spirit and intent of this policy. The same reasoning applies to a rate-up scenario – giving such firms a classification change effective date of January 1, 2004.

The executive summary indicated that the classification committee had consulted the B.C. and Yukon Hotel Association, but although it had recognized the issue, it decided not to give input to the committee. The B.C. Lodging and Campgrounds Association advised the committee that some campgrounds operate on a timeshare basis, but it did not believe such operations would be appropriately classified in a classification unit for resort timeshare operations. It considered such operations as different in nature from regular resort timeshares that operate more similarly to hotels or condominiums. The executive summary also described the submissions made by the employer and X Ltd. to the classification committee, advising that a “representative of two large resort timeshare firms has made a presentation to the Classification Committee and discussed classification of these operations at length with committee members.” The executive summary noted that the Assessment Department had also contacted seven other jurisdictions (Quebec, Alberta, Ontario, Florida, Nevada, Washington and Arizona) to research how the Workers’ Compensation Boards in those jurisdictions classified resort timeshare firms.

The executive summary offered five options (outlining advantages and disadvantages of each option) to the board of directors:

- Option 1 – Status Quo: the Board would make no changes to the existing classification system, but would continue to classify resort timeshare firms within various existing classification units;
  - One of the disadvantages of this option referred to by the summary was the significant opposition to the status quo from the firms involved. As well, the committee noted that it would violate the principle that competing businesses should be classified in the same classification unit.
- Option 2 – Reclassify all resort timeshare firms into one classification from the current classification scheme;
  - One of the disadvantages noted was that amending classification unit descriptions to include activities not originally conceived for the classification would join two separate industries within the classification system, which would be contrary to normal practice and might result in cross subsidization of one industry by another.
- Option 3 – Create a new classification for resort timeshare operations, effective January 1, 2003. Such firms would remain in their current classifications until the new classification unit became effective;
  - One of the disadvantages noted was that as “the firms involved brought the issue to the department’s attention in 2002, a January 1, 2002 effective date for the new classification may be seen to be required for equitable application of policy.”



- Option 4 – Create a new classification for resort timeshare operations, effective January 1, 2003. In addition, for the year 2002, the Board would retroactively assign such firms to the classification unit with the most similar cost levels located in the same rate group as the proposed new classification unit, as a device to mimic retroactively creating a new classification in 2002. The classification unit that best meets this criterion was 741013 (General Retail – not elsewhere specified);
  - One of the disadvantages noted was that this option “technically violates the existing policy since it assigns resort timeshare firms in a classification unit that does not expressly match their cost rate. This may be justified on the basis that it is simply a device that mimics placing resort timeshare firms in their own classification effective January 1, 2002, which would be an operationally

unfeasible option. To create a new classification effective January 1, 2002 would potentially have significant negative impact on the Board's operating systems. Systems administrators have advised against retroactive creation of classification units, as this would involve significant testing and other Information Technology work."

- One of the advantages noted was that "This option is more favourable to the resort timeshare firms that any other option other than assigning them to the real estate classification. It will result in fewer assessments collected and assessment savings for these firms.
- Option 5 – Create a new classification for resort timeshare operations, effective January 1, 2003. As in option 4, the Board would also retroactively assign the firms to an interim classification during 2002. However, under this option, the classification selected would have regard to industry similarity as well as costs. The two main choices would be classification units 762033 (Real Estate Agency) and 761033 (Property Management).
  - The disadvantages noted were that since the assessment rate charged to real estate agencies is significantly less than would likely be charged to the proposed new classification, placing resort timeshare firms with real estate agencies would mean the firms' costs would be subsidized by genuine real estate agencies. Further, since the assessment rate charged to property managers is significantly more than would likely be charged to the proposed new classification, placing resort timeshare firms with property managers might mean these firms would be subsidizing the property managers.

The executive summary stated that the classification committee's recommendation was option 4. In this regard, the summary stated that it would be preferable to have an effective date of January 1, 2002 for a new classification unit for resort timeshare operations, but that Board systems would not respond well to such a retroactive change. The summary stated:

Thus, the committee recommends that known timeshare operation firms should be retroactively assigned to classification unit 74103 (General Retail – not elsewhere specified), effective January 1, 2002. This classification unit was chosen as it is in the industry and rate groups that the new resort timeshare classification will reside in. This mimics the creation of a new classification for resort timeshare firms effective January 1, 2002. Thus, the department recommends the Board adopt option 4.

Option 4 ensures equitable classification between competitors that sell a very similar, but not identical product. It also ensures less

cross-subsidization within the classification system by virtue of the fact that a discrete industry would no longer be classified in several different rate groups.

The base rate of a new resort timeshare classification (and the general retail classification) would be lower than that of the other existing industry classifications in which resort timeshare firms were currently classified (apart from the real estate agency classification). The executive summary noted that the implementation of a new classification with a lower base rate than most resort timeshare firms were currently assessed, would reduce assessments paid to the Board by over \$200,000.00 for each year of 2002 and 2003.

On February 11, 2003, after considering the committee's recommendations, the board of directors passed *Resolution 2003/02/11-06*. It reads as follows:

**BOARD OF DIRECTORS**

Douglas Enns, Chair Terry Brown Stephen Hunt  
Roslyn Kunin Calvin Lee  
Peter Morse Arlene Ward

**2003/02/11- 06**

**THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA**

**RESOLUTION OF THE BOARD OF DIRECTORS**

**Re: Establishment of a New Classification Unit  
Resort Timeshare Operations**

**WHEREAS:**

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("*Act*"), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

**AND WHEREAS:**

For certain employers presently classified in Cabin, Cottage, Lodge, Resort, or Other Overnight Rental Accommodation (not elsewhere

specified), and other classifications, the Classification Committee has recommended

- (a) the creation of a new classification unit described as Resort Timeshare Operations effective January 1, 2003; and,
- (b) the affected employers will be retroactively placed in an interim classification with an assessment base rate of \$0.89 effective January 1, 2002;

**AND WHEREAS:**

The Board has authority pursuant to the *Act* to create and rearrange classes under Section 37(1) and (2) of the *Act* and to adjust assessment rates under Section 42 of the *Act*;

**THE BOARD OF DIRECTORS RESOLVES THAT:**

- 1. A new classification unit described as Resort Timeshare Operations be created effective January 1, 2003;
- 2. The employers presently conducting business as described in Resort Timeshare Operations be transferred to that classification unit from their present classifications;
- 3. No adjustment will be made to the funds, reserves and accounts of other classifications consequential to the transfer of certain employers to Resort Timeshare Operations;
- 4. The affected employers will be retroactively placed in a classification unit having an assessment base rate of \$0.89 effective January 1, 2002; and
- 5. This resolution constitutes a policy decision of the Board of Directors.

DATED at Richmond, British Columbia, on February 11, 2003.

**By the Workers' Compensation Board**

**DOUG ENNS  
CHAIR, BOARD OF DIRECTORS**

On March 10, 2003, the Board's manager of classification and rate modification programs, Assessment Department, wrote to the employer, in response to its earlier request for a classification review. The manager referred to the board of directors' *Resolution 2003/02/11-06* and advised that to date, the Board had been able to identify 22 employers that it believed were engaged in the resort timeshare industry. The employer was one of those firms. The manager then stated that effective January 1, 2003, the employer would be assigned CU 761055 (Resort Timeshare Operations), with a 2003 base rate of \$0.89 per \$100.00 of assessable payroll. Effective January 1, 2002, the employer would be assigned a CU with a base rate of \$0.89 per \$100.00 of assessable payroll. The manager advised that the 2002 CU was a "holding" CU, not representative of the employer's industrial undertaking. He said that the holding CU was merely a method of providing the employer with the appropriate rate for 2002. The Board would also transfer the employer's experience rating data.

