

Legislative Review of  
Workers' Compensation

# **Review of Section 38 (Benefits), *Workers' Compensation Act***

Discussion Paper

May 2015

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## Introduction

The modern concept of workers' compensation has its origins in Germany, Great Britain and the United States between the late 1800s and early 1900s. In Canada, workers' compensation had its beginnings in Ontario when Mr. Justice William Meredith was appointed to a royal commission to study this area in 1910. His final report, known as the Meredith Report, was produced in 1913.

There were five basic cornerstones to the original workers' compensation laws known as the "Meredith Principles." These cornerstones, which have survived to a greater or lesser extent, are as follows:

- **No-fault compensation:** workers are paid benefits regardless how the injury happened.
- **Security of benefits:** a fund is established to guarantee funds exist to pay benefits.
- **Collective liability:** covered employers, on the whole, share liability for workplace injury insurance.
- **Independent administration:** organizations that administer workers' compensation insurance are separate from government.
- **Exclusive jurisdiction:** only workers' compensation organizations provide workers' compensation insurance.

These principles are referred to as the historic compromise in which employers agreed to fund workers' compensation and, in turn, injured workers surrendered their right to sue their employer for their injury.<sup>1</sup>

## Subject

WorkSafeNB, formerly known as the Workplace Health, Safety and Compensation Commission, is a Crown corporation under Part IV of the Public Service. It is responsible for the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*, the *Occupational Health and Safety Act*, the *Firefighters Compensation Act*, the *Blind Workmen's Compensation Act*, the *Silicosis Compensation Act* and regulations. WorkSafeNB is administered by a board of directors consisting of a chair, a vice-chair and an equal number of worker and employer representatives. The president / chief executive officer is a non-voting member.

Although WorkSafeNB is an independent body, the Minister of Post-Secondary Education, Training and Labour is responsible for the legislation. The board of WorkSafeNB reports to Cabinet through the Minister with respect to administrative and financial accountability.

WorkSafeNB, as well as the structure of the board of directors, was established under the

1 [http://awcbc.org/?page\\_id=59](http://awcbc.org/?page_id=59)

*Workplace Health, Safety and Compensation Commission Act* in 1994.

In April 2013, the provincial government announced the initiation of a comprehensive review of New Brunswick's workers' compensation legislation. This review is a multi-phase initiative and a collaborative effort between the Department of Post-Secondary Education, Training and Labour and WorkSafeNB.

Phase II of the legislative review includes:

- Governance structure for WorkSafeNB;
- Workers' and Employers' Advocates Services; and
- Section 38 (benefits) of the Workers' Compensation Act.

This document discusses Section 38 of the *Workers' Compensation Act* on the benefits provided to injured workers and their dependents.

A specific direction by the provincial government for the review of workers' compensation legislation was that it be reviewed to:

- ensure that the legislation strikes the necessary and appropriate balance between adequate compensation for injured workers and employers' fiscal interests, and
- confirm the appropriate response to the Court of Appeal's decision in the matter of *J.D. Irving, Ltd. (Sussex Sawmill) versus Wayne Douthwright and Workplace Health, Safety and Compensation Commission*, 2012.

The section contains the core benefits and entitlements available to injured workers.

**Question:** How well does WorkSafeNB compare to other Canadian jurisdictions in terms of type and of benefits provided? How can Section 38 be redrafted to make it more readable?

## Provisions of Section 38

Section 38 comprises about 30 per cent of the act and includes 16 provisions that have been gradually added when significant benefit changes were made in 1982, 1992 and 1998. The result is that the various Section 38 provisions that set out benefits and entitlements depending on the date of the injury are not consolidated, not arranged sequentially and are not worded in a user friendly manner.

The main objective of this area of the legislative review is to receive stakeholder views about benefits under Section 38 and any other part of the act that may have a bearing on the benefit levels on the injured workers of New Brunswick. These issues include:

- **Loss of earning benefits:**

These benefits are paid at different levels depending on the date of the injury. Since 1998, they have been paid at 85 per cent of the net loss of earnings to a maximum amount set in legislation. The maximum insurable earnings set in legislation for 2014 were \$60,100. Earnings exceeding this amount are not insured under the *Workers' Compensation Act*.