The employer then asked the manager to provide written reasons for the effective dates of the reclassifications. The manager responded in a letter dated April 2, 2003. He stated that the effective dates were made in accordance with *Resolution 2003/02/11-06*. He also stated that the decision to implement the classification change effective January 1, 2002 was "an application of Assessment Operating Policy AP1-37-3 – Classification Changes – item 4 – Change in Board Classification Practice," defined as the Board moving an industry or segment of an industry from one classification to another, recognizing and defining a new industry classification or changing the definitions of the industry classifications. The manager advised that the policy applied to the case at hand. Although the board of directors had established a new industry classification for resort timeshare operations effective January 1, 2003, the Board had determined that there was a need to define this new industry classification in late 2002. Therefore, in keeping with the spirit of Board policy, the board of directors had made the classification change for the employer effective January 1, 2002.

The employer had referred the manager to its 1994 onsite audit, and the auditor's description of operations as "Rental of resort accommodations." The manager stated that based on that description, the Board at that time had properly assigned the employer to the appropriate classification unit: CU 062703 (Resort Cabins, Tourist Resorts). The employer had also referred the manager to the fact that it had initially requested a classification review in December 2001. The manager stated that the Board had responded to that request by commencing an investigation to resolve the issue of appropriate classification of firms engaged in the resort timeshare industry. This resulted in the Board deciding, in late 2002, that there was a need to define a new industry classification, with the board of directors approving its Resolution of February 11, 2003 to establish a new classification unit effective January 1, 2003 and reclassifying affected employers into a holding classification unit for 2002.

The employer then appealed the manager's decision to the Review Division, which issued the August 8, 2003 decision at issue in these proceedings.

On August 28, 2003, the employer wrote to the chair of the board of directors, attaching a copy of its submission to the Review Division that had outlined its concerns regarding the effective dates set out in *Resolution 2003/02/11-06*. The employer expressed its hope that the Board would reconsider its initial decision in light of the information the employer had provided in its attached submission.

The chair of the board of directors referred the employer's August 28, 2003 letter to the vice president of the Board's Finance Division. In a letter dated September 29, 2003, the vice president advised that the Review Division decision was a final decision with which the Board must comply. He referred to the employer's appeal rights to WCAT, and noted the provisions of section 251 of the Act in which WCAT could consider whether a policy of the board of directors should not be applied.

The employer then initiated this appeal to WCAT.

### **Employer's Submissions**

The employer relied on its submission to the Review Division as well as additional arguments presented in these appeal proceedings.

The employer submitted that the board of directors' Resolution was illegal (patently unreasonable) because there was no consultation with any of the employers, or their industry association, affected by the Resolution. Further, the employer argued that the information provided to the board of directors by the classification committee contained material errors of fact and omission. The employer argued that if the board of directors had been given full and accurate disclosure of the facts, the Board would have properly applied the "Board error" component of *Assessment Policy AP1-37-3* and made the classification adjustment to a "holding" CU retroactive to January 2000. The employer argued that this would not constitute a policy change, because it would not require creating a new classification unit.

#### *Lack of Consultation*

The employer argued that the classification committee conducted its reviews, and gathering of information "with considerable secrecy." The employer submitted that as a result, affected employers were never given an opportunity to know about and comment on the information given to, options being considered by, nor the recommendations provided to, the board of directors. The employer referred to the fact that it needed to make a freedom of information request to the Board, followed by an appeal to the Information and Privacy Commissioner, in order to obtain disclosure of all the relevant

documents. This disclosure was finally received approximately 16 weeks after the employer made its request.

The employer referred to the last line of the letter dated March 22, 2004 from the director of the Assessment Department to WCAT, in which he stated that the Board had given the B.C. and Yukon Hotel Association and the B.C. Lodging and Campground Association an opportunity to “discuss and opine” on the Resolution. In that regard, the employer questioned why those associations were shown the Resolution and asked to comment on it, whereas the affected employers were “kept in the dark.”

In support of its argument that the Board was secretive about its review of the resort timeshare industry, the employer referred to the December 20, 2002 letter its representative received from the secretary of the classification committee, advising that he could not at that time disclose the classification committee’s decision regarding X Ltd.’s correct classification to the representative. The secretary advised that the matter was going before the board of directors in February 2003 and that the Board would have a decision for the representative by the end of February 2003.

The employer stated that the Board invited only one employer, X Ltd., to attend a meeting with the classification committee. Although the employer’s representative (and its representative at the time) was at the meeting, the employer’s point is that the Board only invited X Ltd., not the employer or other affected employers, to attend the meeting.

Further, the employer stated that its representative and X Ltd. did not make a “presentation” to the committee, as described by the executive summary for the board of directors. The committee did not ask for a presentation, but instead gave a list of ten questions in advance to be answered in writing prior to the meeting. Those questions and answers were then discussed at the meeting. The employer argued:

As previously noted, the meeting (and the 10 questions) did not reveal any of the options being considered by the Committee and the employer thus had no opportunity for input or corrections...The assessment department does not refer to consultations with any of the remaining 20 employers identified by the assessment department, so presumably none took place. We do not know the nature or relevance of the “consultations” with the BC and Yukon Hotel Association and the BC Lodging and Campground Association, since they “declined” to provide input. In any event, neither of these Associations represents any of the employers involved with this appeal.

Expanding on that last point, the employer notes that neither it nor the other four firms involved in similar WCAT appeals have been a member of the B.C. and Yukon Hotel Association or the B.C. Lodging and Campground Association. All five firms are

members of the Canadian Resort Development Association (CRDA). The employer submitted that the Board never approached the CRDA, and stated that it does not understand how or why the Board selected the other two associations for consultation. The employer stated that apart from itself and X Ltd. (the two firms who had raised the issue with the Board in December 2001), none of the other affected employers were even aware that an industry classification review was taking place until after informed about the February 2003 board of directors' Resolution.

### *Error in Applying Board Published Policy*

For ease of reference, section AP1-37-3 in the *Assessment Policy Manual* (effective January 1, 2003) states as follows:

The effective date of a change in a firm's classification depends on the reason for the change. There are five main reasons why a firm's classification would change:

- (1) *Board error.* This occurs if the information is available and complete to allow the proper classification to be applied but a clear error is made in classifying a firm; it includes an improper classification continuing after a Board officer has audited a firm. It does not include borderline classification questions requiring a judgment decision. Nor does it include situations where the information supplied by the firm is incomplete or inaccurate, regardless of whether this was deliberate or inadvertent.
- (2) *Change in the firm's Operations – Distinct.* This occurs where a firm undertakes a new, unrelated business activity that is not ancillary to or supportive of the firm's current operations. It does not include an expansion or contraction of the firm's current operations. If that results in a different classification, it is covered by (c).
- (3) *Change in Firm's Operations – Evolution.* This refers to an enhancement, expansion, contraction or a change in method of producing the same product/service, which results in a change of classification. If there is a fundamental change in a firm's operations, it is covered by (b) even though the new operation may be a related industry utilizing the same equipment.
- (4) *Change in Board Classification Practice.* This can result from the Board moving an industry or segment of an industry from one classification to another, recognizing and defining a new industry



classification or changing the definitions of the industry classifications.

- (5) *Misrepresentation.* A firm may represent its operations deliberately or inadvertently. Misrepresentation can be by omission of information, submission of false information, or by words which, though reasonably interpreted, do not accurately reflect the firm's operations.

The policy went on to provide a table to show how each of the foregoing situations would affect the date when a base rate increase or decrease would be effective. As only items (1) and (4) above are relevant in this case, I will just refer to the table provisions applicable to those items with respect to the effective dates of base rate decreases. For item (1), Board error (which the employer has alleged was the situation in this case), the policy provided that for the effective date of a base rate decrease, the Board might use the date when the error was made. For item (4), Change in Board Classification Practice, the policy provided that for the effective date of a base rate decrease, the Board would use "January 1<sup>st</sup> of the year the definitions/parameters were clarified/changed or when the firm fell within the new definition/parameters, whichever is later."

The employer's argument is that the board of directors erred in applying the foregoing policy AP1-37-3, because it relied on the classification committee's executive summary, which contained significant factual errors, including errors of omission. The employer argues that if the executive summary had provided full and accurate information to the board of directors, the board of directors would have concluded that "Board error" applied, and that the retroactive holding CU should be applied to all resort timeshare employers as of January 1, 2000 (when the Board introduced its new classification system). Alternatively, still applying the concept of Board error in policy AP1-37-3, the board of directors would have concluded that the proper and fair effective date for assigning a retroactive holding CU would be January 1 of the year a resort timeshare employer first questioned its classification. The alleged errors are outlined by the employer as follows:

- Both the employer and X Ltd. made their initial written requests for a classification review in December 2001, followed by written submissions in April 2002. Further, the executive summary did not disclose to the board of directors that several other timeshare firms had also formally asked for classification reviews, or raised concerns about their classifications, from as early as 1999, but the Assessment Department did not act on their concerns at that time. As well, the executive summary did not disclose to the Board that several other timeshare firms had been audited by the Board in earlier years, and none of those audits led to a

reclassification of the firms, even though the phrase “time share sales” had been used to describe their operations by the auditor or in the initial Board registration forms. Finally, the employer argues that the executive summary does not disclose to the board of directors that the Board failed to identify a major industry group (resort timeshare firms) when it introduced the new classification system in January 2000. In the employer’s view, that constituted “Board Error” as identified in policy AP1-37-3.

- The executive summary did not disclose that the classification committee did not give affected employers any opportunity to supply information, or evidence, about whether multiple classification was an option, or whether multiple classification for the employers would contravene Board policy;
- The executive summary did not refer the board of directors to other reasons in policy AP1-37-3 for the reclassification of resort timeshare firms, such as Board error.
- The executive summary was not accurate in listing the number of firms affected by the proposed reclassification. It listed 22 employers, but according to the employer, as of July 2003, only 11 have in fact been reclassified by the Board in the new resort timeshare CU, as well as 3 other firms who were not included in the list of 22. The employer submits that since the list of 22 in the executive summary is only “50% or less accurate”, it casts considerable doubt on the reliability of all the financial information (analyses of assessments paid, cost rate, comparable base rates, estimated changes in assessments). The employer argues that these material inaccuracies cast doubt on the recommendation made in the executive summary by the classification committee to the board of directors.
- The executive summary did not consider how the Board could otherwise deal with the “cross subsidization” issue that had existed since January 2000, that is, it did not consider assigning the holding CU from an earlier date. The employer states that the base rate for the holding CU (general retail) has remained relatively constant at \$0.85, \$0.88, \$0.89 and \$0.89 from 2000 to 2003. Similarly, the base rates for the Hotel, Cabin, Lodge, Real Estate and Property Management CUs have not changed significantly since 2000. The employer argued that it would not require any system changes at the Board to retroactively assign the resort timeshare industry firms to the holding CU as of January 2000 or January 2001, instead of January 2002. However, the executive summary did not explore that option for the board of directors.

## Reasons and Findings

*What is the scope of WCAT's jurisdiction in reviewing a board of director's Resolution? Scope of Review – does WCAT have any jurisdiction to review the manager's March 10, 2003 decision as confirmed by the Review Division in its August 8, 2003 decision?*

In his August 8, 2003 decision, the review officer stated that section 96.2(1)(b) of the Act limited the Review Division's authority to review Board decisions "in a specific case." *Resolution 2003/02/1-06* was stated to be a policy decision. The manager's March 10, 2003 decision letter simply applied the Resolution. The review officer found that the Review Division had no authority to review the Resolution as it was general in scope and did not purport to deal with a specific case.

The manager's March 10, 2003 decision, however, did apply the Resolution to a specific case, namely that of the employer. Therefore I am not certain that I agree with the review officer's interpretation of section 96.2(1)(b) of the Act as restricting the authority of the Review Division (and ultimately, WCAT under section 239(1) of the Act) to consider the legality of the Resolution itself. This is because it would seem possible to consider, in the context of the specific case of the manager's application of the Resolution to the employer, the legality of the Resolution itself with respect to that specific case.

The review officer did not refer to section 96.2(2)(c) and (d). Those provisions provide that no review may be requested of an assessment or classification matter respecting the following:

- 96.2(2)(c): an assignment of an employer or a subclass to a class or a subclass, except the assignment of an employer to a class or a subclass that
  - (i) has employers as members, and
  - (ii) does not have subclasses as members;
  
- 96.2(2)(d): a withdrawal of an employer or a subclass from a class or subclass, except a withdrawal of an employer from a class or subclass that
  - (i) has employers as members, and
  - (ii) does not have subclasses as members;

The Classification and Rate List now uses terminology different from the Act. Thus the terms “sector”, “subsector” and “classification unit” are used instead of the statutory references to classes and subclasses. As well, the term “rate group” may be used. In the new assessment policy amended as of March 3, 2003, item AP1-37-1 clarifies the framework of the classification system. It provides:

The terms classes, subclasses and further subclasses are used in section 37 of the Act. For the purposes of describing the Board's classification system, a sector is equivalent to a class, a rate group is equivalent to a subclass, and an industry group and a classification unit are equivalent to further subclasses.

The policy goes on to provide that classification units that are large enough will form their own industry group. Otherwise, the Board will combine classification units into industry groups on the basis of similarity of industrial activity and a reasonable expectation of similar cost rates.

In any event, *Resolution 2003/02/1-06*, as applied by the manager in his March 10, 2003 decision, moved the employer in this case from the service sector 76, subsector 7610 (Accommodation, Food and Leisure Services Subsector), classification unit 761008 (Cabin, Cottage, Lodge Resort), to, effective January 1, 2002, the trade sector 74, subsector 7410 (Retail subsector), classification unit 741013 (General Retail). The Resolution as applied by the manager then moved the employer, effective January 1, 2003, to a completely new classification unit, the newly created resort timeshare CU 761055, back into the service sector 76, subsector 7610. The Resolution, in effecting both an interim solution to lower the employer's base rate for the year 2002, effectively reclassified the employer by moving it back and forth across sector and subsector lines in the Classification and Rate List.

Arguably, the manager's decision of March 10, 2003, in applying *Resolution 2003/02/1-06*, in effect withdrew the employer from one class and subclass (service sector and 7610 subsector) and assigned it to a completely different class and subclass (trade sector and 7410 subsector). That decision, including the ancillary effective date of the employer's withdrawal from one class and assignment to another, was, arguably pursuant to section 96.2(2)(c) and (d) of the Act, not a matter for review by the Review Division.

The wording of section 96.2(2) c) and (d) of the Act is very difficult to understand and apply, and it is made even more difficult by the fact I earlier mentioned, namely, that the Classification and Rate List now uses terminology different from that of the Act. I am not certain that the effect of section 96.2(2)(c) and/or (d) would be to prevent the Review Division (and hence, as well, a further appeal to WCAT under section 239(1) of the Act) from reviewing the manager's decision of March 10, 2003. Since the point was

not argued before me, I do not rest my decision on that matter. But I do point out that as a preliminary step for WCAT in determining its scope to review a board of directors' Resolution, the first question to ask is whether there is even jurisdiction to review the Board officer's decision that applied the Resolution. In this case, I am prepared to assume that WCAT does have jurisdiction under section 239(1) of the Act to deal with the employer's appeal of the August 8, 2003 Review Division decision that confirmed the Board manager's March 10, 2003 decision.

#### *Scope of Review – Standard of Review*

The scope of jurisdiction also pertains to the standard of review that WCAT should apply in dealing with the challenge to a board of director's Resolution.

*Resolution 2003/02/11-06* states, on its face, that it was issued in accordance with the authority of the board of directors under sections 37(1), 37(2), 42 and 82 of the Act. Section 82 of the Act refers to the Board's authority to set and revise as necessary the policies and direction of the Board, including policies respecting compensation, assessment, rehabilitation and occupational health and safety, and among other things, to develop policies to ensure adequate funding of the accident fund. Section 37 of the Act provides that industry classes are established for the purpose of assessment in order to maintain the accident fund. This relates to the Board's obligation under section 36 of the Act to "continue and maintain the accident fund for payment of the compensation, outlays and expenses" under Part 1 of the Act (compensation to workers and dependants) and for payment of expenses incurred in administering Part 3 of the Act (occupational health and safety). It also relates to the Board's obligation under section 39(1) of the Act to assess and levy assessments rates on payroll, sufficient funds for the purpose of maintaining an adequate accident fund.