In 2014, there was a wide range in the maximum compensable earnings across Canada, from \$51,100 in Prince Edward Island to \$92,300 in Alberta. Compared to the other Maritime provinces, New Brunswick's maximum compensable earnings was the highest at \$60,100.

The percentage on which earnings benefits is based vary across the country, from 75 per cent in the Yukon of gross income to 90 per cent of net in six jurisdictions. None of the Maritime provinces bases the loss of earning benefits on more than 85 per cent of net income.

A caution is that benefit comparison between Canadian jurisdictions does not take into account different tax regimes and the percentage of the population working at specific income levels. A straight calculation of the percentage of loss of earnings calculated against the maximum annual earnings may not take these differences into account.

For further information:

- [http://awcbc.org/wp-content/uploads/2013/12/Key\\_Benefits\\_Information.pdf](http://awcbc.org/wp-content/uploads/2013/12/Key_Benefits_Information.pdf)

- **Spousal dependent benefits:**

Spousal dependent benefits are paid in differing amounts depending on the date of death. Since 1998, surviving spouses have received 80 per cent of the deceased worker's net pre-accident earnings to a maximum set in legislation on a monthly basis for the first year after death. The maximum amount of insured earnings is calculated under the same formula as for insurable earnings for injured workers. Within one year after the death, the surviving spouse must elect to receive one of two available benefit streams. WorkSafeNB pays for the surviving spouse to receive independent financial advice before making this election. Under one option, the spouse is paid at 85 per cent of the deceased worker's average net earning less Canada Pension Plan (CPP) to age 65. Under another, a lump sum payment is made to the spouse and monthly payments are made to each child who was a dependent of the deceased worker.

How spousal dependent benefits across Canada are administered is different in each jurisdiction. Most are based on a percentage of the deceased worker's average net earnings (70 to 90 per cent). Some, such as Saskatchewan and Alberta, have a minimum monthly rate for a period and help the spouse become gainfully employed. The compensation rate in other provinces, such as Ontario and British Columbia, is based on the age of the surviving spouse.

For further information:

- [http://awcbc.org/wp-content/uploads/2013/12/Dependency\\_Benefits.pdf](http://awcbc.org/wp-content/uploads/2013/12/Dependency_Benefits.pdf)

- **Three-day waiting period:**

There is currently a requirement in New Brunswick that an injured worker go three days without employment-related pay after an injury. This provision does not apply to any injured worker who is admitted as an in-patient to a hospital after the workplace accident, nor does it apply to police and firefighters. An injured worker who remains off work due to the injury for more than 20 working days is reimbursed for the three days of pay. Likewise, if an injured worker returns to work but has a recurrence of the same injury within 20 working days that worker is not required to undergo a further three day waiting period.

The Maritime provinces are the only jurisdictions in Canada that have a waiting period whereby the worker is not paid immediately following an injury. The waiting period is two days in both Prince Edward Island and Nova Scotia.

For further information:

- [http://awcbc.org/wp-content/uploads/2013/12/Waiting\\_Periods.pdf](http://awcbc.org/wp-content/uploads/2013/12/Waiting_Periods.pdf)

- **Collateral benefits (Top-ups):**

In New Brunswick, an injured worker is allowed to earn a maximum of 85 per cent of his or her pre-accident net earnings through a combination of compensation benefits and financial payment/wages. Although an employer may make additional financial payments to the injured worker who is receiving compensation benefits (top-up), legislation requires a reduction of compensation benefits so that the combined total received by the injured worker does not exceed 85 per cent of pre-accident net earnings.

Four jurisdictions do not allow for top-ups: Newfoundland and Labrador, Prince Edward Island, Manitoba and New Brunswick. Other jurisdictions either allow for top-ups within their legislation or are silent on the topic.