Under section 37(2) of the Act, the Board has the authority, for the purposes of assessment in order to maintain the accident fund, to create new industry classes, to divide classes into subclasses and divide subclasses into further subclasses, and to withdraw an employer from a class or subclass and transfer it to another class or subclass or form it into a separate class or subclass. Under section 42 of the Act, the Board has the obligation to establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just, and may adopt a system of experience rating in order to confer special rates or assessments on an industry or plant to correspond with the relative hazard or cost of compensation of that industry or plant.

Before the legislative amendments to the Act which created WCAT, the former Appeal Division had dealt with several challenges to the legality of Resolutions issued by the governing body of the Board (formerly known as the Panel of Administrators). In *Appeal Division Decision #2002-2849* (November 8, 2002), an employer had argued on

appeal that a panel of administrators' Resolution was unlawful as contrary to the Act. share of the surplus account. In *Decision #2002-2849*, I indicated that the standard of review which should be applied by the Appeal Division to the validity of a panel of administrators' Resolution was whether the Resolution contravened the Act, or whether it was consistent with a viable interpretation of the Act. In that regard, I stated:

After considering the matter, I have decided that the appropriate standard of review of the legality of a Panel of Administrators' policy is the standard referred to by the panel minority in Decision #99-0734, which standard the Appeal Division recently adopted in Decision #00-0668 [16 W.C.R. (No. 2), (May 10, 2000)]. The reasons for this choice are the persuasive ones expressed by the minority opinion in Decision #99-0734. To summarize, by Sections 82 and 83.1 of the Act, the legislature has vested responsibility and authority for policy-making in the Board's governing body. *Policy-making involves consideration of a broad range of factors, of which legal interpretation of the Act is only one. Further, policy-making generally involves making choices among various permissible options, which requires an evaluation of the significance and effect of the choice of the workers' compensation system. Policy-makers need to consider numerous interests simultaneously, and balance the benefits and costs for many different stakeholders in the workers' compensation community. To the extent that the Board's governing body makes choices guided by economic and systemic considerations, which involve a balancing of competing interests, a second-guessing of those choices by the Appeal Division would involve an improper encroachment on the policy-making authority of the governing body under Section 82 and 83.1 of the Act. Thus, if a policy is based on a viable interpretation of the Act, that is, one that is supportable according to accepted principles of statutory interpretation, then the policy would not be based on an error of law.*

[reproduced as written, italic emphasis added]

It is clear from the foregoing passage that under Appeal Division jurisprudence, the standard of review involved considerable deference to the statutory authority of the Board's governing body in making Board policy under section 82 of the Act.

With respect to the appropriate standard of review to apply to the issue of the validity of a Board policy, Appeal Division *Decision #2001-2111/2112* (October 26, 2001), 18 W.C.R. 33 is also notable. In that case, the panel concluded:

In summary, we conclude that a standard of patent unreasonableness is an appropriate standard for the Appeal Division to apply to its review of policy decisions of the governing body of the Board. A policy provision will be patently unreasonable if it is not viable in light of the relevant legislation (constitutional legislation may pose different considerations). If it requires

some significant searching or testing to find the defect then it may be merely unreasonable and valid. But if the defect is apparent on the face of the policy then it is patently unreasonable and invalid.

Sections 250(2) and 251(1) of the Act, in force as of March 3, 2003, are statutory provisions that make very clear the degree of deference that WCAT is required to give a board of directors' policy. Section 250(2) provides that WCAT must apply a policy of the board of directors that is applicable in a case. Section 251(1) states that WCAT may refuse to apply such a policy only if the policy is "so patently unreasonable that it is not capable of being supported by the Act and its regulations." If, in an appeal, an appeal tribunal considers that a policy of the board of directors should not be applied, the issue must be referred to the WCAT chair. Subsections (2) through (9) of section 251 then set out a process whereby the appeal proceedings are suspended pending a determination by either the chair or the board of directors. Under section 251(4), if the chair determines that the policy should be applied, the chair must refer the matter back to the panel and the panel is bound by that determination. If the chair determines that the policy should not be applied, the chair must send a notice of that determination, with written reasons, to the board of directors. The board of directors must, within 90 days of receiving notice from the chair, review the policy and determine whether WCAT may refuse to apply it as being patently unreasonable under section 251(1). Under section 251(8), after the board of directors makes a determination, it must refer the matter back to WCAT, and WCAT is bound by that determination.

Section 251(1) of the Act specifies a statutory standard of review for WCAT of policies of the board of directors. This standard, the "patently unreasonable" test, establishes a very high degree of deference for the board of directors in its policy-making role under the Act. The phrase "patently unreasonable" was not used in *Decision #2002-2849*, but rather a test of "viability with the Act" was used. In Appeal Division *Decision #2001-2111/2112*, the "patently unreasonable" test was articulated. In my view the considerable degree of deference and the standard of review used in those cases were intended to be similar, if not the same. Overturning a Board policy only if it was not viable under the Act (or based on a viable interpretation of the Act), would seem to be essentially the same as applying a Board policy unless one found it to be so patently unreasonable that it was not capable of being supported by the Act and its regulations.

The next issue is whether *Resolution 2003/02/1-06* was a “policy” of the board of directors, thus attracting the standard of review referred to in section 251(1) of the Act. In Canadian administrative law, a “policy” is a type of delegated legislative function carried out in a context that benefits the public interest. It is to be contrasted with decisions or functions of an administrative or quasi-judicial nature that affect individual concerns or rights unique to only certain parties.

*Resolution 2003/02/1-06* states, on its face, in paragraph five that “This resolution constitutes a policy decision of the Board of Directors.” In *Aasland v. British Columbia (Ministry of Environment, Lands and Parks)*, [1999] B.C.J. No. 1104 (Vancouver Registry No. A990597) (QL), 19 Admin. L. R. (3d) 154 (S.C.), Mr. Justice Edwards of the B.C. Supreme Court stated that the form of an instrument through which a statutory power is exercised does not necessarily determine its classification. Extrapolating from that point, the board of directors could not definitely deem a Resolution to be a matter of policy simply by stating so on the face of Resolution. If in fact the board of directors was exercising a quasi-judicial or administrative function, the board of directors could not escape that fact by claiming the function to be the exercise of its policy-making role.

In this case, however, after reviewing the Resolution and the background to its development, I am satisfied that the Resolution does constitute a policy decision of the Board.

Under section 36(2) of the Act, the Board is solely responsible for the management of the accident fund and must manage it with a view to the best interests of the workers’ compensation system. The statutory authority in section 37 of the Act to classify industries, to create and divide classes and subclasses of industries, and to assign employers to industries or one or more classes or subclasses, are powers provided to the Board for the purpose of raising adequate assessments in order to maintain the accident fund.

*Resolution 2003/02/11-06* created a new classification unit of “Resort Timeshare Operations,” pursuant to the Board’s authority under section 37(2) of the Act. The term “classification unit” is not found in the Act, but policy in AP1-37-1 indicates that a classification unit is a further subclass of a subclass of a class (or sector). Further, again under section 37(2) of the Act, the Resolution had the effect of withdrawing certain employers from one class and subclass and transferring them across industry lines to a different “holding” class, subclass and classification unit effective January 1, 2002, and then again transferring them across industry lines to form them into a separate classification unit of “Resort Timeshare Operations,” effective January 1, 2003. The issue of whether the new base assessment rate for employers in the resort timeshare industry should be applied prospectively or retroactively was part of the Board’s exercise of delegated legislative authority under the Act to create and implement a new classification unit. The Resolution, as a whole, exemplified the



exercise of delegated authority from the legislature to the Board to make any necessary changes to the Board's classification system that would best maintain a public policy purpose. That public policy purpose is the appropriate management of the accident fund, which involves the design of an employer classification system that will provide for adequate assessments to ensure that the fund will be continued and maintained for payment of the necessary expenses under Parts 1 and 3 of the Act.

In reading section 37 of the Act, it is clear that the legislature understood that the design of an appropriate employer classification system was not a static matter. Rather, it would be an ongoing process of revision and fine-tuning for the board of directors. In carrying out its statutory mandate under section 37 of the Act, the board of directors would need to be responsive to changes and developments involving industries and employers.

The 2003 Classification and Rate List, published by the board of directors (formerly the panel of administrators), states that the Rate List is published policy of the Board under section 82 of the Act. Again, while that statement alone does not decide the issue, I agree that the annual classification and rate list constitutes published policy of the Board's governing body. Under policy AP1-37-1 of the Board's *Assessment Manual*, which is without doubt published policy of the Board, there is the statement that:

Every year the Board publishes the *Classification and Rate List*, which forms part of Board policy. This publication lists every classification unit and the assessment rate assigned to it for the year.

The Classification and Rate List represents a type of legislative function carried out by the board of directors under its statutory mandate to create and maintain the classification system and to collect assessments in order to manage the accident fund. The list does not represent a type of administrative or quasi-judicial decision involving the adjudication of disputes between entities or affecting only the private concerns of certain individuals or entities. As the List represents published Board policy, then any revisions to that list fall into the category of Board policy. In this case, *Resolution 2003/02/1-06* revised the year 2003 Classification and Rate List by creating a new classification unit described as Resort Timeshare Operations and by changing the base assessment rate for the employers who would be moved to the new resort timeshare classification. This revision to published policy required the exercise of policy-making authority by the board of directors, and *Resolution 2003/02/1-06* was the means to achieve that end.

Having decided that *Resolution 2003/02/1-06* constitutes published policy of the board of directors, I find that pursuant to sections 250(2) and 251(1) of the Act, as a panel of WCAT, I must apply the Resolution unless I find it to be so patently unreasonable that it is not capable of being supported by the Act and its regulations.

*Was Resolution 2003/02/1-06 patently unreasonable because of a lack of adequate consultation with the employer, other resort timeshare employers or an industry association representing the employers?*

The employer's argument on this point is that the Board denied it natural justice in formulating the Resolution, and that this breach of natural justice rendered the Resolution "patently unreasonable." My first difficulty with this issue is that there is a substantial body of case law suggesting that it is not appropriate to characterize a procedurally unfair decision or resolution as "patently unreasonable." Under section 250(1) of the Act, WCAT may consider all questions of fact and law arising in an appeal. As natural justice or procedural fairness is a question of law, or mixed fact and law, I am satisfied that WCAT has the authority to determine whether a breach of natural justice has occurred in any given case. I can also accept that WCAT might well have the jurisdiction to set aside or vary some types of Board decisions on the ground of a breach of natural justice by the decision-maker.

However, section 251 of the Act is a privative clause which requires WCAT to give deference to policies of the board of directors. The absence of deference in a procedural fairness inquiry is inconsistent with section 251's standard of review. In other words, in determining whether the duty of fairness or natural justice has been met, there is no deference in that standard of review. The test is correctness: either the decision-maker has complied with procedural fairness, or it has not complied with procedural fairness. Mr. Justice Binnie, writing for the majority of the Supreme Court of Canada in *CUPE v. Ontario (Minister of Labour)* [2003] 1 S.C.R. 539; [2003] S.C.J. No. 28 (QL); 2003 SCC. 29, explained it this way:

The content of procedural fairness goes to the manner in which [a decision maker] went about making [the] decision, whereas the standard of review is applied to the end product of [the decision maker's] deliberations.

Similarly, Madam Justice Arbour in *Moreau-Berube v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249; [2002] S.C.J. No. 9 (QL); 2003 SCC 11 said of procedural fairness:

The third issue [procedural fairness] requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

With this jurisprudence in mind, section 251(1)'s privative clause allowing WCAT to refuse to apply a board of directors' policy *only* if the policy is so patently unreasonable

that it is not capable of being supported by the Act and its regulations, suggests an intent by the legislature that WCAT focus on the end product, that is the substance or content, of a board of directors' policy, not the steps taken by the board of directors to develop that policy. This interpretation is supported by section 247(4) of the Act, which provides that:

...a member of the board of directors or an officer, an employee or a contractor of the Board may not be compelled to give evidence or produce books, papers, documents or things respecting the development or adoption of the policies of the board of directors.

In this case, when I requested disclosure of relevant documents related to the consideration and development of *Resolution 2003/02/1-06*, the Board voluntarily complied by sending me copies of the freedom of information disclosure it had earlier provided to the employer. In another case, however, if the Board did not voluntarily comply with a request for relevant documentary evidence, and without the statutory authority for WCAT to compel disclosure of relevant evidence, it might be difficult for WCAT to rely only on an appellant's evidence in assessing the appellant's allegation of procedural unfairness by the Board in the development of a policy. It would be particularly awkward if the appellant did not have the type of freedom of information disclosure provided by the employer in this case. Section 247(4) might be a signal from the legislature that the privative clause in section 251(1) was intended to limit the scope of WCAT's jurisdiction to reviewing the content, or end product, of board of directors' policies.

It is true, however, that in assessing the reasonability of the content or substance of a policy Resolution, it is often helpful for WCAT to understand the options considered by the board of directors in developing the policy. Those options are usually found in documents relating the development of a policy and the board of directors' considerations in formulating a policy Resolution. That type of background gives context for a board of directors' decision and in relating the reasons for a particular choice, may effectively give the justification for a finding of reasonability of a board of directors' resolution. Thus section 247(4) could also have a negative impact on WCAT's ability to decide an issue squarely within its jurisdiction, namely, the reasonability of the substance of a board of directors' resolution. For if a Board officer were to refuse an invitation by WCAT to voluntarily supply such evidence, a WCAT tribunal might be faced with evidence from an appellant giving only one side of the story. In my view, it is in the Board's interest, and the public interest, that WCAT obtain all evidence relevant to matters within its jurisdiction, as that type of evidentiary base is essential for a reasoned and accurate decision. Continued cooperation from the Board in response to WCAT's requests for disclosure of evidence would be helpful to achieve the best interests of both the Board and the public to meet the goal of sound appellate decisions.

Section 247(4) may or may not be a signal from the legislature that section 251(1) was intended to restrict WCAT's jurisdiction to reviewing only the substance or content of a board of directors' policy. But my review of the jurisprudence in the context of sections 247(4) and 251 of the Act suggests that it is possible WCAT may not have the jurisdiction to refuse to apply a board of directors' policy resolution on the ground that the board of directors was procedurally unfair and breached the natural justice rights of an appellant. If that is correct, then such a challenge to a board of directors' policy would likely need to be made in court by way of judicial review.

There is another line of authority which would maintain a scope of WCAT jurisdiction to assess the procedural fairness of board of directors' policy formulation. A line of Supreme Court of Canada jurisprudence indicates that a finding of procedural unfairness would render a Board policy a nullity or void from the outset (*void ab initio*), as opposed to merely voidable. See *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners* [1979] 1 S.C.R. 311 (SCC). Also see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; [1992] S.C.J. No. 21 (QL) for the uncompromising statement that:

A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal.

[para. 40 QL]

If procedural unfairness renders a board of directors' policy a nullity, then the policy would have no effect from the outset. Thus the question of the applicability of the substance of the policy would never be reached – in effect, there would be nothing to apply. A finding by WCAT that the board of directors breached natural justice in formulating a policy with the result that the policy was a nullity, would mean that there was nothing to apply. With that perspective, section 251(1)'s limitation on WCAT's jurisdiction would never be engaged. Under that approach, WCAT would have jurisdiction under section 250 of the Act to consider all questions of fact and law in an appeal, including the issue of the procedural fairness of the board of directors in reaching a policy Resolution. That inquiry would be a separate line of inquiry limited to the process and procedure followed by the Board, not addressing the substance of the policy, which would be subject to the "patently unreasonable" analysis in the standard of review under section 251 of the Act.