For further information:

- [http://awcbc.org/wpcontent/uploads/2013/12/Payment\\_of\\_Comp\\_Supplemental\\_Benefits.pdf](http://awcbc.org/wpcontent/uploads/2013/12/Payment_of_Comp_Supplemental_Benefits.pdf)

- **Annuity or pension benefits paid at age 65:**

When an injured worker is on workers' compensation for more than two consecutive years, the *Workers' Compensation Act* requires that an additional amount be set aside for the worker to offset any CPP retirement benefit or private pension plan benefit losses incurred by him or her because of the duration of the injury. The amount set aside is 10 per cent of the injured worker's benefit eligibility. Legislation requires that when the injured worker reaches age 65, he or she must buy an annuity with the funds.

Nova Scotia, British Columbia and Ontario set aside five per cent per month to fund an annuity, although the latter two provinces allow the injured worker to contribute up to five per cent from their own wage loss benefits. New Brunswick, Saskatchewan and Yukon have a 10 per cent provision. Newfoundland and Labrador and Prince Edward Island pay an amount equal to the demonstrated loss of CPP or registered employer sponsored pension plan benefit. Manitoba's annuity at age 65 is complex – five to seven percent annuity less amount paid by employer before the injury and the employer's contribution rate after 24 cumulative months. The worker has the option to match the amount paid by the board. Alberta, the Northwest Territories and Nunavut do not pay an annuity. In Alberta, the Economic Loss Payment is adjusted upon reaching retirement age (usually 65, but may be later) to reflect the loss of retirement income, rather than employment income, and continues for the life of the worker. Benefits provided in the Northwest Territories and Nunavut are for life; therefore, annuities are not required.

For further information:

- [http://awcbc.org/wp-content/uploads/2013/12/Payment\\_of\\_Comp\\_Annuity.pdf](http://awcbc.org/wp-content/uploads/2013/12/Payment_of_Comp_Annuity.pdf)

- **Permanent physical impairment:**

In New Brunswick, as with most other jurisdictions, injured workers are entitled to a lump sum payment in recognition of loss of opportunity when they suffer a permanent physical impairment as a result of a workplace accident or occupational disease on or after January 1, 1982. Where an injured worker's condition has stabilized and there is evidence of a permanent physical impairment (PPI), the worker is assessed by a physician who is qualified as a Certified Independent Medical Examiner by the American Board of Independent Medical Examiners as to the level of total impairment. The PPI benefit is paid to the injured worker as a lump sum based on a percentage of impairment by the annual maximum insurable earnings. An injured worker who has been assessed for and received a PPI award may be re-evaluated if his or her condition worsens. It is neither intended as a settlement of a claim nor does it affect entitlement to other compensation benefits such as loss of earnings benefits.

In 2014, minimum lump sum PPI awards ranged from \$500 in New Brunswick and Prince Edward Island to \$32,182 in Ontario. The maximum lump sum PPI awards ranged from \$38,400 in Manitoba to \$86,588 in Alberta. In New Brunswick, the maximum award was \$60,100 for 100 per cent permanent physical impairment.

Only Manitoba (if the award is greater than \$15,400 in 2014) and the Yukon allow the worker to convert the lump sum impairment award to an annuity.

For further information:

- [http://awcbc.org/wp-content/uploads/2013/12/Permanent\\_Disability.pdf](http://awcbc.org/wp-content/uploads/2013/12/Permanent_Disability.pdf)

- **Estimated Capable Earnings (Deeming):**

What the injured worker is estimated to be capable of earning (or deemed to earn), at a suitable occupation, after the injury or recurrence of injury. Under the definition of "loss of earnings" and Subsection 38.11(12) in the *Workers' Compensation Act* and WorkSafeNB's Policy No. 21-210: Calculation of Benefits, the commission establishes an injured worker's estimated capable earnings by:

- Determining if the injured worker is earning remuneration after the injury; and/or
- Examining if the injured worker is capable of earning remuneration at a suitable occupation when WorkSafeNB determines he or she is ready to return to work.