In this case, I have found it unnecessary to make a final determination on this aspect of WCAT's jurisdiction under the Act. This is because, for other reasons, assuming that as a WCAT panel I have jurisdiction to decide the procedural fairness question raised by the employer, I have decided to deny the employer's appeal on the point.

In *Aasland v. British Columbia (Ministry of Environment, Lands and Parks)*, supra, the Supreme Court of British Columbia reviewed the law pertaining to the principles of natural justice and the duty of fairness. The Court referred to Brown and Evan's text *Judicial Review of Administrative Action in Canada* (Toronto: Canvasbook Publishing, 1998), which provides a basic summary of the distinction between legislative and administrative decisions, and when the duty of fairness applies:

It is clearly established that in the absence of a statutory provision to the contrary, the duty of fairness does not apply to the exercise of powers of a legislative nature...

While no precise definition of "legislative" power emerges from the case law, for the purpose of defining the extent of the duty of fairness two characteristics seem important. The first is the element of generality, that is, that the powers are of general application and when exercised will not be directed at a particular person. The second indicium of a legislative power is that its exercise is based essentially on broad considerations of public policy, rather than on facts pertaining to individuals or their conduct. Decisions of a legislative nature, it is said, create norms or policy, whereas those of an administrative nature merely apply such norms to particular situations.

In that case, Mr. Justice Edwards stated:

The distinction I take from the cases is that administrative action taken in connection with private rights will give rise to a requirement for notice and an opportunity to be heard, whereas legislative action taken in regard to public policy needs, even though that includes private rights of some one or more of the persons affected by the action, will be beyond review for determination of natural justice.

I have also kept in mind that there has been a trend in the jurisprudence not to attempt to pigeon-hole decisions into strict categories, but to review the circumstances of the decision-making power in question, the statutory provisions as context, and the nature of the matter that was decided. As stated by the Supreme Court of Canada in *Syndicat des employes de production du Quebec et de l'Acadie v. Canada (Canadian Human Rights Commission)* [1989] 2 S.C.R. 879:

Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the

high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

In this case, with the foregoing jurisprudence in mind, I have concluded that the board of directors did not breach natural justice or otherwise act unfairly toward the employer in this case in formulating *Resolution 2003/02/1-06*.

My assessment of the board of directors' role in formulating the Resolution was that on the continuum between a quasi-judicial function or a legislative function, the Board was engaging in more of a policy-making or legislative function than making a quasi-judicial or administrative decision affecting the private rights of parties. Earlier in this decision I have characterized the Resolution as a policy, noting that as a whole, it exemplified the exercise of delegated authority from the legislature to the Board to make any necessary changes to the Board's classification system, keeping in mind the public policy purpose of maintaining an adequate accident fund. The creation of the new classification unit for resort timeshare employers, with an effective date of January 1, 2003 was undoubtedly a legislative function for the board of directors, as it altered the Classification and Rate List, itself published policy of the Board. The employer in this case is not complaining about that aspect of the Resolution, but rather challenges the retroactive "interim" solution with its choice of an effective date of January 1, 2002.

In my view, however, the decision to provide a retroactive solution that would give resort timeshare employers a lower base assessment rate was part of a broad policy consideration to create and implement a new classification, with the new lower rate, for employers whose business activities met the resort timeshare description. The interim solution cannot be considered in isolation from the exercise as a whole that was before the board of directors. In making its recommendation to the board of directors, the classification committee first considered a broad range of options to deal with the resort timeshare industry. Many of those considerations were of a public policy nature, considering the principles already reflected in Board policy and whether or not an option might further or contravene such principles. Further, in recognition of the fact that the creation of a new classification unit would impact the classification system as a whole, the classification committee also researched the practices of other workers' compensation classification systems in other jurisdictions. Thus the classification committee had taken a broad look at the structure of the classification system as a whole. To make a recommendation to the board of directors, the classification committee could not and did not focus only on the needs and interests of individual firms qualifying under the description of a resort timeshare operation.

For example, with respect to option 2 in the executive summary, the committee noted the disadvantage of cross subsidization of one industry by another, contrary to the normal practice for the Board's classification system. Under option 3, firms would remain in their current classifications until a new classification unit became effective in January 2003, but the committee was concerned about finding an implementation date for a lower assessment rate that would be equitable under Board policy. Option 4, the one most favoured by the committee, proposed the retroactive effective date of January 1, 2002 and a transfer of the firms to a different classification unit. The problem with option 4, however, was that it involved a conflict with existing Board policy that required assigning employers to a classification unit that did not meet the description of their business activities nor, hence, match their expressed cost rate under the Classification and Rate List. It also resulted in fewer assessments collected for the Board's accident fund. However, the other option of creating a new classification unit effective January 1, 2002 presented the even greater disadvantage of problems for the Board's operating systems and negative consequences for information technology at the Board.

In considering which option to choose, and in ultimately formulating *Resolution 2003/02/1-06*, which adopted option 4, the board of directors needed to weigh the advantages and disadvantages of at least five different options. Those advantages and disadvantages included considering the impact of the options on other employers in the classification system, the problem of cross subsidization of industries, the need to treat employers fairly, the Board's interest in maintaining effective operating systems, and the need to try to adhere to current published Board policy (or at least the spirit of it). Therefore I am satisfied that the *Resolution 2003/02/1-06*, including its aspect relating to the interim effective date of January 1, 2002 for the new lower assessment rate for resort timeshare employers, was the exercise of a quasi-legislative function (or a policy-making function) by the board of directors. The needs of employers who fell into the new resort timeshare classification were considered by the Board, and those employers were undoubtedly affected by the Resolution. But I find that they did not have, as individual firms, legal procedural rights requiring the board of directors to engage in a process of direct consultation with each employer or a designated representative of each employer.

With that in mind, I have found no breach of natural justice or unfairness in the way the Board developed *Resolution 2003/02/1-06*. In the context of its policy-making function, the Board's process for developing the Resolution was reasonable. The classification committee tried to solicit advice and input from two industry associations that it believed were representative of firms who met the resort timeshare description. It also invited the management representative representing the employer and X Ltd. to participate by responding to questions about the industry, and to participate in the committee's discussion at the December 2, 2002 meeting. It was the management representative's requests for classification review of the employer and X Ltd. that prompted the Board's

investigation into the resort timeshare industry, and in my view it made sense for the classification committee to invite that representative to the December 2, 2002 meeting.

As the documents disclose, the committee's intent in extending the invitations was to obtain a balanced set of perspectives about the resort timeshare industry. It was not engaging in a legal process of soliciting submissions from all parties potentially affected by a change in policy. I have found that the Board was not required to engage in such a process. I find that the Board did a reasonable job of trying to consult with a representative cross-section of B.C. employers and industry representatives to better understand the resort timeshare industry and how best to deal with the issue of its classification.

The employer in this case has protested that the CRDA should have been the appropriate industry association for the committee to have invited, not the B.C. and Yukon Hotel Association or the B.C. Lodging and Campground Association. There is no evidence that in declining the committee's invitation to attend the December 2, 2002 meeting, those associations advised that they were not the appropriate associations to consult. It does not appear that anyone referred the committee to the CRDA's existence. It is significant that neither this employer nor its representative (the management consultant who represented it in this appeal proceeding) made any protest to the classification committee at or before its December 2, 2002 meeting regarding inadequate consultation with industry representatives. The employer and the management representative knew that the CRDA existed, and if it was important for the committee to have input from the CRDA (or from other resort timeshare employers), there was full opportunity for the employer or its representative to have so advised the committee. Having failed or neglected to complain to the committee about the lack of participation by CRDA or other resort timeshare employers, in my view it is too late for the employer to credibly complain about it in these proceedings. I also note that although the CRDA must be aware by now of *Resolution 2003/02/1-06*, it did not initiate an appeal akin to this one, complaining about the lack of consultation and a consequential invalidation of the Resolution. Further, the employer had the opportunity of advising the CRDA about these appeal proceedings, and could have suggested to the CRDA that it request intervener status to support its position. But no such request for intervener status was made.

It is obvious that the classification committee was not trying to hide from members of the resort timeshare industry the fact that it was considering a change to classification policy. The committee had invited two industry associations that it believed represented employers in the resort timeshare industry. It had also invited the management representative who it knew was representing the employer and X Ltd., because the management representative had requested a classification review by the Board on behalf of those two firms. The management representative has stated that he did not give a presentation to the committee, but rather responded to the committee's



questions about resort timeshare operations. The minutes of the December 2, 2002 meeting indicate, however, that the management representative's participation was broader than simply responding to a set list of questions. Among other discussion, he also set forth and explained his clients' position that they should be classified in the real estate industry, and also maintained that a multiple classification solution (real estate agency and property management classification) might be a solution.

While the employer in this case complains that it did not receive an express invitation from the classification committee to participate in the December 2, 2002 meeting, I find that its interests at the meeting were adequately represented by its management representative. I also note that the classification committee meeting minutes identify the management representative as a representative of the employer as well as X Ltd., and thus the committee considered the representative as attending on behalf of the employer as well as X Ltd.

I do not find unreasonable the letter dated December 20, 2002 from the committee's secretary to the employer's representative, advising that he could not at that time disclose any decision regarding the classification issue to the representative. The board of directors had the authority to change policy by way of a Resolution, not the classification committee. It would have been inappropriate for the committee to disclose its recommendations prematurely, when the board of directors might well have decided on one of the other four options discussed in the executive summary, or even devised an entirely different option in the Resolution.

The employer's representative has taken out of context the last line of the letter dated March 22, 2004 from the Assessment Department's director to WCAT, in which he stated that the Board had given the B.C. and Yukon Hotel Association and the B.C. Lodging and Campground Association an opportunity to "discuss and opine" on the Resolution. The documentary evidence in this case satisfies me that those associations did not see and comment on the Resolution before it was issued by the board of directors. There is no evidence whatsoever to substantiate the representative's interpretation in that regard. I am satisfied that by that rather loosely worded sentence, the director was referring to the classification committee's invitation to those two associations to attend the December 2, 2002 meeting, which invitation they ultimately rejected. Thus, as with the employer and X Ltd., the committee gave them the opportunity to describe the resort timeshare industry and to state their position on appropriate industry classification. I find that in the last sentence of his March 24, 2002 letter, the director meant no more than to refer to that opportunity.

The last point I make on the procedural fairness/natural justice issue is that the impact of the Resolution was a significant benefit to firms falling within the new industry definition of resort timeshare operations. Their base assessment rate dropped for the

year 2003 from \$1.94 to \$0.89, a decrease of \$1.05 per \$100.00 of assessable payroll. The employer in this case is not challenging the entire Resolution, but rather limits its appeal to challenging the Resolution's choice of an effective date of January 1, 2002 for the retroactive "interim" solution.

If the employer were to succeed in its argument that the board of directors failed to adequately consult with resort timeshare employers in formulating *Resolution 2003/02/1-06*, thereby denying their procedural rights to natural justice, then the Resolution as a whole would be subject to a declaration of invalidity under section 251 of the Act. Whether void as a nullity from the outset, or voidable with the potential for curative action by the Board at a later date, the result on appeal to WCAT, through the process articulated in section 251(1) through (8) of the Act, might well be to negate the effect of the entire Resolution, not just part of it. The legal effect of a breach of natural justice would permeate the Resolution as a whole, not just the part the employer wants to have changed, because a WCAT panel does not have the statutory authority to make policy, or revise policy, on the Board's behalf. This could have the effect of reverting the classification system to its state as it was before the Resolution was issued on February 11, 2003, arguably making the affected employers obligated to pay the Board significantly higher assessments for the years 2002, 2003 and 2004. My last point, therefore, is that for the employer to have succeeded on this procedural fairness aspect of its appeal could have been a pyrrhic victory.

For the foregoing reasons, I find that *Resolution 2003/02/1-06* was not patently unreasonable or otherwise invalid because of a lack of adequate consultation with the employer, other resort timeshare employers, or an industry association representing resort timeshare employers.

*Was Resolution 2003/02/1-06 patently unreasonable because it relied on inaccurate and incomplete information? Was Resolution 2003/02/1-06 patently unreasonable because it improperly applied Board policy?*

These two questions are related because the employer has argued that the board of directors relied on inaccurate and incomplete information presented by the classification committee in the executive summary, which led the board of directors to improperly apply Board policy.

I do not agree with the employer's argument that the executive summary's financial information (analyses of assessments paid, cost rate, comparable base rates, estimated change in assessments) was so unreliable that it rendered the board of directors' reliance on the information, and the resulting Resolution, so patently unreasonable that the Resolution is not capable of being supported by the Act and its regulations. There is insufficient evidence for me to find that the list of 22 was, as alleged by the employer, "50 or less accurate," or that the financial information based

on it was too unreliable for the board of directors to rely on it. The employer was referring to July 2003 data, less than six months after the Resolution was passed, and in my view, it was premature to rely on that evidence. Further, I make the same point I made earlier with respect to the employer's argument on procedural fairness. If WCAT were to accept the employer's argument that the financial information relied on by the board of directors was so inaccurate that it wholly tainted the reasonability of *Resolution 2003/02/1-06*, making it unsupportable under the Act and its Regulations, then WCAT would be justified in refusing to apply the entire Resolution, not just the aspect of the Resolution challenged by the employer. My earlier comments regarding a pyrrhic victory for the employer could well apply here, as well.

Next, I disagree with the employer's submission that "Board error" in AP1-37-3 was the appropriate policy for the board of directors to have applied in choosing an effective date for the implementation of a lower assessment base rate for resort timeshare employers. My first observation is that in revising the Classification and Rate List to create a new classification unit, the board of directors was creating policy when it formulated *Resolution 2003/02/1-06*. In doing so, the board of directors was not obligated to apply existing policy. Since it is the entity with the statutory authority to make and revise Board policies, it was entitled to decide on an effective date using other criteria. Provided that the revision of policy or new policy was supportable by the Act and its Regulations, WCAT would be obligated to apply any choice selected by the board of directors in its Resolution.

In reviewing the five options presented in the classification committee's executive summary, I am unable, on the evidence before me, to find any of those options so patently unreasonable that it could not be supported by the Act and its regulations. This includes the "status quo" option 1, wherein no changes would be made to the existing classification system, but the Board would maintain the existing classifications for affected employers. It also includes option 3, wherein the new classification would be effective January 1, 2003, but the firms would remain in their current classifications until the new classification unit became effective.

The classification administrator's December 17, 2001 memorandum to the classification committee indicated that the effective date for the change to a new classification unit needed to be an operationally feasible date, and that the effective date for an interim solution ought to be "fair and reasonable." The administrator did not indicate that the effective dates needed to be made in accordance with existing Board policy, which is consistent with my view that in creating new policy or revising policy, the board of directors did not need to comply strictly with existing policy. "Fair and reasonable" is a sound approach for an interim solution, although, as I have noted, for purposes of WCAT's review under section 151 of the Act, the test is not whether the interim effective date was fair and reasonable, but whether it can be supported by the Act and its regulations.