Estimated capable earnings are usually zero immediately following the injury (during rehabilitation) because the injured worker is unable to work. However, as the injured worker's medical recovery progresses, actual earnings or estimated capable earnings may change to reflect an improvement in his or her condition and ability to work, resulting in a recalculation of the loss of earnings benefit.

Legislation in all jurisdictions provide a basis for loss of earnings benefits to injured workers – what he or she was earning before the accident (average net earnings) and what he or she is capable of earning after the injury (net estimated capable earnings).

For further information:

- [http://awcbc.org/wp-content/uploads/2013/12/rehabilitation\\_legislation\\_policy\\_additional\\_info.pdf](http://awcbc.org/wp-content/uploads/2013/12/rehabilitation_legislation_policy_additional_info.pdf)

## Court of Appeal's decision (Douthwright)

The final direct component of this review is to confirm the appropriate response to the Court of Appeal's decision in the matter of *J.D. Irving, Ltd. (Sussex Sawmill) versus Wayne Douthwright and Workplace Health, Safety and Compensation Commission*, 2012 NBCA 35. Prior to this court decision, WorkSafeNB interpreted many different kinds of income as being employment-related. In the Douthwright decision, the court had a different interpretation of the *Workers' Compensation Act*. As result of the decision, WorkSafeNB reimbursed injured workers who had some loss of earnings benefit amounts held back because of receiving income from other sources. The WorkSafeNB board of directors also amended its policy (No. 21-215: Supplement to Compensation as per the link below) to provide better clarity on the kinds of income that are considered and not considered as employment-related.

Refer to:

- <http://www.worksafenb.ca/pdf/resources/policies/21-215.pdf>

The general approach is that if an injured worker is receiving additional benefits from an

employment-related source that were earned prior to the injury, these benefits are not deducted from workers' compensation benefits. Employment-related benefits earned during the period of injury are deducted from workers' compensation benefits.

It should be noted that CPP disability benefits paid to an injured worker for the same injury compensated for under the *Workers' Compensation Act* are deducted as specifically required by law.

## Cost of benefits

To ensure that the legislation strikes the necessary and appropriate balance between adequate compensation for injured workers and employers' fiscal interests, consideration needs to be given to the potential increased cost to employers, who are the funders of WorkSafeNB, whenever increasing benefits, as well as the sustainability of the workers' compensation system.

## Conclusion

This discussion paper on Section 38 (Benefits) of the *Workers' Compensation Act* is one of three topic areas under Phase II of the legislative review of workers' compensation in New Brunswick.

We welcome your comments, ideas and suggestions on this discussion paper, as well as other ideas for improving Section 38. Please contact the Department of Post-Secondary Education, Training and Labour at:

Email: [wclr@gnb.ca](mailto:wclr@gnb.ca)

Fax: 506-453-3618

Online: [www.gnb.ca/consultations](http://www.gnb.ca/consultations)

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Fredericton, NB E3B 5H1

**The deadline for submissions is September 25, 2015.**

### Information collected from consultations

The information you provide will be administered in accordance with New Brunswick's *Right to Information and Protection of Privacy Act*. Therefore, you should not include information about other parties (such as employers or other employees) or any other information from which other parties could be identified unless their permission has first been obtained.

All personal information and comments received are directly sent to the consultation panelists. They are not publicly posted on the Government of New Brunswick website.

At the end of the consultation, the panelists will submit a final report. You may choose to have your personal information shared in the report. When you submit your comment(s), **please provide your written consent** for the panelists to include any or all of the following information in its final report:

- Your name;
- Your title or position;
- The name of your organization;
- The location of your organization;
- Word-for-word quote(s) of your comment(s); and
- A paraphrase of your comment(s).

**If you do not provide consent** to the disclosure of any of the above information, the co-panelists will include your comment(s) in a summary that will not identify you or your organization.

Thank you for taking the time to participate.