I agree with the observation of the classification committee found in the minutes of the December 20, 2002 meeting that the reason for a new classification unit fell within item 4 of then *Assessment Policy 30:20:40* (Change in WCB Classification Policy). Under assessment policy effective January 1, 2003, the applicable reference was AP1-37-3, item 4. The Board was “recognizing and defining a new industry.” The committee did not believe it was possible to apply the “letter of the policy,” as the new resort timeshare CU did not exist until 2003. I believe that the letter of the policy could have been applied, and it would have dictated that with a “rate down” effect, the “rate down” change would be effective January 1, 2003, the beginning of the year when the firm “fell within the new definition/parameters.” In my view, the classification committee went further than it needed to, in attempting to “apply the spirit” of item 4, in deciding to accord timeshare resort firms the advantage of a “rate down” assessment even earlier than January 1, 2003, namely, January 1, 2002. The committee stated that as the classification definitions/parameters regarding timeshare operations were clarified in 2002, the “rate down” change would be effective January 1, 2002. However, item 4 stated that *the later* of the date (January 1 of the year the definitions/parameters were clarified/changed) or (January 1 of the year when the firm fell within the new definition/parameters) would be applied. Thus Board policy would dictate January 1, 2003 as the effective date for the “rate down” change, and there was no need for the Board to have provided the resort timeshare employers with the benefit of a retroactive “rate down” change. The executive summary noted that a January 1, 2003 effective date followed the “letter of policy” but decided that January 1, 2002 “could be seen to better fit the spirit and intent of the policy.” In making that judgement, the classification committee’s recommendation gave the resort timeshare employers a benefit above and beyond what existing Board policy required.

Much of the employer’s argument is based on its submission that “Board error” was the correct policy (item 1 in policy 30:20:40, effective prior to January 1, 2003; and item 1 in policy AP1-37-3, effective January 1, 2003). For a “rate down” assessment rate change, the policy provides that the Board may use the date when the error was made.

Referring to Board error as the applicable policy to apply, the employer argued that the board of directors was misled because, the executive summary did not refer to some resort timeshare employers who make requests for classification review as early as 1999, or to firms who had been audited by the Board in earlier years. The employer also argued that the executive summary did not advise the board of directors that the Board had failed to identify resort timeshare operations as a major industry group when the Board introduced its new classification system in the year 2000.

I find that the executive summary did not mislead the board of directors as alleged by the employer, and that it was unnecessary for the summary to have explored that option for the board of directors. Indeed, I find that it would have been wrong for the executive summary to have taken that approach. Thus the fact that the classification issue had

arisen prior to 2002 and even prior to 2000 was not relevant to the issue of an effective date for an assessment rate down change.

There was no “clear error” by the Board in its classification of the affected employers prior to the effective date of *Resolution 2003/02/1-06*. Firms were not “improperly classified” after a Board officer had audited them. The applicable versions of the Board error policy expressly state that Board error did not include “borderline classification questions requiring a judgment decision.” It should be obvious, from the research and assessment by the classification committee as exemplified in its meeting minutes, that the classification issue of resort timeshare firms was no clear-cut matter. Considerable judgement was needed to formulate various options and to make a recommendation on an appropriate course of action for classification. Over the course of its deliberations, the classification committee even changed its mind on different points.

The meeting minutes of October 7, 2002 indicate that while the need for a new classification unit, at least effective January 1, 2004, became obvious to all classification committee members during their discussions in 2002, there were opposing views on what to do about the situation prior to January 1, 2004. The classification issue was a subjective one, and the classification committee explored a variety of options (including status quo classification). It was not obvious, as alleged by the employer in this case, that the need for a new industry classification should have been apparent when the Board introduced its new classification system in the year 2000. I note that the employer’s first position to the Board, in requesting a classification review, was that the real estate agency CU was the appropriate classification. Thus it was not immediately obvious even to the employer, or its representative, that a new classification unit for the industry was the most appropriate solution. I reject the argument that “Board error” should have been presented to the board of directors as a policy consideration upon which to base its decision regarding an appropriate effective date for a “rate down” assessment change for resort timeshare firms.

Given that finding, I do not find it a material omission that the executive summary did not explore other avenues to deal with the cross subsidization issue, in order to recommend an earlier effective date for the “rate down” change, such as January 2000.

I also reject the employer’s argument that there was a material omission in the executive summary regarding lack of notice to affected employers to supply information regarding multiple classification as an option. Earlier in this decision, I have provided reasons why there was no legal duty on the Board to have canvassed the views or otherwise obtained submissions from all potentially affected employers, and why the Board did a reasonable job of consultation in the context of the decision it was trying to make. On the multiple classification issue, the classification committee discarded that option for sound reasons referred to in the December 20, 2002 meeting minutes. Therefore there was no need for the executive summary to have explored the multiple classification issue in any depth for the board of directors.

Sections 37(2) and 37(3) of the Act provide the Board with broad statutory discretion to manage the classification system. This includes the authority to change the classification system. The classification system was established and is maintained by the Board in order to maintain the accident fund, which the Board must manage with a view to the “best interests of the workers’ compensation system”. My assessment of the evidence is that the Board made every effort to find a fair and expedient solution, viable with the Act and in the best interests of the workers’ compensation system as a whole, to the issue of appropriate classification for a new industry of resort timeshare operations. The employer has argued that the executive summary could have put forth other options for the board of directors’ consideration, but did not. Although this is undoubtedly true, I find that this does not render the Resolution invalid. Neither does it render the Resolution so patently unreasonable that it can not be supported by the Act and its Regulations. The employer’s arguments amount to a position that the benefits conferred upon resort timeshare employers by the Resolution are not as advantageous as they potentially might have been. This argument ignores the fact that one executive summary option, which I have found would have been viable under the Act and Regulations, would have been to make no changes at all, and another option, equally viable in my view, would have been to make any assessment “rate down” change prospective only in effect.

In *Appeal Division Decision 2002-2849*, supra, I referred to the Supreme Court of British Columbia case in *British Columbia Federation of Labour and Georgetti v. Workers’ Compensation Board of British Columbia* (1988) 53 D.L.R. (4<sup>th</sup>) 259 (the *B.C. Federation* case) as illustrative of the difficulty for the Board were it to attempt to satisfy every one of its constituents in the workers’ compensation community when managing the classification and assessment system. In *Decision 2002-2849*, an employer who had received a rebate benefit as a result of a Board policy Resolution challenged the Resolution as discriminatory because the rebate benefit it received under the Resolution was not as advantageous as rebates received by some other employers. In the case at hand, the employer is challenging *Resolution 2003/02/1-06*, wanting an even greater benefit than already accorded in the Resolution, by way of an even earlier effective date for a “rate down” assessment change. All of these cases illustrate the challenges faced by the Board in its management and administration of the classification and assessment system under the Act. Whatever decisions the Board makes in that regard under its demanding statutory mandate, it runs the risk that some member or group in the workers’ compensation community will be aggrieved by the choices it has made. In this case, the evidence satisfies me that the Board made careful and considered decisions in formulating *Resolution 2003/02/1-06*, with due regard to the interests of the affected employers and the interests of the classification system as a whole. I find that *Resolution 2003/02/1-06* is a reasonable one, supported by the Board’s mandate under the Act and its Regulations.

## Conclusion

For the foregoing reasons, I dismiss the employer's appeal. I confirm the August 8, 2003 Review Division decision which confirmed the March 10, 2003 decision by the manager, Classification and Rate Modification Programs, Assessment Department. The March 10, 2003 decision by the manager, Classification and Rate Modification Programs, correctly applied *Resolution 2003/02/1-06* to the employer's situation. (There has never been any argument by the employer that the manager incorrectly applied the Resolution.) Accordingly, the correct date for the reclassification of the employer into CU 761055 was January 1, 2003. The correct date for assigning the employer into the "holding" CU was January 1, 2002.

In this decision, I have examined the scope of WCAT's jurisdiction in reviewing a board of directors' policy. I have found that *Resolution 2003/02/1-06* was a policy decision of the board of directors. I have found that in enacting that Resolution, the board of directors did not breach natural justice or otherwise deny procedural fairness to the employer. I have found that *Resolution 2003/02/1-06* was not so patently unreasonable that it is not capable of being supported by the Act and its regulations. Pursuant to sections 250(2) and section 251(1) of the Act, WCAT must therefore apply *Resolution 2003/02/1-06* in this case. I have applied *Resolution 2003/02/1-06* in confirming the Review Division's decision of August 8, 2003 that upheld the manager's March 10, 2003 decision.

No costs are awarded in this case.

Heather McDonald  
Vice Chair

HM/hba